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PRODUCTS LIABILITY—INNOCENT BYSTANDER ENJOYS PROTECTION OF IMPLIED WARRANTY

Plaintiff was injured when a shotgun, fired by another, exploded. The explosion was allegedly caused by a defective shotgun shell, purchased by the shooter. Plaintiff brought a personal injury action against the manufacturer, wholesaler, and retailer of the shell, alleging separate counts of negligence and breach of implied warranty. With reference to the latter count, plaintiff contended that the shell was not suitable for its intended use, and that, even though he was neither the purchaser nor the user of the shell, he was entitled to rely upon the implied warranty of fitness and suitability which attended the manufacture, distribution, and sale of the product. The trial court dismissed the implied warranty count for want of privity of contract between plaintiff and defendants. On appeal, the Michigan Supreme Court reversed.[1] *Held:* Lack of privity is no defense to a personal injury action brought by an innocent bystander on the theory of breach of implied warranty; it is sufficient that plaintiff allege and prove a defect of manufacture and the causal connection between the defect and the injury suffered. *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965).[2]

Historically, privity of contract was required in order for an injured party to sustain an action against the manufacturer of the injury-causing product.[3] The rigidity of this rule, however, has been relaxed by the courts. Privity has been eliminated in actions against a manufacturer based on negligence.[4] To sustain an action in implied warranty, however, privity is still required under the prevailing view,[5] although many courts adhering to this view have found privity based on fictions derived from agency, assignment, and third-party beneficiary principles.[6] Some courts have all but eliminated the privity requirement when

[1] The vote for reversal was 5-2. The dissenters agreed with the trial court that plaintiff's action in implied warranty was barred by lack of privity.

[2] 25 MD. L. REV. 267 (1965).

[3] The origin of the privity requirement is generally credited to Winterbottom v. Wright, 10 Mees. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). See, *e.g.*, 2 HARPER & JAMES, TORTS 1535 n.4 (1956); PROSSER, TORTS 658 (3d ed. 1964). *But see* Comment, 27 MO. L. REV. 194, 195 (1962).

[4] See Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946), 26 B.U.L. REV. 411, 34 GEO. L.J. 377, 44 MICH. L. REV. 1157; MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), 16 COLUM. L. REV. 428, 29 HARV. L. REV. 866, 25 YALE L.J. 679; 1 HURSH, AMERICAN LAW OF PRODUCTS LIABILITY 608 (1961).

[5] See 2 HARPER & JAMES, TORTS 1570 (1956); 1 HURSH, *op. cit. supra* note 4, at 631-48.

[6] Twenty-nine highly imaginative theories have been compiled in Gilliam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1958).

the injury-causing product was intended for human consumption[7] or was inherently dangerous;[8] even in these exceptional cases, the plaintiff, if not the purchaser or remote purchaser, was at least the user[9] of the injury-causing product. Prior to the decision in the principal case, no court had extended implied warranty protection to an innocent bystander.

Because so much had already been written about the requirement of privity in breach of implied warranty actions,[10] the court in the principal case dispensed with an elaborately reasoned opinion, perceiving the need to state a definite rule "with references which appeal to us as both trendful [*sic*] and best reasoned."[11] The court turned to its recent decisions involving implied warranty actions,[12] and evaluated them as removing lack of privity from available defenses.[13] Refer-

[7] See cases collected in 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY 1505-60 (1964).

[8] *Id.* at 1201-407. The trend of expanding the types of injury-causing products for which the manufacturer is liable without privity is dramatically illustrated by the recent history of the *Restatement of Torts (Second), § 402A.* When submitted originally, the new section provided strict liability for sellers of "food for human consumption." RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 6, 1961). To this section was subsequently added "products for intimate bodily use." (Tent. Draft No. 7, 1962). Finally the rule was adopted imposing liability upon one who sells "any product" in a defective condition unreasonably dangerous to the user or consumer. (Tent. Draft No. 10, 1964). This latest change was said to be required or the *Restatement of Torts (Second)* would be out-of-date by the time it is published. *Id.* at 2.

[9] See, *e.g.*, Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (plaintiff borrowed inflammable hula skirt).

[10] The court cited the following articles: Bushnell, *Practical Aspects of Defending Products Liability Cases*, 11 DEFENSE L.J. 99 (1962); Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1 (1963); Jaeger, *Product Liability, the Constructive Warranty*, 39 NOTRE DAME LAW. 501 (1964); Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493 (1962); Note, *Strict Liability and the Bystander*, 64 COLUM. L. REV. 916 (1964). The following articles, though not a comprehensive list, are also worthy of note: Ashe, *So You're Going to Try a Products Liability Case*, 13 HASTINGS L.J. 66 (1961); Gilliam, *supra* note 6; Green, *Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 TENN. L. REV. 928 (1957); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963); Keeton, *Products Liability—Current Developments*, 40 TEXAS L. REV. 193 (1961); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Comment, *Implied Warranty: Let's Abandon Privity*, 16 BAYLOR L. REV. 263 (1964); Comment, *Implied Warranties—The Privity Rule and Strict Liability—The Non-Food Cases*, 27 Mo. L. REV. 194 (1962).

[11] 133 N.W.2d at 134.

[12] Hill v. Harbor Steel & Supply Co., 374 Mich. 194, 132 N.W.2d 54 (1965) (administratrix successfully brought action against manufacturer of defective welding unit and compressed gas containers causing death to employee of purchaser); Barefield v. LaSalle Coca-Cola Bottling Co., 370 Mich. 1, 120 N.W.2d 786 (1963) (privity not required by consumer who was wife of purchaser, action failed on other grounds); Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W.2d 918 (1961) (consumer of offensive soft-drink purchased by husband recovered against manufacturer); Spence v. Three Rivers Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (remote purchaser recovered for property damage arising from defective cinder blocks).

[13] 133 N.W.2d at 134-35: "I would say definitely that [cases cited note 12 *supra*] ... have put an end in Michigan to the defense of no privity, certainly so far as concerns an innocent bystander injured as this plaintiff pleads...."

ring with approval to these cases and to a recent landmark New Jersey case,[14] the court asked rhetorically whether the result would have been any different in those cases, based on the same reasoning, if the plaintiffs had been innocent bystanders. The rationale, as expressed by the court, was that "the manufacturer is best able to control the dangers arising from defects of manufacture."[15] The court concluded:

> The fact is that Michigan, for abundantly worthy reasons, has eliminated lack of privity as a defense to actions as at bar, and that when the factual position of the suing plaintiff is so far causally removed as to render the defect a remote cause of his injury or damage, a case not now before us will come to consideration.[16]

In essence, the court in the principal case recognized implied warranty as being a tortious action, completely divorced from contract. Thus it was logically able to eliminate contractual privity from the elements necessary to sustain an implied warranty action. By recognizing implied warranty as a duty imposed by law, rather than a duty arising from contract,[17] the court in the principal case evaded the major pitfall on the path away from privity.[18]

Another reason the privity requirement has endured is that courts have been reluctant to break from a precedent dating back to 1842.[19] Although the original statement of the privity doctrine has long been exposed as dictum,[20] the rule that privity is required to sustain an action

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[14] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), 46 CORNELL L.Q. 607 (1961), 74 HARV. L. REV. 630 (1961), 59 MICH. L. REV. 467 (1961) (wife of purchaser recovered from auto manufacturer in implied warranty for personal injuries sustained when steering mechanism failed in car she was driving).

[15] 133 N.W.2d at 134.

[16] *Id.* at 135.

[17] *Accord,* Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (Munic. Ct. App. Wash. D.C. 1962); B. F. Goodrich Co. v. Hammond, 269 F.2d 501, 504 (10th Cir. 1959) (applying Kansas Law).

[18] A most recent example of this pitfall is illustrated by Justice O'Hara's dissent in the principal case, 133 N.W.2d at 133:

> An action for breach of warranty, whether or not "sounding" in tort, is still essentially a contract action. To recover thereunder a plaintiff has to have some relationship to the contract of sale, and the use which implicitly follows thereafter.

[19] See note 3 *supra.*

[20] In Winterbottom v. Wright, 10 Mees. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), the driver of a mailcoach sued a contractor who had agreed with the Postmaster General to keep the coach in repair. Plaintiff was denied recovery. The Exchequer properly sustained defendant's demurrer on grounds that plaintiff was not a party to the contract between defendant and the Postmaster General, which was the contract on which plaintiff based his claim. Though defendant was not the manufacturer of the mailcoach, the general rule developed from the broad dictum of Lord Abinger, C.B., that lack of privity between the parties precluded recovery against the manufacturer. See 1 FRUMER & FRIEDMAN, *op. cit. supra* note 7, at 15; 1 HURSH, *op. cit. supra* note 4, at 530-32.

against a manufacturer persisted because of judicial inertia.[21] Perhaps the privity rule was justified at the time of its origin: mid-nineteenth century manufacturers were struggling for existence, and their meager assets required protection if industrial growth was to be encouraged. This protection is less warranted in the present day, however, since industry, being well-developed, is not so dependent upon judicial protection for further growth.[22] While argued in terms of privity, the basic issue appears to be to what extent the public should be protected from injury-causing products, or, alternatively, to what extent the manufacturer should be held liable. The principal case does not purport to resolve this question.[23]

Although the decision in the principal case furthers the current trend toward protecting the public, as opposed to the protection formerly afforded manufacturers,[24] the holding does not impose absolute liability; that is, a plaintiff may not recover merely because he was injured by a product which defendant manufactured. Plaintiff must still prove a defect.[25] The rule announced in the principal case places upon plaintiff the burden of proving that the product was defective *and* that a causal connection existed between the defect and the injury.[26] According to a prior Michigan case, however, yet a further element of proof must be met: that the defect existed when the product left the defendant's control.[27] The principal case does not resolve how this burden may be met by plaintiff, but a prior case suggests the use of circumstantial evidence.[28] Such use, in effect, would be analogous to application of the

[21] For a recent example of the privity rule applied, see Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963) (implied warranty of fitness held not to run to employee of purchaser).

[22] For discussions in factual contexts, see Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W.2d 918 (1961); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). See generally 2 HARPER & JAMES, TORTS 1535, 1606 (1956); PROSSER, TORTS 672-74 (3d ed. 1964).

[23] "It is enough to say . . . that it is now not necessary to establish 'the outside limits of the warranty protection'." 133 N.W.2d at 135.

[24] For evidence of this trend see RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 10, 1964); 2 HARPER & JAMES, TORTS 1535 (1956); PROSSER, TORTS 678 (3d ed. 1964); Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1-2, 63-64, 141 (1963).

[25] It should be noted that the court in the principal case does not define what is meant by the term "defect." See note 33 *infra*. For problems in formulating a satisfactory definition of the term, see Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367-71 (1965).

[26] 133 N.W.2d at 134, 135. *Accord*, Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (Munic. Ct. App. Wash. D.C. 1962).

[27] Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W.2d 918, 922 (1961). *Accord*, Williams v. Paducah Coca-Cola Bottling Co., 343 Ill. App. 1, 98 N.E.2d 164 (1951); Cudahy Packing Co. v. Baskin, 170 Miss. 834, 155 So. 217 (1934); Kruper v. Procter & Gamble Co., 160 Ohio St. 489, 117 N.E.2d 7 (1954).

[28] Manzoni v. Detroit Coca-Cola Bottling Co., *supra* note 27, at 922: "[The rule that plaintiff must show the presence of offensive condition when it left defendant]

negligence doctrine of *res ipsa loquitur*,[29] even though implied warranty does not require proof of negligence on the part of defendant.[30] Inferences could be raised by introducing into evidence circumstances which would lead reasonable men to believe that the product was defective and that the defect existed at the time the product left defendant's control. Provided that the causal connection could also be proved, plaintiff could establish his case in implied warranty. In practice, this method of proof has been applied to implied warranty cases in other jurisdictions.[31]

Unlike in a negligence action established by the use of *res ipsa loquitur*, the defendant in an implied warranty action cannot escape liability by showing due care in manufacturing the product.[32] The result, of course, is strict liability; *i.e.*, the defendant may be held liable without negligence on his part.[33] This result appears to further the trend of

. . . does not impose an impossible burden on the plaintiff. Rather he is aided by the doctrine most clearly enunciated by Mr. Justice Wiest many years ago when [he] . . . said, 'The poisoned flour speaks for itself; unexplained, it evidences negligence . . . .' It speaks with equal clarity when the action is brought on a theory of warranty. Unexplained it evidences such breach . . . ."

[29] The doctrine of *res ipsa loquitur* is a device whereby an injured plaintiff may establish a cause of action in negligence by introducing circumstantial evidence. Recognized and accepted in some form or another by all courts, the doctrine is far from uniform. However, the usual conditions for applying the doctrine are these:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Some courts have at least suggested a fourth condition, that evidence as to the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. PROSSER, TORTS 218 (3d ed. 1964).

The procedural effect of the doctrine differs in various jurisdictions. In some courts, satisfaction of the conditions gives rise to a *presumption* of negligence which, if not rebutted, results in a directed verdict in favor of the plaintiff. In most courts, however, satisfaction of the conditions merely gives rise to an *inference* of negligence, sufficient to carry plaintiff's case past a motion to dismiss and to the jury. See 2 HARPER & JAMES, TORTS 1099-102 (1956). See generally *id.* at 1075-107; 1 FRUMER & FRIEDMAN, *op. cit. supra* note 7, at 282-337; 1 HURSH, *op. cit. supra* note 4, at 364-81; PROSSER, TORTS 215-39 (3d ed. 1964).

[30] Piercefield v. Remington Arms Co., 133 N.W.2d at 134, quoting with approval from Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919, 922 (Munic. Ct. App. Wash. D.C. 1962). *Accord,* Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W.2d 918, 922 (1961). *Cf.* Vaccarezza v. Sanguinetti, 71 Cal. App. 2d 687, 163 P.2d 470 (1945) (statutory warranty).

[31] Patterson v. George H. Weyer, Inc., 189 Kan. 501, 370 P.2d 116 (1962) (chemical burns from beauty shop permanent wave preparation); LeBlanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952) (deteriorated fly in soft-drink bottle); Atkinson v. Coca-Cola Bottling Co., 275 S.W.2d 41 (Mo. 1955) (cigar butt in soft-drink bottle).

[32] See cases cited note 31 *supra.*

[33] The benefits of applying this standard of strict liability, as far as plaintiff's burden of proof is concerned, would seem to depend upon the type of defect on which plaintiff is suing. Two types of defects are evident, (1) a defect which occurs when the product is not as it was designed because of a mistake in the manufacturing process, and (2) a defect which arises from faulty design. As to the first type, plaintiff is aided by the strict liability standard because he is relieved of the burden of proving that the

shifting from an attempt to do justice between the parties towards an attempt to formulate rules which (1) provide an incentive to minimize accident-causing conduct on the part of the manufacturer, and (2) to distribute the risk among those who benefit from that conduct which is ultimately accident-causing.[34] Still, the result is not liability without fault. As defined by Dean Prosser, " 'fault' is a failure to live up to an ideal of conduct."[35] When a product causes injury because of a defect, the manufacturer of that product has failed to meet the ideal of conduct because he has allowed the defect to arise and has caused the defective product to be marketed.[36] The impact of the principal case is simply this: while the holding does not broaden the basis of the manufacturer's liability, the decision has enlarged his total liability by introducing a new class of potential plaintiffs—innocent bystanders.

STRICT LIABILITY IN TORT—BUILDER-VENDOR OF MASS PRODUCED HOUSE STRICTLY LIABLE FOR INJURIES CAUSED BY CONSTRUCTION DEFECTS

Defendant, a mass-developer who planned communities and sold homes on the basis of advertised models, installed a water heater in a house without following the manufacturer's recommendations.[1] Plaintiffs leased the house from defendant's vendee, and plaintiffs' minor son was subsequently scalded by excessively hot water drawn

mistake of manufacture was the result of the defendant's negligence. As to the second type, however, plaintiff must prove that the design was unreasonably dangerous, or that a reasonable man would not put it on the market because of the risks associated with it. See Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 13-21 (1965). Though relieved of proving the defendant manufacturer's knowledge of the risks, the plaintiff is little aided by the strict liability standard when his action is based on faulty design because he still has the burden of proving essentially the same elements he would have been required to prove had his action been based on negligence. *Compare* the defect in the principal case *with* the defect in Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965), 41 WASH. L. REV. —.

[34] For analyses of some ramifications of this problem, see Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965).

[35] PROSSER, TORTS 507 (3d ed. 1964).

[36] The manufacturer can still escape liability in implied warranty if plaintiff's injury was not in fact caused by the defective product, as when plaintiff had warning of the offensive condition and failed to heed it. See Barefield v. LaSalle Coca-Cola Bottling Co., 370 Mich. 1, 120 N.W.2d 786 (1963).

[1] The manufacturer of the heating unit had recommended that a mixing valve be installed outside the boiler to avoid delivery of excessively hot water for domestic use. Instead of following the recommendations, defendant relied on combination spigots to mix the water, cautioning purchasers to open the cold top part way before turning on the hot tap.