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PRODUCTS LIABILITY WITHOUT PRIVITY: CONTRACT WARRANTY OR TORT

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The recent decision of the New York Court of Appeals in *Mendel v. Pittsburgh Plate Glass Co.*,[1] involves serious implications which may impede the growth and development of the law of strict product or enterprise liability.

Stripped of collateral issues, the case impliedly holds that the defendant, Pittsburgh Plate Glass Company, who had manufactured and installed a defective glass door at the entrance to a bank, was liable for breach of warranty to the plaintiff who, while entering the bank, was injured when the door struck her and caused her to fall and sustain personal injuries. However, the majority opinion, written by Judge Scileppi, held that the applicable statute of limitations had expired before the plaintiff was injured, and thus before the cause of action could be brought, and therefore denied recovery. The dissenting opinion, written by Judge Breitel and concurred in by Chief Judge Fuld and Judge Gibson, argued that the plaintiff's action was in tort and that the statute of limitations did not begin to run until the plaintiff was injured.

The case turned on which of two statutes of limitations was controlling — the one applicable to an action on a contractual obligation, express or implied, or the one applicable to personal injuries arising from tort. The majority opinion in *Mendel* relied on the case of *Blessington v. McCrory Stores Corp.*[2] in holding that the provision applicable to an action on a contractual obligation was controlling.[3] In arriving at this conclusion, the Court appears to have overlooked several pertinent considerations that made the holding in *Blessington* inapplicable. First, at the time *Blessington* was decided, privity of contract was required and the action allowed was against an immediate vendor, not against a remote supplier.[4] Hence, it was quite logical to treat an obligation

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1 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

2 305 N.Y. 140, 111 N.E.2d 421 (1953).

3 CIVIL PRACTICE ACT § 48(1). The Court apparently overlooked subdivision 3 of that section, which provided a six-year limitation for "an action to recover damages for personal injuries, except in a case where a different period is expressly prescribed in this article." *See* 28 ST. JOHN'S L. REV. 127, 128 n.3, 129 (1953). The Civil Practice Act is no longer operational in New York and has been superseded by the Civil Practice Law and Rules (CPLR).

4 Although the walls of the citadel had been undermined through the third-party

arising from an implied warranty to a person in privity with the seller as one arising from a contractual obligation. Second, the alternative statute of limitations considered by the Court specifically applied to personal injuries resulting from *negligence*.[5] Moreover, the appellee in *Blessington* had conceded that the lower court had properly dismissed his negligence counts against the manufacturer, the manufacturer's supplier of the defective goods and McCrory.[6] Third, the Court was not required, as in *Blessington*, to choose between a limitation applicable to an action arising from a contractual obligation and one arising from negligence. Instead, the available choice in *Mendel* was between a limitation applicable to an action arising from a contractual obligation[7] and one applicable to an action to recover damages for a personal injury.[8]

It appears, therefore, that the *Mendel* Court erred in applying the limitation applicable to contractual obligations; first, because the plaintiff was a total stranger to the sales transaction, and second, because the more specific statute applicable to actions for personal injuries should have taken precedence over the more general one.

The significant aspect of *Mendel*, however, is the Court's treatment of the right of a person injured by a defective product to recover from the manufacturer-seller of the product as a right grounded in contract warranty even though there was a total lack of privity between the manufacturer and the injured person.

While the New York Court originally led the way in piercing the shield of privity in negligence cases,[9] it proceeded cautiously in abandoning privity in actions based on warranty. Like other jurisdictions, it stretched agency and third-party beneficiary concepts beyond their traditional limits to extend the benefits of warranties to persons not in privity with the sales transaction out of which the warranty came into existence.[10] The problem was present in *Blessington* but was not discussed. In *Greenberg v. Lorenz*,[11] the Court dealt haltingly with the privity problem in an action by a child and his father against a retail

beneficiary and agency routes, they did not fall until Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1966). Even in *Randy Knitwear*, privity in the form of reliance on the manufacturer's representation was present.

5 CIVIL PRACTICE ACT § 49(6).

6 305 N.Y. at 140, 111 N.E.2d at 422.

7 CPLR 213(2).

8 CPLR 203(a); 214(5).

9 MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

10 The various strategies used by the courts are discussed in Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1957), and are entertainingly summarized in Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1124 n.153 (1960).

11 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

food store to recover damages arising from injuries sustained by the child which resulted from eating unwholesome sardines purchased by the father. The Court, after noting that the statutory warranties said nothing about privity, concluded that the strict privity rule should be revised and that warranty protection should be extended to members of the family. However, the Court, while purporting to modify the strict privity rule as to food and household goods purchased for family use, clung to the privity concept by use of a presumption that the food was purchased for all members of the household.[12]

The next significant inroad on the privity requirement was made in *Randy Knitwear, Inc. v. American Cyanamid Co.*[13] Randy Knitwear manufactured clothing with fabric purchased from mills which produced cloth treated with resins manufactured and sold by American Cyanamid for the purpose of preventing shrinkage. American Cyanamid had widely advertised the effectiveness of its resins and had provided labels to be passed on to clothing manufacturers by licensed textile manufacturers. The opinion by Judge Fuld, after recounting the history of the privity requirement in New York and noting that the requirement had not been adhered to with logical consistency, flatly stated the holding in *Greenberg* to be that in cases of foodstuffs and other household goods the implied warranties of fitness and merchantability run from the retailer to members of the purchaser's household, regardless of privity of contract.[14] The opinion, in concluding that the plaintiff could recover on the basis of an express warranty without privity of contract, again adverted to the fact that the statutory warranties nowhere state that liability for express warranty extends only to the warranting seller's immediate buyer and cannot extend to a later buyer who made the purchase in foreseeable and natural reliance upon the original seller's affirmation. While this case purports to hold that a seller's express warranty may extend to a remote purchaser who was not privy to the original sale, great stress was placed on the remote buyer's expected reliance upon the original seller's misrepresentation.[15]

The crux of the problem arises from the confusion which was in-

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12 *Id.* at 198-99, 173 N.E.2d at 775-76, 213 N.Y.S.2d at 42-43.

13 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

14 *Id.* at 11, 181 N.E.2d at 401, 226 N.Y.S.2d at 366. No mention was made of the presumption that such goods are purchased for all members of the household.

15 The plaintiff's expected reliance on the original seller's misrepresentation was not only stressed in the Court's opinion, but was also the basis of a separate concurring opinion by Judge Froessel in which Judges Dye and Van Voorhis concurred. The concurring opinion stated: "We do not agree that the so-called 'old court-made rule' should be modified to dispense with the requirement of privity without limitation." *Id.* at 16, 181 N.E.2d at 405, 226 N.Y.S.2d at 371.

troduced into the New York law by *Goldberg v. Kollsman Instrument Co.*[16] and which has been compounded in *Mendel.* The majority opinion in *Mendel,* written by Judge Scileppi, a dissenter in *Goldberg,* states:

> While there is language in the majority opinion in *Goldberg* approving of the phrase "strict tort liability", it is clear that *Goldberg* stands for the proposition that notwithstanding the absence of privity, the cause of action which exists in favor of third party strangers to the contract is an action for breach of an implied warranty.[17]

Goldberg involved a suit by the administrator of a passenger of American Airlines against Lockheed, the manufacturer and seller of a plane which crashed and killed the plaintiff's intestate, and against Kollsman, a supplier to Lockheed of a defective altimeter. Recovery, without proof of negligence, was allowed against Lockheed but not against Kollsman. Contrary to Judge Scileppi's statement in *Mendel,* it is not at all clear that the recovery allowed in *Goldberg* was for a breach of an implied warranty. While the majority opinion in *Goldberg* did make a questionable assertion that the *Randy Knitwear* opinion at least suggested that all requirements of privity had been dispensed with and that this was the logical and necessary result of the Court's prior decisions, this statement was followed immediately by a statement that "[a] breach of warranty, it is now clear, is not only a violation of the contract out of which . . . [it] arises but is a tortious wrong suable by a non-contracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer."[18] Moreover, the opinion referred to *Greenman v. Yuba Power Products, Inc.*[19] stating: "Very recently the Supreme Court of California . . . in a unanimous opinion imposed 'strict tort liability' (surely a more accurate phrase) regardless of privity on a manufacturer. . . ."[20]

The real clue to the basis of the holding in *Goldberg* is found, however, in its conclusion that the manufacturer of the airplane, Lockheed, was liable and the manufacturer of the defective component which caused the crash, Kollsman, was not. Under the warranty without privity approach, Kollsman, as well as Lockheed, would have been liable. But the Court's conclusion that sufficient protection to passengers was provided "by casting in liability the airplane manufacturer which put into the market the completed aircraft"[21] clearly indicates the

16 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).
17 25 N.Y.2d at 343-44, 253 N.E.2d at 209, 305 N.Y.S.2d at 493.
18 12 N.Y.2d at 436, 191 N.E.2d at 83, 240 N.Y.S.2d at 594.
19 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
20 12 N.Y.2d at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.
21 *Id.*

adoption of a theory of strict enterprise liability, and this was explicitly recognized in Judge Burke's dissenting opinion in *Goldberg*.[22]

The most disturbing aspect of the *Mendel* decision arises, not from the result reached in the case, but from the following statement which appears in the majority opinion:

> We would merely add that both parties appear to agree, and we believe correctly, that strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action.[23]

This statement can be expected to wake a sympathetic response from all who understand that liability in warranty in the absence of privity is a tort doctrine, pure and simple, and that the warranty label is merely a transitional figure of speech designed to accord the same protection to victims of defectively manufactured products who are not privy to warranties arising from a sales transaction with another as is available to those who can be brought under the umbrella of privity. It is surprising, however, in view of Judge Scileppi's concurrence with the dissenting opinion in *Goldberg*, to find flowing from his pen in *Mendel* a statement that was flatly rejected in that dissent.[24]

More surprising, however, than Judge Scileppi's equating strict liability in tort with liability on implied warranty without privity is the reverse twist he applies to the statement. Instead of the usual meaning that liability for implied warranty without privity is a tort liability, he turns the phrase around to mean that strict liability in tort is a warranty liability. And from this he reasons to the conclusion that liability for breach of warranty without privity is a liability arising from a contractual obligation within the meaning of the statute of limitations, an amazing *non sequitur*.[25]

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22 "Inherent in the question of strict products or enterprise liability is the question of the proper enterprise on which to fasten it. Here the majority have imposed this burden on the assembler of the finished product, Lookheed." *Id.* at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 597. Judge Scileppi, the author of the majority opinion in *Mendel*, which contains the statement that *Goldberg* was clearly based on breach of implied warranty, concurred in Judge Burke's dissent. The dissent further argued that any claim of enterprise liability should be fixed on American Airlines or on no one. *Id.* at 441, 191 N.E.2d at 86, 240 N.Y.S.2d at 599.

23 25 N.Y.2d at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494.

24 Per Judge Burke: "We cannot accept the implication of the majority that the difference between warranty and strict products liability is merely one of phrasing." 12 N.Y.2d at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 597.

25 Perhaps the true reason for this bizarre conclusion is contained in the last paragraph of the opinion wherein the Court indicates that the decision to apply the contract period of limitations was made to guard against "unfounded actions that would be brought many years after a product is manufactured" and that plaintiff should therefore be relegated to his action for negligence. 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at

It should not be forgotten that the opinions of the New York Court in *Greenberg, Randy Knitwear* and *Goldberg* did not contend that the New York Sales Act indicated a legislative intent to extend the statutory warranties to noncontracting parties. Instead, the Court, recognizing that the warranty doctrine was of tort origin, was content to point out that the Sales Act contained no language inhibiting the Court from expanding the warranty doctrine to persons not privy to the warranties.

Similarly, the Uniform Sales Act, which had been adopted in New York, contained only one provision respecting the extension of statutory warranties to persons other than the buyer. Section 2-318 provides that a seller's warranty, if it exists, is extended to a limited statutorily created class of third-party beneficiaries which includes a natural person who is in the family or who is a member of the household of the buyer, or who is a guest in his home. It will be noted that this would not reach a business invitee, a neighbor or a guest in the buyer's automobile. It should be noted also that the statutory warranties are subject to exclusion or modification.[26] It is significant also that the official comments to the Uniform Commercial Code (UCC) expressly state that while the UCC warranties (other than the third-party beneficiary provisions in section 2-318) are limited in "scope and direct purpose to the buyer as part of a contract of sale," the provisions are not designed to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to direct parties to such contract.[27] It would appear that the Code leaves the courts at liberty to deal with liability to persons injured by defective products, whether couched in terms of warranty or strict tort liability, free of its many limiting features with respect to the warranties that may arise between buyer and seller as the result of a sale.[28]

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495. This point is adequately dealt with in the dissenting opinion and needs no further elaboration. However, it would appear that the change in the language of the statutes of limitations previously adverted to would have the effect of making the tort limitation rather than the contract limitation applicable in any event. *Compare* CIVIL PRACTICE ACT §§ 48(1) & 49(6) *with* CPLR 203(a), 213(2) & 214(5).

26 UNIFORM COMMERCIAL CODE § 2-316.

27 *Id.* §§ 2-313, comment 2; 2-318, comment 3.

28 For a discussion of the exclusion or modification of statutory warranties under the UCC and the limitations that may be placed thereon by the seller, see Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases,* 18 STAN. L. REV. 974, 992 *et seq.* (1966). *See also* L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A(5) (1968); Prosser, *The Assault Upon the Citadel,* 69 YALE L.J. 1099, 1127-34 (1960) (wherein the intricacies and obstacles to recover under the UCC are elaborated); Rapson, *Products Liability Under Parallel Doctrine,* 19 RUTGERS L. REV. 695 (1962); Shanks, *Strict Tort Theory of Products Liability and The Uniform Commercial Code,* 17 W. RES. L. REV. 5 (1965); Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code,* 51 VA. L. REV. 804 (1965).

An early case which dealt with the question of compliance with the notice requirements of warranties arising under a sales act is *La Hue v. Coca-Cola Bottling, Inc.*[29] The Supreme Court of Washington, in holding the manufacturer liable to a consumer who was not in privity, stated that the action for breach of implied warranty arose upon principles of tort and that the plaintiff was not required to comply with the notice provisions of the Uniform Sales Act.

An important point made by Justice Traynor in the celebrated case of *Greenman v. Yuba Power Products, Inc.*[30] was that, although strict liability of a manufacturer to a person not in privity has usually been based on the theory of a warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between the parties involves recognition that the liability is not assumed by agreement but is imposed by law. It was therefore unnecessary for the plaintiff to prove that a warranty was given or that the notice requirements of the UCC were complied with.[31]

Although New Jersey initiated strict liability without privity under the warranty approach in *Henningsen v. Bloomfield Motors, Inc.*,[32] in *Santor v. A & M Karagheusian, Inc.*,[33] the same Court, after noting that the warranty approach was a sufficient basis for recovery against a manufacturer by a purchaser from a retailer, stated that the liability could more directly be based on tort.[34] Pursuant to this view, the Court concluded that the notice provisions of the Code were inapplicable.

In *Rosenau v. New Brunswick*,[35] the New Jersey Court came to grips with a problem similar to that presented in *Mendel*. The lower court recognized that plaintiff's cause of action was grounded on strict liability in tort but held that the action accrued when the defendant

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29 50 Wash. 2d 645, 314 P.2d 421 (1957).

30 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

31 For additional cases holding that the notice requirements are not applicable to persons not in privity, see Wright Bachman, Inc. v. Hodnett, 235 Ind. 307, 133 N.E.2d 713 (1956); Silverstein v. R. H. Macy & Co., 266 App. Div. 5, 40 N.Y.S.2d 916 (1st Dep't 1943); Kennedy v. F. W. Woolworth Co., 205 App. Div. 648, 200 N.Y.S. 121 (1st Dep't 1923). For a holding that the notice requirements must be met when recovery is based on the claim of an express warranty, see Wojciuk v. U.S. Rubber Co., 19 Wis. 2d 224, 120 N.W.2d 47 (1963), *aff'd in part and rev'd in part on rehearing*, 19 Wis. 2d 235a, 122 N.W.2d 737 (1963). *See also* Annot., 6 A.L.R. 3d 1371, 1374 (1966).

32 32 N.J. 358, 161 A.2d 69 (1960).

33 44 N.J. 52, 207 A.2d 305 (1965).

34 *Santor* also involved the question whether strict liability should extend to the loss of a product's value as well as to injuries or damages caused by the defect. The New Jersey Court answered this question in the affirmative. *But see* Seeley v. White Motor Corp., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), wherein Justice Traynor rejected the idea that *Greenman* had superseded the legislative warranty scheme and stated that the development of strict tort liability was for the purpose of dealing with physical injuries.

35 51 N.J. 130, 238 A.2d 169 (1968).

delivered a defective water meter to the city of New Brunswick, which had subsequently installed it on the plaintiff's premises, and not when the defective meter caused damage to plaintiff's premises. The Supreme Court reversed, holding that the action was in tort and that it accrued when the injury occurred. In so holding the Court noted that the lower court's opinion "incongruously served to bar their claim long before it arose and well before the meter was installed."[36]

The opinion in *U.S. Fidelity and Guaranty Co. v. Truck and Concrete Equipment Co.*,[37] decided by the Supreme Court of Ohio shortly after *Mendel*, provides an interesting contrast to the majority opinion of the New York Court. In *Mendel*, the contract statute of limitations had expired but the tort statute had not. In the Ohio case, the tort limitation period had expired but the UCC limitation for breach of warranty had not. The Ohio Court held that the plaintiff, who was not privy to the sale, could not rely on the longer UCC limitation applicable to warranties and that his action was barred by the shorter period applicable to torts. The Court said that plaintiff's action was "in tort based upon the breach of an implied warranty."[38]

Courts which have candidly recognized that the liability of a remote manufacturer or supplier of defectively dangerous products is a tort doctrine rather than a fictional warranty liability have generally recognized that the tort statute of limitations is applicable and that the action accrues when the injury occurs.[39] This approach makes it unnecessary to examine the terms of the manufacturer's sales contract or that of intermediate or mediate vendors to determine what warranties were included, whether the statutory warranties were excluded or modified and whether the buyer's remedies were contractually limited. Also eliminated is a whole congery of complex choice of law problems inherent in the contract warranty approach of the New York Court in *Mendel*.[40] Since the distributive chain of merchandising often involves sellers in several states and even in foreign countries, and since the terms of various sales may differ, the remedies available to an injured person may be affected by differences in the applicable law relating to

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36 *Id.* at 136, 238 A.2d at 176. The Court, recognizing the hardship on the defendant of defending his actions of many years before, conceded that it would be more undesirable and unjust to bar a plaintiff's remedy before his cause of action existed.

37 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970).

38 *Id.* at 251-52, 257 N.E.2d at 384.

39 Holifield v. Setco Indus., Inc., 42 Wis. 2d 750, 168 N.W.2d 177 (1969); Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 236 N.E.2d 125 (1969). *See* L. FRUMER & M. FRIEDMAN, *supra* note 28.

40 *See* Comment, *Manufacturer's Responsibility for Defective Products: Continuing Controversy Over the Law to be Applied*, 54 CALIF. L. REV. 1681 (1966).

the interpretation of the various sales contracts, by the question of where the sale was consummated, by attempted exclusions or modification of warranties, by the consequences of contractual limitations of remedies, by questions relative to the statutory requirement of notice of breach, and by the necessity of determining whether the place of the contract's consummation or the place of performance is applicable to one or more of these problems. The resolution of these problems might result in liability for an intermediate vendor which could not be passed upward to his supplier or it might defeat an action against an immediate vendor which would lie against the manufacturer seller.

Mendel, by expanding the concept of the reach of warranty beyond *Randy Knitwear*, where emphasis was placed on the remote buyer's reliance on the manufacturer's express representations, and beyond *Goldberg*, where the victim of the defective product was a user thereof, to a mere bystander who was in the foreseeable ambit of danger, indicates that the Court has heard and heeded the tolling of the tocsin[41] of privity, but the majority opinion, in turning its back on *Goldberg*, has, it is submitted, misinterpreted the import of its warning. If the protection of all who are in the ambit of danger from defectively supplied products is to be accomplished by placing responsibility upon the suppliers of such products, it is essential that the escape hatches which are available to suppliers under the warranty nomenclature be closed and nailed shut. The *Greenman* doctrine and the progeny of that imaginative decision provide the tools necessary to accomplish this purpose. The barrier thrown up in the majority opinion in *Mendel*, and which was so effectively weakened by the dissenting opinion, will, it is predicted, be swept away by the mounting tide of decisions which recognize the justice of placing the cost of injury and damage caused by defective products upon those who place them in the stream of commerce. This is but a logical extension of the *MacPherson* doctrine, which accomplishes this result when negligence can be proved, since liability for negligence may itself be liability without actual fault of the manufacturer.[42]

The argument that hardship on the manufacturer-supplier requires the statute of limitations to begin running when the product is

41 *See* Jaeger, *Privity of Warranty: Has the Tocsin Sounded*, 1 DUQUESNE L. REV. 1 (1963).

42 The doctrine of respondeat superior, under which a manufacturer is vicariously liable for the negligence of its employees, obviously does not contemplate that a manufacturer is at fault unless all employees continuously exercise due care. *See* Ehrenzweig, *Negligence Without Fault*, 54 CALIF. L. REV. 1422 (1966); Keeton, *Products Liability — Problems Pertaining to Proof of Negligence*, 19 SW. L.J. 26, 39-42 (1965); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 8 (1965).

first sold applies equally to an action for negligence. In either case, the injury or damage to a victim of the product may occur long after the original sale and in either case the manufacturer may find it difficult to disprove the claim that the product was defective. However, the burden of proof will be on the plaintiff, whether proof of the defect is attempted in a negligence action or in one based on a strict tort liability theory.

Indeed, the additional difficulty encountered by a plaintiff in proving negligence, as well as the original defectiveness of the product, is the *raison d'être* of the strict liability doctrine. Therefore, to use difficulty of proof as a reason for applying a statute of limitation which would bar recovery before the injury giving rise to the action occurred, is both incongruous and indefensible.