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## THE WARRANTY OF HABITABILITY

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### PART I: THE BACKGROUND†

“THE SUBJECT of implied warranties on the sale of chattels has perplexed the Common Law Courts for a long time, and has been a source of many apparently contradictory decisions.”<sup>1</sup>

This statement by the Illinois court might have been made with equal force and accuracy today instead of, as it was, one hundred twenty-three years ago.

Some knowledge and understanding of the origin and evolution of the warranties that accompany the sale of goods at common law and under the Uniform Commercial Code are essential if comprehension and appreciation of the currently developing warranty of habitability are to be achieved. Therefore, the evolution and development of common-law warranties will be traced and discussed in the pages which follow. The second part of the article, to appear in the next issue, will discuss the current trends with respect to the warranty of habitability.

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Doctor Jaeger's publications include: *Collective Labor Agreements* (1962); *Cases and Materials on International Law* (with William V. O'Brien 1958); *Law of Contracts* (1953); *Cases and Statutes on Labor Law* (1939) (1959 Supp.); *Cases on International Law* (with James Brown Scott) (1937); *Trading Under the Laws of Great Britain* (1935); *Company Law and Business Taxes in Great Britain* (1933). He is also the author-editor of the third edition of *Williston on Contracts* of which twelve volumes have been published to date.

† This article is based on an address delivered by Dr. Jaeger before the Supreme Court of Rhode Island and the Judicial Conference of that State.

The second and final part of Doctor Jaeger's article will appear in the next issue of the Review.

<sup>1</sup> *Misner v. Granger*, 9 Ill. 69, 73, 4 Gilm. 48, 51 (1847).

The early history of warranty indicates that it has only been recognized as a form of contract action for about two hundred years, or since the decision in *Stuart v. Wilkins*.<sup>2</sup> Theretofore, the action was grounded in tort.<sup>3</sup> Prior to the case-by-case analysis of the decisions recognizing an implied or constructive warranty accompanying the sale of houses by a builder-vendor, it is necessary to examine some of the leading precedents in the field of product liability<sup>4</sup> and certain related concepts.

<sup>2</sup> 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778).

<sup>3</sup> 1 Williston, Sales §§ 196-257 (Rev. 1948).

<sup>4</sup> *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961); *Gladiola Biscuit Co. v. Southern Ice Co.*, 267 F.2d 138 (5th Cir. 1959) *rev'g* 163 F. Supp. 570 (E.D. Tex. 1958); *Alexander v. Inland Steel Co.*, 263 F.2d 314 (8th Cir. 1958); *Coca-Cola Bottling Co. of Puerto Rico, Inc. v. Negron Torres*, 255 F.2d 149 (1st Cir. 1958); *Ketterer v. Armour & Co.*, 200 F. 322 (S.D.N.Y. 1912); *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961); *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd* 304 F.2d 149 (9th Cir. 1962); *Magee v. General Motors Corp.*, 117 F. Supp. 101 (W.D. Pa. 1953), *judgment and order vacated and cause remanded* 213 F.2d 899 (3d Cir. 1954); 124 F. Supp. 606 (W.D. Pa. 1954), *aff'd per curiam*, 220 F.2d 270 (3d Cir. 1955).

*Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960); *Collum v. Pope & Talbot, Inc.*, 135 Cal. App. 2d 653, 288 P.2d 75 (1955); *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954); *Rubino v. Utah Canning Co.*, 123 Cal. App. 2d 18, 266 P.2d 163 (1954); *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939); *Hector Supply Co. v. Carter*, 122 So. 2d 22 (Fla. App. 1960); *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1956); *Florida Coca-Cola Bottling Co. v. Jordan*, 62 So. 2d 910 (Fla. 1953); *Cliett v. Lauderdale Biltmore Corp.*, 39 So. 2d 476 (Fla. 1949).

*Tiffin v. Great Atlantic & Pacific Tea Co.*, 18 Ill. 2d 48, 162 N.E.2d 406 (1959); *Sharpe v. Danville Coca-Cola Bottling Co.*, 9 Ill. App. 2d 175, 132 N.E.2d 442 (1956); *Patargias v. Coca-Cola Bottling Co. of Chicago*, 332 Ill. App. 117, 74 N.E.2d 162 (1947); *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N.E.2d 739 (1943); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920); *Cernes v. Pittsburgh Coca-Cola Bottling Co.*, 183 Kan. 758, 332 P.2d 258 (1958); *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953); *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P.2d 930 (1938); *Le Blanc v. Louisville Coca-Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952); *Miller v. Louisiana Coca-Cola Bottling Co.*, 70 So. 2d 409 (La. App. 1954); *Sams v. Ezy-Way Foodliner Co.*, 157 Me. 10, 170 A.2d 160 (1961); *Spence v. Three Rivers Builders & Masonry Supply*, 353 Mich. 120, 90 N.W.2d 873 (1958); *Biedenharn Candy Co. v. Moore*, 184 Miss. 721, 186 So. 628 (1939); *Rainwater v. Hattiesburg Coca-Cola Bottling Co.*, 131 Miss. 315, 95 So. 444 (1923); *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547 (Mo. 1959); *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 53 S.W.2d 532 (1952); *Seaton Ranch Co. v. Montana Vegetable Oil & Feed Co.*, 123 Mont. 396, 217 P.2d 549 (1950).

*Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 213 N.Y.S.2d 39 (1961); *Parish v. Great Atlantic & Pacific Tea Co.*, 13 Misc. 2d 33, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 4 Ohio Ops. 2d 291, 147 N.E.2d 612 (1958); *Markovich v. McKesson & Robbins, Inc.*, 106 Ohio App. 265, 7 Ohio Ops. 2d 10, 78 Ohio L. Abs. 111, 149 N.E.2d 181 (1958); *Cook v. Safeway Stores, Inc.*, 330 P.2d 375 (Okla. 1958); *Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. 515, 156 A. 537 (1931); *General Motors Corp. v. Dodson*, 338 S.W.2d 655 (Tenn. App. 1960); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942); *Campbell Soup Co. v. Ryan*, 328 S.W.2d 831 (Tex. Civ. App. 1959); *LaHue v. Coca-Cola Bottling, Inc.*, 50 Wash. 2d 645, 314 P.2d 421 (1957); *Martin v. J. C. Penney Co.*, 50 Wash. 2d 560, 313 P.2d 689 (1957); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

## INTRODUCTION

Originally, the common law insisted on the use of very precise words, to wit, "warranty" or some equivalent, before a vendor could be held. Warranties were classified as to the subject matter as:

1. Warranties of title; and
2. Warranties of quality.

As to mode of expression, warranties were further classified as *express* and *implied in fact*; in addition, the law supplied the *constructive* warranty as a matter of public policy. It is with the latter development that this article is primarily concerned.

*Warranty of Title*

While a marketable title, in the absence of an express disclaimer, is required in the case of transfers of real property, sales of chattels at early common law were not accompanied by an implied warranty of title or quiet possession.<sup>5</sup> Gradually, a development in this direction became discernible in the law of sales. At first, it was essential that the vendor have possession of the goods,<sup>6</sup> but later, an affirmation of title was held effective even where the vendor was not in possession.<sup>7</sup> However, the mere act of selling a chattel was not considered as equivalent to a representation of title in the vendor, and therefore, a warranty, until the second half of the nineteenth century in the case of *Eichholz v. Bannister*.<sup>8</sup>

However, with the adoption of the Uniform Commercial Code in forty-nine of the States, the District of Columbia and the Virgin Islands, questions as to warranty of title in the sale of goods have been largely resolved.

*Warranty of Title Under the Commercial Code*

Under the Code, the vendor, unless a contrary intention appears, expressly warrants that the title conveyed shall be good:<sup>9</sup>

<sup>5</sup> 7 Williston, Contracts § 923 *et seq.* (3d ed. Jaeger 1963).

<sup>6</sup> *Medina v. Stoughton*, 1 Salk. 210, 1 Ld. Raym. 593 (1700).

<sup>7</sup> *Pasley v. Freeman*, 3 T.R. 51, 100 Eng. Rep. 450 (K.B. 1789).

<sup>8</sup> 17 C.B.N.S. 708 (1864).

<sup>9</sup> Uniform Commercial Code § 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.

- (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that
- (a) the title conveyed shall be good, and its transfer rightful; and
  - (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.<sup>10</sup>

(2) A warranty under subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.<sup>11</sup> "The warranty extends to a buyer whether or not the seller was in possession of the goods at the time the sale or contract to sell was made."<sup>12</sup> The Uniform Commercial Code expressly excludes "things in action" and investment securities.<sup>13</sup> Goods are defined to include:<sup>14</sup>

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things

<sup>10</sup> The warranty of subsection (1) is not designated as an "implied" warranty, and hence is not subject to Section 2-316(3). Disclaimer of the warranty of title is governed instead by subsection (2), which requires either specific language or the described circumstances. Uniform Commercial Code § 2-312, Comment 6.

"Security interest" is defined in § 1-201(37).

<sup>11</sup> This section continues:

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

Subsection (2) [*supra* text] recognizes that sales by sheriffs, executors, foreclosing lienors and persons similarly situated are so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer and therefore no personal obligation is imposed upon the seller who is purporting to sell only an unknown or limited right. This subsection does not touch upon and leaves open all questions of restitution arising in such cases, when a unique article so sold is reclaimed by a third party as the rightful owner. Uniform Commercial Code § 2-312, Comment 5.

<sup>12</sup> Uniform Commercial Code § 2-312, Comment 1.

<sup>13</sup> Uniform Commercial Code Article 8, discussed in 4 Wiliston, Contracts §§ 947-954D (3d ed. Jaeger 1964).

<sup>14</sup> Uniform Commercial Code § 2-105.

attached to realty as described in the section on goods to be severed from realty.<sup>15</sup>

A significant illustration of the application of the principles stated above may be found in *Menzel v. List*, involving the sale of a valuable painting.<sup>16</sup> After a Parisian dealer had sold the work of art to a New York picture gallery, it was bought by a private collector.<sup>17</sup> When the original owner became aware that the painting was listed in a book as belonging to the collector, she asserted her claim and asked for the painting. When her demand was refused, this action was brought.<sup>18</sup>

As was to be expected, the defendant impleaded the owners of the New York art gallery who had sold the painting to him, alleging "breach of an implied warranty of title."<sup>19</sup> The trial court entered judgment for the plaintiff, and both parties appealed.<sup>20</sup> Implied warranties were held to exist that:

1. The vendor had a "right to sell the goods," and
2. The "buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale."<sup>21</sup>

The issue presented to the appellate court was: What is "or should be the proper measure of damages for the breach of an implied warranty of title (or quiet possession) in the sale of personal property."

Noting that "there is a marked absence of case law on the issue," the court commented: "Furthermore, the case law in other jurisdictions in this country provides no consistent approach, much less 'rule', on this

<sup>15</sup> Uniform Commercial Code § 2-107.

<sup>16</sup> 24 N.Y.2d 91, 298 N.Y.S.2d 979 (1969).

<sup>17</sup> The earlier history of the Chagall painting showed that it had been purchased at an auction in Brussels, Belgium by the plaintiff and her husband. During the German invasion, the painting was removed by the invaders and its whereabouts was unknown for a period of some 14 years. The New York buyers did not know anything about its earlier antecedents, but were content to rely on the reputation of the Parisian art gallery.

<sup>18</sup> The action was brought in replevin against the private collector, List, who had paid \$4,000 for the painting.

<sup>19</sup> During the trial, expert witnesses were called upon to testify as to the "fair market value" of the painting which the jury found to be \$22,500. The defendant List was directed to pay this amount or return the painting; he chose the latter alternative.

<sup>20</sup> The impleaded defendants were ordered to pay the original defendant \$22,500 plus the "costs of the Menzel action." *Menzel v. List*, 24 N.Y.2d 91, 94, 298 N.Y.S.2d 979, 980 (1969).

<sup>21</sup> This determination was based upon § 13 of the Uniform Sales Act, N.Y. Personal Property Law § 94 (McKinney 1964), since superseded by the Uniform Commercial Code.

issue and it is difficult even to add up jurisdictions to pinpoint a "majority" and a "minority". . . . In the face of such unsettled and unconvincing 'precedent', the issue is one which is open to resolution as a question which is actually one of first impression."<sup>22</sup>

The defendants contended that the measure of damages should be the same as that governing "breach of the warranty of quiet possession as to real property. However," said the court,

this analogy has been severely criticized by a leading authority in these terms: "This rule [limiting damages to the purchase price plus interest] virtually confines the buyer to rescission and restitution, a remedy to which the injured buyer is undoubtedly entitled if he so elects, but it is a violation of general principles of contracts to deny him in an action on the contract such damages *as will put him in as good a position as he would have occupied had the contract been kept.*"<sup>23</sup>

If the recovery of the plaintiff were limited to the purchase price plus interest, as the court signalized,

the effect is to *put him in the same position he would have occupied if the sale had been made.* Manifestly, an injured buyer is not compensated when he recovers only so much as placed him in *status quo ante* since such a recovery implicitly denies that he had suffered any damage.<sup>24</sup> . . . "The purpose of compensatory damages is to place the buyer in as good condition as he would have occupied had the title been good." This measure of damages reflects what the buyer has actually

<sup>22</sup> As the court pointed out:

One attempt to collect and organize the law in this country on this issue concludes that there are at least four distinct "rules" for measuring the damages flowing from the breach of a personal property warranty of title: purchase price plus interest; "value," without specification as to the time at which value is to be determined; value at the time of dispossession; and value at the time of the sale (An-Interestingly enough, the annotator was able to find New York cases each of which used language which would apparently suggest that a different one of these four "rules" was the rule (Annot., *supra* at 1380) [sic]. *Menzel v. List*, 24 N.Y.2d 91, 96, 298 N.Y.S.2d 979, 982 (1969).

<sup>23</sup> Quoting "Williston, Contracts § 1395A (3d ed. Jaeger 1968), [sic]"; emphasis added by the court, which continued:

Clearly, List can only be put in the same position he would have occupied if the contract had been kept by the Perls if he recovers the value of the painting at the time when, by the judgment in the main action, he was required to surrender the painting to Mrs. Menzel or pay her the present value of the painting. Had the warranty been fulfilled, i.e., had title been as warranted by the Perls, List would still have possession of a painting currently worth \$22,500 and he could have realized that price at an auction or private sale.

*Menzel v. List*, 24 N.Y.2d 91, 97, 298 N.Y.S.2d 979, 983 (1969).

<sup>24</sup> "This rationale," the court noted, "has been applied in Massachusetts in a case construing a statute identical in language to section 150 (subd. 6) of the PPL where the buyer was held entitled to the value 'which [he] lost by not receiving a title to it as warranted \* \* \* His loss cannot be measured by the [price] that he paid for the machine. He is entitled to the benefit of his bargain' (*Spillane v. Corey*, 323 Mass. 673, 675, 84 N.E.2d 5 (1949); see also, *Pilligrene v. James J. Paulman, Inc.*, 6 Terry 225, 226, 45 Del. 225-226, 71 A.2d 59 (1950)." *Menzel v. List*, 24 N.Y.2d 91, 97, 298 N.Y.S.2d 979, 983 (1969).

lost and it awards to him only the loss which has directly and naturally resulted, in the ordinary course of events, from the seller's breach of warranty.<sup>25</sup>

Accordingly, the judgment of the trial court was reinstated with interest.<sup>26</sup>

### *Warranties of Quality*

Having examined the warranty of title, it now becomes necessary to review the development of the warranties of quality, specifically, the warranty of merchantability and the warranty of fitness for use or for a particular purpose. Subsequently, attention will be concentrated on the implied-in-law or *constructive* warranty which was ultimately extended to the sale of new houses when sold by the builder-vendor.

In this development, the law has followed a path somewhat similar to the one traced in the evolution of title or ownership warranties, although more slowly. From cases decided at the beginning of the last century,<sup>27</sup> it is clear that by that time, it was no longer necessary, in order to render the vendor liable as a warrantor, to use the word "warrant" or any other word of promise. This was not such a departure from early law as it might seem, for even in the early law, when the use of the word "warrant" seems to have been essential, the gist of the action was regarded as the deceit caused by a misrepresentation deliberately made to induce a bargain.<sup>28</sup>

How little any idea of promise was thought to be involved in a warranty may be inferred from the early rule that there could be no warranty as to a future event.<sup>29</sup> In other words, a warranty must be a misrepresentation of an existing fact in precisely the same way that a fraudulent misrepresentation must now be in order to furnish a basis for action.<sup>30</sup>

It is generally if not universally accepted as the rule today that any representation of fact as to the quality of the goods made for the

<sup>25</sup> *Menzel v. List*, 24 N.Y.2d 91, 298 N.Y.S.2d 979 (1969).

<sup>26</sup> 11 *Williston, Contracts* §§ 1394 *et seq.*; §§ 1412 *et seq.* (3d ed. Jaeger 1968).

<sup>27</sup> *Power v. Barham*, 4 A. & E. 473 (1836); *Yates v. Pym*, 6 Taunt 446 (1816); *Bridge v. Wain*, 1 Stark. 504 (1816); *Jendwine v. Slade*, 2 Esp. 572 (1797).

<sup>28</sup> *Stuart v. Wilkins*, 1 Dougl. 18, 99 Eng. Rep. 15 (K.B. 1778).

<sup>29</sup> 3 *W. Blackstone's Commentaries* 165 (1st U.S.A. ed. 1967).

<sup>30</sup> 12 *Williston, Contracts* §§ 1487 *et seq.* (3d ed. Jaeger 1970).



apparent purpose of inducing the buyer to purchase them amounts to a warranty.<sup>31</sup>

With the advent of the Uniform Commercial Code and its general, well nigh universal adoption in the latter half of this century, there has been a remarkable increase in consumer protection. As to warranties of quality, the Code provides:

*Implied Warranty: Merchantability*<sup>32</sup>

(1) Unless excluded or modified,<sup>33</sup> a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.<sup>34</sup>

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

<sup>31</sup> A certain degree of confusion was introduced by a statement which appears in *Pasley v. Freeman*, 3 T.R. 51, 100 Eng. Rep. 450 (K.B. 1789): "It was rightly held . . . that an affirmation at the time of a sale is a warranty provided it appears on evidence to have been so intended."

Most courts have in terms rejected any such requirement for making out an express warranty.

Even in jurisdictions where the requirement of intention was laid down, intent to warrant was not used as the equivalent of intent to contract: it means intent to affirm as a fact: in determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not.

*De Lassalle v. Guildford* (1901) 2 K.B. 215.

The *Pasley* statement *supra* has been disapproved by the House of Lords, *Heilbut v. Buckleton* (1913), A.C. 30. *Cf. Carleton v. Jenks*, 80 F. 937, 26 C.C.A. 265, 47 U.S. App. 734 (1897); *Rothermel v. Phillips*, 292 Pa. 371, 141 A. 241 (1928); *Spencer Heater Co. v. Abbott*, 91 N.J.L. 594, 104 A. 91 (1918); *Roberts v. Applegate*, 153 Ill. 210, 38 N.E. 676 (1894).

Similarly, it has been held that while intent to warrant is essential to a warranty, a positive assertion or representation intended to induce the buyer to purchase relying thereon raises a conclusive presumption of such an intent, *Ellis v. Barkley*, 160 Iowa 658, 142 N.W. 203 (1913).

<sup>32</sup> Uniform Commercial Code § 2-314.

<sup>33</sup> See Uniform Commercial Code § 2-316.

<sup>34</sup> This provision of the Code disposes of a long moribund anachronism dating back to an earlier era when innkeepers and tavern operators were held to "utter" the food and drink they purveyed. A discussion of this appears in *Nisky v. Childs Co.*, 103 N.J.L. 464, 135 A. 805 (1927) and *Sofman v. Denham Food Service, Inc.*, 37 N.J. 304, 181 A.2d 168 (1962). In the latter case, the majority opinion found "no resemblance between the operation of a cafeteria and the operation of the ancient inn."

In a separate concurring opinion, it was suggested that instead of adopting the approach the majority used, it might have been more logical and better representative of the evolution of the law to overrule squarely *Nisky v. Childs Co.*, *supra*. Since the adoption by New Jersey of the Uniform Commercial Code, *Nisky v. Childs Co.* can no longer be considered authoritative.

- (b) in the case of fungible goods, are of fair average quality within the description; and
  - (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged, and labeled as the agreement may require; and
  - (f) conform to the promises or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified<sup>35</sup> other implied warranties may arise from course of dealing or usage of trade.<sup>36</sup>

The companion warranty to that of merchantability, namely, the warranty of fitness for use, oftentimes serves the same purpose, especially where foodstuffs or beverages are concerned.<sup>37</sup> The relevant Code section reads:

*Implied Warranty: Fitness for Particular Purpose*<sup>38</sup>

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.<sup>39</sup>

Whether this warranty arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting.<sup>40</sup>

<sup>35</sup> Uniform Commercial Code § 2-316.

<sup>36</sup> Uniform Commercial Code § 2-314. See Williston, *Contracts*, §§ 648-662 (3d ed. Jaeger 1961).

<sup>37</sup> Since merchantability with respect to food means wholesome, and fitness for a particular purpose means edible or fit for human consumption, there is no significant difference between these warranties in this context.

<sup>38</sup> Uniform Commercial Code § 2-315.

<sup>39</sup> According to the official comment to this section, the buyer need not bring home to the seller actual knowledge of the particular purpose for which the goods are intended or of his reliance upon the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists. The buyer, of course, must actually be relying on the seller. Uniform Commercial Code § 2-315, Comment 1. 8 Williston, *Contracts*, § 982 (3d ed. Jaeger 1964).

<sup>40</sup> See *Scanlon v. Food Crafts, Inc.*, 2 Conn. Cir. 3, 193 A.2d 610 (1963); the plaintiff purchased a cellophane-wrapped "grinder" from a cart-vendor. The court described a "grinder" as "a gustatory extravaganza of regal dimensions and savor." In other words, a king-size sandwich made with elongated hard rolls.

When the plaintiff bit into the sandwich he broke an incisor tooth which cut his gums. The pain and bleeding lasted for about an hour. The court held that "there was a breach of implied warranty as to fitness for which the defendant is absolutely liable." The court cited

Thus, in *Henningsen v. Bloomfield Motors, Inc.*,<sup>41</sup> the court emphasizes the fact that the distinction between warranties of merchantability and of fitness for a particular purpose are in many instances "practically meaningless."

### *Disclaimer of Warranty*

Especially significant in connection with the Code treatment of warranties are the disclaimer provisions.<sup>42</sup> No longer will any kind of disclaimer provision be effective if consonant with public policy,<sup>43</sup> but as a reading of the pertinent sections will demonstrate, such disclaimer must take a particular form:

### *Exclusion or Modification of Warranties*<sup>44</sup>

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence<sup>45</sup> negation or limitation is inoperative to the extent that such construction is unreasonable.<sup>46</sup>

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and

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the Uniform Commercial Code, Conn. Gen. Stat. § 42a-2-315. Cf. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>41</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), discussed in Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 Rutgers L. Rev. 493 (1962).

<sup>42</sup> Uniform Commercial Code § 2-316.

<sup>43</sup> An increasing number of decisions have held that certain disclaimer provisions are contrary to public policy *infra* notes 46, 48, 49.

<sup>44</sup> The Official Comment to § 2-316 reads in part:

Purposes:

1. This section is designed principally to deal with those frequent clauses in sales contract which seek to exclude "all warranties, express or implied." It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

2. The seller is protected under this Article against false allegations of oral warranties by its provisions on parol and extrinsic evidence and against unauthorized representations by the customary "lack of authority" clauses. This article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty.

<sup>45</sup> Citing Uniform Commercial Code § 2-202.

<sup>46</sup> This provision is extensively discussed in *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. 1964) where it was held that a contract of sale of a helicopter was governed by the law of Pennsylvania which had adopted the Uniform Commercial Code. Specifically, there was a question as to whether a purported disclaimer of liability was effective to defeat recovery for breach of warranty. The court held that it did not.

to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.<sup>47</sup>

(3) Notwithstanding subsection (2)

- (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; . . .
- (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

Where a disclaimer is contrary to public policy,<sup>48</sup> the courts have held that it will not be enforceable, no matter how specific and conspicuous its terms may be.<sup>49</sup> The growing trend of the cases is clearly moving in this direction,<sup>50</sup> as the opinion in a leading case clearly demonstrates:

<sup>47</sup> It should be noted that if the warranty of merchantability is to be disclaimed, *merchantability* must be specifically mentioned; where there is a disclaimer of the implied warranty of fitness, it must be in *writing* and *conspicuous*. Uniform Commercial Code § 2-316.

<sup>48</sup> In addition to cases cited in text, other representative decisions include: *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (Mun. Ct. App. D.C. 1962) noted in *Breach of Implied Warranty—Absence of Contractual Privity No Defense*, 12 Am. U.L. Rev. 216 (1963), citing *Jaeger, Warranties of Merchantability and Fitness for Use*, 16 Rutgers L. Rev. 493 (1962). *Simpson v. Logan Motor Co.*, 192 A.2d 122 (D.C.C.A. 1963) citing *Picker X-Ray Corp. v. General Motors Corp.*, *supra*. *Cf. B.F. Goodrich v. Hammond*, 269 F.2d 501 (10th Cir. 1959); the plaintiff sued for wrongful death due to defective tire blowing out which was expressly warranted to be blow out proof. The court held plaintiff could recover for death of driver-purchaser under express warranty and for death of a passenger under implied warranty of fitness for purpose designed. The implied warranty is a right arising from law, and privity is not essential where an implied warranty is imposed by law on basis of *public policy*. Judgment for plaintiff. *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961) citing *Pritchard v. Liggett & Myers Tobacco Co.*, 134 F. Supp. 829 (W.D. Pa. 1955). *Cf. Cottom v. McGuire Funeral Service, Inc.*, 262 A.2d 807 (D.C. C.A. 1970) citing *Picker X-Ray Corp. v. General Motors Corp.*, *supra*.

<sup>49</sup> As, for example, in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), discussed in *Jaeger, Warranties of Merchantability and Fitness for Use*, 16 Rutgers L. Rev. 493 (1962).

<sup>50</sup> Any number of examples could be adduced which demonstrate the application of public policy in these product liability cases: *Ewing v. Lockheed Aircraft Corp.*, 202 F. Supp. 216 (D. Minn. 1962); *Middleton v. United Aircraft Corp.*, 204 F. Supp. 856 (S.D.N.Y. 1960); *Siegel v. Braniff Airways, Inc.*, 204 F. Supp. 861 (E.D.N.Y. 1960); *Conlon v. Republic Aviation Corp.*, 204 F. Supp. 865 (S.D.N.Y. 1960); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 67, 377 P.2d 897 (1962); *Hayman v. Shoemaker*, 203 Cal. App. 2d 140, 21 Cal. Rptr. 519 (1962); *Corporation of Presiding Bishop v. Cavanaugh*, 217 Cal. App. 2d 492, 32 Cal. Rptr. 144 (1963), citing with approval *Jaeger, Privity of Warranty: Has the Toscin Sounded?* 1 *Duquesne U.L. Rev.* 1 (1963), noted in *Keeffe, Practicing Lawyer's Guide to Current Law Magazines*, 49 *A.B.A.J.* 701 (1963); *Hardman v. Helene Curtis Industries, Inc.*, 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964); *Suvada v. White Motor Co.*, 51 Ill. App. 2d 318, 201 N.E.2d 313 (1964); *State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc.*,

The terms of the warranty are a sad commentary upon the automobile manufacturers' marketing practices. Warranties developed in the law in the interest of and to protect the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles and to decide for himself whether they are reasonably fit for the designed purpose. . . . But the ingenuity of the Automobile Manufacturers Association, by means of its standardized form, has metamorphosed the warranty into a device to limit the maker's liability.<sup>51</sup>

This reasoning, which prompted the Supreme Court of New Jersey in a unanimous decision<sup>52</sup> to refuse enforcement of the disclaimer provision on grounds of public policy, was followed in *General Motors Corp. v. Dodson*,<sup>53</sup> where a similar warranty was likewise declared invalid. Referring to the aforesaid decisions, the Supreme Court of Iowa said succinctly:

It is our opinion that these recent pronouncements in New Jersey and Tennessee represent the most advanced thinking and the soundest conclusions in the field of new car warranties, express and implied.<sup>54</sup>

Finally, in *Norway v. Root*,<sup>55</sup> the Supreme Court of Washington, referring to the leading precedent, *Henningsen v. Bloomfield Motors, Inc.*<sup>56</sup> remarked that it "contains the best-documented criticism we have found. It brands the attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom as so inimical to the public good to compel an adjudication of its invalidity."<sup>57</sup>

252 Iowa 1289, 110 N.W.2d 449 (1961); *Manzoni v. Detroit Coca-Cola Bottling Co.*, 363 Mich. 235, 109 N.W.2d 918 (1961); *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963), citing Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 Duquesne U.L. Rev. 1 (1963); *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J. Super. 476, 164 A.2d 773 (1960); cf. *Merchants Indemnity Corp. of N.Y. v. Eggleston*, 68 N.J. Super. 235, 172 A.2d 206 (1961); *Jakubowski v. Minnesota Mining & Mfg.*, 80 N.J. Super. 184, 193 A.2d 275 (1963); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963), citing Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 Duquesne U.L. Rev. 1 (1963); *Amie v. Laure*, 16 App. Div. 2d 736, 226 N.Y.S.2d 832, *aff'd*, 16 App. Div. 2d 737, 226 N.Y.S. 2d 1024 (1963); *Williams v. Union Carbide Corp.*, 17 App. Div. 2d 661, 230 N.Y.S.2d 476 (1962); *United Pacific Insurance Co. v. Balcrank, Inc.*, 175 Ohio St. 267, 25 Ohio Op. 2d 77, 193 N.E.2d 920 (1963).

<sup>51</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 375, 161 A.2d 69, 78 (1960). "To call it an 'equivocal' agreement," the court added, "as the Minnesota Supreme Court did, is the least that can be said in criticism of it." Citing *Federal Motor Truck Sales Corp. v. Shanus*, 190 Minn. 5, 250 N.W. 713 (1933).

<sup>52</sup> *Henningsen v. Bloomfield Motors, Inc.*, *supra*.

<sup>53</sup> 338 S.W.2d 655 (Tenn. App. 1960).

<sup>54</sup> *State Farm Mutual Automobile Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 1301, 110 N.W.2d 449, 456 (1961).

<sup>55</sup> 58 Wash. 2d 96, 361 P.2d 162 (1961).

<sup>56</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), discussed in Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 Rutgers L. Rev. 493 (1962).

<sup>57</sup> *Norway v. Root*, 58 Wash. 2d 96, 99, 361 P.2d 162, 164 (1961).

*The Implied Warranty and Product Liability*

Practically all of the jurisdictions have made the parties who purvey food or drink liable for injuries caused by the deleterious or noxious character of their products.<sup>58</sup> This has resulted in the gradual erosion of the so-called privity requirement and in many instances, it has been frankly acknowledged that this liability is a public policy consideration.<sup>59</sup> There are a few jurisdictions which have adhered to the archaic and ill-advised notion of privity of warranty, sometimes seeking refuge in the contention that a change so drastic as its abolition should come from the legislature. Of course, this ignores the fact that the mischief all began with two opinions *obiter dicta* in *Winterbottom v. Wright*<sup>60</sup> where it was said that there being “[n]o privity of contract[,] . . .” defendant should have judgment; also, that unless the right to recover is confined “[t]o those who enter into the contract[,] . . .” there is “[n]o point at which such actions would stop.”<sup>61</sup> What makes the paradox even more pointed, aside from the *obiter dicta*, is that neither a manufacturer nor a retailer was involved in the *Winterbottom* case.

This argument, however, overlooks the significant point that since the requirement so-called was judge-made, it could also be unmade in the same way. The courts continue to recognize this.<sup>62</sup>

Soon after the privity requirement was first laid down,<sup>63</sup> courts began to deviate therefrom, especially after the classic decision in *MacPherson v. Buick Motor Co.*<sup>64</sup> There, the court declared: “The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser.”<sup>65</sup> And to this, the court added:

<sup>58</sup> Cases cited *supra* note 4.

<sup>59</sup> As to public policy and its vagaries, it has been aptly said, it “[i]s a very unruly horse, and when once you get astride it you never know where it will carry you.” Tracey v. Franklin (Del. Ch.) 61 A.2d 780, *aff’d* 31 Del. Ch. 477, 67 A.2d 56, 11 A.L.R.2d 990, quoting Richardson v. Mellish, 2 Bing. 229 (1824).

<sup>60</sup> 10 Mees. & W. 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (Ex. 1842).

<sup>61</sup> *Dicta* of Abinger, C.B. and Alderson, B., respectively.

<sup>62</sup> Greenberg v. Lorenz, *supra* note 4; Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963); Parish v. Great Atlantic & Pacific Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (N.Y. Mun. Ct. 1958).

<sup>63</sup> *Winterbottom v. Wright*, *supra* note 60.

<sup>64</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>65</sup> *Id.* at 385.

We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.<sup>66</sup>

Thereupon, in three categories of cases, privity was simply eliminated where negligence was the issue:

1. Products having an inherently dangerous or harmful character;
2. Defective products that were imminently dangerous; and
3. Instances where fraud or deceit was present.<sup>67</sup>

Today, goods or chattels falling within any of the afore-enumerated classes almost automatically entitle the injured plaintiff to recovery. However, it is essential to recall that the essence of the tort action has been negligence. Consequently, the question must be posed: What is negligence? The courts are hopelessly at odds.<sup>68</sup>

A number of fictions have been resorted to by the courts in order to avoid, discard or circumvent the "privity requirement" in breach of warranty cases.<sup>69</sup> Among the major theories for this dispensation may be included:

1. The agency concept;<sup>70</sup>
2. The general offer;<sup>71</sup>
3. Direct warranty to the consumer;<sup>72</sup>
4. The distributive chain or conduit concept;<sup>73</sup>

<sup>66</sup> MacPherson v. Buick Motor Co., *supra* note 64, at 390.

<sup>67</sup> Williston, Contracts §§ 1486-1534 (3d ed. Jaeger 1970).

<sup>68</sup> As an example of the divergent views of the courts, *res ipsa loquitur* and its variants may be cited; also, the lack of harmony in the decisions where assumption of risk has been pleaded in defense, *cf.* Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

<sup>69</sup> These are discussed in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* Duquesne U.L. Rev. 1 (1963).

<sup>70</sup> Ryan v. Progressive Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931); Mouren v. Great Atlantic & Pacific Tea Co., 1 N.Y.2d 884, 154 N.Y.S.2d 642 (1956).

<sup>71</sup> Timberland Lumber Co. v. Climax Manufacturing Co., 61 F.2d 391 (3d Cir. 1932); Carlill v. Carbolic Smokeball Co., [1893] 1 Q.B. 256.

<sup>72</sup> Rogers v. Toni Home Permanent Co., *supra* note 4; Markovich v. McKesson & Robbins, Inc., *supra* note 4.

<sup>73</sup> Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963); General Motors Corp. v. Dodson, *supra* note 4.

5. Warranties "running with the goods";<sup>74</sup> and
6. The third-party beneficiary doctrine.<sup>75</sup>

Many of these are being superseded by a strict liability in tort approach,<sup>76</sup> or the simple elimination of privity as a matter of public policy.<sup>77</sup> An examination of a few of the leading cases will suffice to illustrate the more significant changes that have finally led to the adoption of the warranty of habitability in an increasing number of jurisdictions.<sup>78</sup>

### ILLUSTRATIVE CASES

In California, at a relatively early date, a concurring opinion in *Escola v. Coca-Cola Bottling Co. of Fresno*<sup>79</sup> presaged the adoption of the doctrine of strict liability. Some twenty years later, the state Supreme Court adopted this doctrine in *Greenman v. Yuba Power Products*.<sup>80</sup> Thereafter, a number of other jurisdictions followed California's example, including New Jersey and New York.<sup>81</sup> As strict liability has gained so much ground, especially as it has been espoused by one of the most eminent writers in the field,<sup>82</sup> it is appropriate to quote the concurring opinion in the *Escola* case at some length:

<sup>74</sup> *Davis v. Van Camp Packing Co.*, *supra* note 4; *Anderson v. Tyler*, 223 Iowa 1033, 274 N.W. 48 (1937); *Coca-Cola Bottling Co. v. Lyons*, 145 Miss. 876, 111 So. 305 (1927); *cf.* *Klein v. Duchess Sandwich Co.*, *supra* note 4; *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (concurring opinion).

<sup>75</sup> *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928); *Manzoni v. Detroit Coca-Cola Bottling Co.*, 363 Mich. 235, 109 N.W.2d 918 (1961) at 921-22; *cf.* *Klein v. Duchess Sandwich Co.*, *supra* note 4; *Parish v. Great Atlantic & Pacific Tea Co.*, *supra* note 62; UCC § 2-318; *Williston, Contracts* § 378A.

<sup>76</sup> *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1962); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

<sup>77</sup> *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *cf.* *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963) citing *Jaeger, Privity of Warranty: Has the Tocsin Sounded?* 1 *Duquesne U.L. Rev.* (1963); *Mendel v. Pittsburgh Plate Glass Co.*, 57 Misc. 2d 45, N.Y.S.2d 94 (1967).

<sup>78</sup> A discussion of the cases wherein it was held that there was a warranty of habitability will be found in Part II of this article which will appear in Vol. 47, No. 1 of this Review.

<sup>79</sup> 24 Cal. 2d 453, 150 P.2d 436 (1944).

<sup>80</sup> 59 Cal. 2d 57, 377 P.2d 897 (1962).

<sup>81</sup> *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965); *cf.* *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Goldberg v. Kollsman Instrument*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963); *cf.* *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964), applying what was thought to be New York law.

<sup>82</sup> *Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1099 (1960); *Prosser, The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *Minn. L. Rev.* 791 (1966).



In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence, . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.<sup>83</sup>

It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection. . . .<sup>84</sup> It is to the public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally.<sup>85</sup>

In New Jersey, after the landmark case of *Henningsen v. Bloomfield Motors, Inc.*<sup>86</sup> had substantially established the breach of warranty action as available regardless of privity, the Supreme Court went on to adopt the doctrine of strict liability in tort in *Cintrone* and *Santor* (footnoted herein, above). In each of these cases, the Court concluded that as a matter of public policy, the time had come for a further extension of consumer protection. However, in *Schipper v. Levitt & Sons, Inc.*,<sup>87</sup> the Supreme Court appears to have been satisfied that the plaintiff could proceed on theories of both breach of warranty and strict liability in tort. This is a sound rule, especially as a distinct

<sup>83</sup> This concept of loss distribution has also been adopted in a number of cases involving breach of the warranty of seaworthiness, as, for example, *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315 (1964); *Reed v. The Yaka*, 373 U.S. 410 (1963); cf. *Ryan v. Pan-Atlantic Corp.*, 350 U.S. 124 (1955).

<sup>84</sup> This can be accomplished in a satisfactory manner by contracting for product liability insurance as suggested in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 *Duquesne U.L. Rev.* 1, 137 *et seq.* (1963).

<sup>85</sup> *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436 (1944) concurring opinion of Traynor, J., at 461, 150 P.2d at 440-41.

<sup>86</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>87</sup> 44 N.J. 70, 207 A.2d 314 (1965).

action of breach of warranty is emerging as a remedy without reference to privity or other undesirable inhibitions.<sup>88</sup>

### *Breach of Warranty versus "Strict Liability"*

In New York, it appeared as though strict liability might be the order of the day when the Court of Appeals decided the case of *Goldberg v. Kollsman Instrument Corp.*,<sup>89</sup> where the court commented:

A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty 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.<sup>90</sup>

Prior to this decision, the court was prepared to apply either breach of warranty or strict liability in tort, but in the early development of the law, as exemplified by *Blessington v. McCrory Stores Corp.*,<sup>91</sup> the concept of breach of warranty had prevailed.

In the most recent case, *Mendel v. Pittsburgh Plate Glass Co.*,<sup>92</sup> the court reverted to the breach of warranty concept. In this case, a woman, while entering the Central Trust Building in Rochester, New York, walked through one of the entrance doors leading from the street into the premises of the defendant, Central Trust Co., when the door struck her causing her to fall to the ground and sustain severe personal injuries.

Four causes of action were alleged on behalf of Mrs. Mendel:

1. Negligence, seeking recovery for Mrs. Mendel's personal injuries, and
2. Mr. Mendel's derivative consequential damages;
3. The breach of an implied warranty of fitness for a particular use and damages for Mrs. Mendel; and
4. Damages for Mr. Mendel for consequential and derivative damages.

<sup>88</sup> As suggested by the court in *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1964) where the emergence of a distinct action for breach of warranty, as distinguished from breach of contract or tort, is recognized.

<sup>89</sup> 12 N.Y.2d 432, 191 N.E.2d 81 (1963).

<sup>90</sup> *Id.* at 436, 191 N.E.2d at 82.

<sup>91</sup> 305 N.Y. 140, 111 N.E.2d 421 (1953).

<sup>92</sup> 25 N.Y.2d 340, 253 N.E.2d 207 (1969).

Upon motions to dismiss made by the defendants, the Special Term granted these,<sup>93</sup> the Appellate Division unanimously affirmed<sup>94</sup> and the appellants, plaintiffs below, appealed.<sup>95</sup> It is necessary to mention here that the plate glass doors which were used for the entrance to the Central Trust Building were delivered by the Pittsburgh Plate Glass Co., to the defendant, in October, 1958. Thus, the question arose as to what was the applicable Statute of Limitations with respect to appellant's cause of action.<sup>96</sup>

Had it been determined that the cause of action sought recovery for a tortious wrong, then the action having accrued at the time of the injury, which was October 29, 1965, a three year statute would have governed<sup>97</sup> and the motion to dismiss would have been improperly granted.

Were this action, however, to be regarded as a contract cause, then *the action having accrued at the time the sale was consummated*, the action would necessarily be barred by the six-year Statute of Limitations<sup>98</sup> (C.P.L.R. 213, subdivision 2). Since the sale was consummated in 1958, the case was not governed by the Uniform Commercial Code which had a four year limitation,<sup>99</sup> the effective date of which was September 27, 1964.<sup>100</sup> In a four to three decision, the court rejected the strict liability or tort theory of recovery and adhered to its earlier decision in *Blessington v. McCrory Stores Corp.*<sup>101</sup> There the court held that the six-year contract Statute of Limitations was applicable to an action seeking recovery for personal injuries arising out of a breach of implied warranty. As the court observed:

Although such a breach of duty may rest upon, or be associated with, a tortious act, it is independent of negligence, and so such a cause of action gets the *benefit* of the six-year limit of subdivision 1 of section 48 of the Civil Practice Act,<sup>102</sup> as being on an implied contract obligation or liability . . . while an action for breach of a statutorily implied

<sup>93</sup> Mendel v. Pittsburgh Plate Glass Co., 57 Misc. 2d 45, 291 N.Y.S.2d 94 (1967).

<sup>94</sup> 29 A.D.2d 918, 290 N.Y.S.2d 186 (1968).

<sup>95</sup> Mendel v. Pittsburgh Plate Glass Co., 57 Misc. 2d 45, 291 N.Y.S.2d 94 (1967).

<sup>96</sup> Basically, the question centered upon the type of action being brought: contract or tort?

<sup>97</sup> N.Y.C.P.L.R. § 214, subd. 5.

<sup>98</sup> N.Y.C.P.L.R. § 213, subd. 2.

<sup>99</sup> Uniform Commercial Code § 2-725.

<sup>100</sup> Uniform Commercial Code § 2-725(4).

<sup>101</sup> 305 N.Y. 140, 111 N.E.2d 421 (1953).

<sup>102</sup> Now C.P.L.R. § 213, subd. 2.

warranty of fitness may involve, incidentally, some showing of negligence, the contract breached is not merely one to use due care, but is a separate (implied) contract of guaranty that the goods are fit for the purpose for which they are sold and bought.<sup>103</sup> Proof of negligence is unnecessary for recovery in such a suit.<sup>104</sup>

The appellate court pointed out that this rationale has been followed since the *Blessington* decision, in *Citizens Utilities v. American Locomotive Co.*,<sup>105</sup> and *Kakargo v. Grange Silo Co.*<sup>106</sup>

The principal argument upon which the appellant relied was that the *Blessington* case could not apply to the instant case because of the decision in *Goldberg v. Kollsman Instrument Corp.*<sup>107</sup> which created in favor of third party strangers to the contract a cause of action in tort and not in warranty; therefore, "the three-year-from-the-time-of-the-injury," rather than "the six-year-from-the-time-of-the-sale," limitations would necessarily apply. However, the appellate court rejected this argument. In reviewing the holding in *Goldberg*, the appellate court said:<sup>108</sup>

After determining that the cause of action should exist, two avenues were open to us—either to establish, as other jurisdictions already had, a new action in tort, or to extend our concept of implied warranty by doing away with the requirement of privity. 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 implied warranty*.<sup>109</sup> The instant action being one for personal injuries arising from a breach of warranty, it is our opinion that *Blessington* controls and, therefore, the applicable Statute of Limitations is six years from the time the sale was consummated.<sup>110</sup>

The argument was advanced by appellants that a decision in favor of the latter would not necessarily require an overruling of the *Blessington* decision for it would be possible to limit the three-year-from-the-time-of-injury rule to those parties who are strangers to the

<sup>103</sup> Citing *Rinaldi v. Mohican Co.*, 235 N.Y. 70, 121 N.E. 471 (1918); *Giminez v. Great Atlantic & Pacific Tea Co.*, 264 N.Y. 390, 191 N.E. 27 (1934).

<sup>104</sup> *Blessington v. McCrory Stores, Corp.*, 305 N.Y. 140, 147, 111 N.E.2d 421, 422 (1953).

<sup>105</sup> 11 N.Y.2d 409, 184 N.E.2d 171 (1962).

<sup>106</sup> 11 A.D.2d 796, 204 N.Y.S.2d 1010 (1960), *motion for leave to appeal denied*, 8 N.Y.2d 711, 170 N.E.2d 834 (1960).

<sup>107</sup> 12 N.Y.2d 432, 191 N.E.2d 81 (1963).

<sup>108</sup> *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207 (1969).

<sup>109</sup> Emphasis supplied.

<sup>110</sup> Citing C.P.L.R. § 213, subd. 2.

contract. However, the court pointed out that this would create the anomalous situation of possibly giving greater rights to the stranger than to the immediate purchaser.<sup>111</sup> The Court offered as an illustration that the driver and purchaser, and the passenger, might both be personally injured in an automobile accident caused by a manufacturing defect. If the Statute of Limitations had already run on the warranty action, then the purchaser would be relegated to a possible action in negligence whereas the passenger could still sue and recover by merely showing the defect and the resulting injury, based on the concept of strict liability.<sup>112</sup>

A further argument was that in order to eliminate the possibility of such an anomaly, the *Blessington* decision could simply be overruled; as thus, the three-year limitation from time of injury for all personal injury actions should become effective. However, this also was rejected as the court said that this could not be done for the legislature, by adopting the applicable provisions of the Uniform Commercial Code had already "clearly manifested an intention to the contrary."<sup>113</sup> The court then quoted pertinent provisions of the Uniform Commercial Code:<sup>114</sup>

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . .

(2) A cause of action accrues when the breach occurs, *regardless of the agreed parties lack of knowledge of the breach*. A breach of warranty occurs when tender deliveries made, except that where warranties explicitly extends to future performance of the goods and the recovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.<sup>115</sup>

(2) Consequential damages resulting from the seller's breach include

.....

(b) Injury to person or property proximately resulting from any breach of warranty.<sup>116</sup>

While the court recognized that the Code did not apply to the

<sup>111</sup> This suggestion was criticized in the dissenting opinion which insisted that "strict liability is based in tort and not in contract," citing Restatement (Second) of Torts § 402A, comment *m* (1964); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).

<sup>112</sup> Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207 (1969).

<sup>113</sup> As noted above, the Uniform Commercial Code did not take effect in New York until September 27, 1964.

<sup>114</sup> Uniform Commercial Code § 2-725(1) and (2).

<sup>115</sup> Emphasis supplied by the court.

<sup>116</sup> Uniform Commercial Code § 2-715(2) (b).

instant case, nevertheless it considered itself precluded from establishing, other than for a limited duration, a three-year limitations period *from the time of the injury* for all personal injury actions.

The court also noted in passing that the extension of warranty protection to plaintiffs not in privity of contract is no longer merely a product of case law, for the New York State Legislature in adopting the Uniform Commercial Code to some extent at least also disregarded the absence of privity; the Code provision reads:

Third Party Beneficiaries of Warranties Express or Implied.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.<sup>117</sup>

Here, the court engaged upon a further discussion of what the parties had agreed to, namely, 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." The court added:

If we were to adopt a three-year limitations period from the time of the injury, then we would create a situation where at least those plaintiffs not in privity covered by section 2-318 of the Uniform Commercial Code, would be entitled to pick and choose between the code's four-year-from-the-time-of-the-sale, and our three-year-from-the-time-of-the-injury, limitations period, depending upon which, under the facts of a given case, would grant them the longest period of time to sue.<sup>118</sup>

Basically, the court suggested that even if the case presented merely an open policy question (which it did not consider to be a fact) the court declared, "We would nevertheless affirm."

We are willing to sacrifice a small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers *ad infinitum*. Surely an injury resulting from a defective product many years after it has been manufactured, presumptively at least, is due to operation and maintenance. It is our opinion that to guard against the unfounded actions that would be brought many years after the product is manufactured, we must make that presumption conclusive by holding the contract Statute of Limita-

<sup>117</sup> Uniform Commercial Code § 2-318.

<sup>118</sup> Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207 (1969).

tions applicable to the instant action and limit appellants to their action in negligence.<sup>119</sup>

A decidedly vigorous dissenting opinion was registered in which three of the judges concurred.<sup>120</sup> The dissent summarized the issues in the case:

1. Does a cause of action of so-called strict liability for an unreasonably dangerous condition in a defective product sound in contract for breach of warranty or in tort?

2. Does the applicable statute of limitations run from the sale and delivery of the defective product or from the date of the injury to the plaintiff?

It was further pointed out that in the case of a tort, no cause of action arises until the injury occurs.<sup>121</sup>

Tracing the history of strict liability, the dissent found that the scope of liability for personal injuries and property damage occurred first in negligence and more recently in strict product liability and has developed beyond the parties in contractual privity but without an accompanying development in analysis or terminology beyond that of warranty, third party beneficiaries and privity. In consequence, contract and tort law have been confused. Thus, there arises the paradox that there can be no strict liability without "warranty" and strict liability is to be determined to some extent by "warranty" law, that is, contract law.<sup>122</sup>

Citing *Rosenau v. City of New Brunswick*,<sup>123</sup> the dissent pointed out that the tort Statute of Limitations was applied by the Supreme Court of New Jersey and the cause of action accrued from the *date of injury*.<sup>124</sup> "Only last May [1969]," the dissent added, "the Supreme

<sup>119</sup> *Id.* at 346, 253 N.E.2d at 210. Thus, the court departed from its holding in *Goldberg v. Kollman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963), citing Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 *Duquesne U.L. Rev.* 1 (1963), to the extent that it adhered to breach of warranty rather than strict liability in tort although both had been mentioned as possible remedies in the *Goldberg* case.

<sup>120</sup> *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207 (1969).

<sup>121</sup> Citing *Schmidt v. Merchants Despatch Trans. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936); *Restatement (Second) of Torts* § 899, comment c, at 525.

<sup>122</sup> *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207 (1969) (dissenting opinion).

<sup>123</sup> 51 N.J. 130, 238 A.2d 169 (1968).

<sup>124</sup> This required a departure from *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), discussed in Jaeger, *Warranties of Merchantability and Fitness*, 16 *Rutgers L. Rev.* 493 (1962).

Court of Illinois applying tort principles to the exclusion of contract warranty analysis to a strict product liability case, held that the tort Statute of Limitations controlled and ran only from the time of the injury (*Williams v. Brown Mfg. Co.*<sup>125</sup>).<sup>126</sup> However, since a petition for rehearing has been granted in the *Williams* case, there may be some question as to its continuing validity.

The dissenting opinion, while recognizing that up to the time of the decision in *Blessington v. McCrory Corp.*<sup>127</sup> the New York courts had consistently held that the breach of warranty was a contractual matter, and, therefore, the period of limitations would be computed from the time of the sale,<sup>128</sup> pointed out that in *Goldberg v. Kollman Instrument Corp.*,<sup>129</sup> the Court of Appeals said "unequivocally":

A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises, but is a tortious wrong suable by a non-contracting party whose use of the warranted article is within the contemplation of the vendor or manufacturer.<sup>130</sup>

In conclusion, it should be pointed out that the existence of a cause of action in contract or breach of warranty does not diminish or preclude any other remedy which an injured person may have against the manufacturer-supplier resulting from acts constituting a breach of the contractual warranty obligation.<sup>131</sup> Neither the majority nor dissenting opinions seem to recognize that a new, distinct and entirely separate form of action is emerging—namely, breach of warranty.<sup>132</sup>

<sup>125</sup> No. 41425 filed May 28, 1969, *rev'g and remanding* 93 Ill. App. 2d 344, 236 N.E.2d 125 (1968), *rehearing granted*. Cf. *Little v. Maxam, Inc.*, 310 F. Supp. 875 (S.D. Ill. 1970).

<sup>126</sup> *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 350, 253 N.E.2d 207, 213 (1969) (dissenting opinion).

<sup>127</sup> 305 N.Y. 140, 111 N.E.2d 421 (1953).

<sup>128</sup> However, if the time of sale is taken as the point of computation of the statute and runs for six years after the breach of warranty, there could be no recovery since the doors were purchased in 1958, whereas the injury occurred in 1965. Thus, the victim's right of action terminated in 1964, the year before the action was filed.

Consequently the plaintiff was left without any remedy since there could be no recovery, according to the court, on the basis of strict liability in tort, which would have treated the time for bringing the action as a period within three years from the date of the actual injury, which would have been within a period from 1965 to 1968.

<sup>129</sup> 12 N.Y.2d 432, 191 N.E.2d 81 (1963).

<sup>130</sup> *Id.* at 436, 191 N.E.2d at 82.

<sup>131</sup> The dissenting opinion cites *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897 (1962) as well as Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965); Lascher, *Strict Tort Liability for Defective Products*, 38 So. Cal. L. Rev. 30 (1965).

<sup>132</sup> *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1964).



*Farm Animals, Feed and Warranties*

The sale of farm animals has frequently resulted in litigation. In *Miller v. Penney*,<sup>133</sup> a case which has gained classic proportions, a bull of pedigreed ancestry and championship caliber was sold to sire a prospective pure-bred herd. However, he completely disappointed his new owner, not to mention the cows, and an action was brought to recover the price as well as the cost of care and maintenance of the high order to which this champion had become accustomed.<sup>134</sup> In the words of the court:

Eileenmere 627th was born in the stable of luxury and raised in the field of plenty. With a long line of champions as his ancestors, he was destined from the day he was calved to follow in the hoofsteps of his illustrious progenitors. In this respect, at least, he did not disappoint his "fitters" (a term applied to those who prepare bulls for the show ring). Before he was two years old he had traversed the "circuit," appearing in twelve shows. Eleven times he was acclaimed as Grand Champion and the twelfth time as champion of his class. This is no mean record where competition in glamour and other bullish qualities, obscure to the uninitiated, is so pronounced as it is in the world of show bulls. Finally having won his laurels as a great star in the show ring, he attracted by his reputation the "big money" buyers. After this was accomplished, he, like most others of his kind, was removed from the tinselled surroundings of the show world and returned to his home that he might bring to the enjoyment of his owners the fruits of his success.<sup>135</sup>

<sup>133</sup> 77 F. Supp. 887 (W.D. Mo. 1948).

<sup>134</sup> *Miller v. Penney*, 77 F. Supp. 887, 888 (W.D. Mo. 1948).

This is adequately demonstrated by the following excerpt from the court's opinion: He was touted as the great son of a noble sire and heralded far and wide as the outstanding "Star of the Year" and the new Junior Sire of an equally aristocratic herd of Aberdeen-Angus cows and heifers. But, alas, while his meretricious charms made him a champion in the show ring, they were unavailing in the mating pen. The cruel hand of fate had destined the great Eileenmere 627th, 735647, to be a celibate. Never could he become the proud Junior Sire of so noble a herd, with ambitious visions no doubt of becoming, in time a prouder Senior Sire; never would he know the proud chest-expanding pride of seeing his own flesh and blood walk the green pastures among a herd over which he would majestically preside. There would be no Eileenmere 628th. Because of defective hind quarters and genital defects he was physically unable to perform the mating act which nature intended should result in reproduction. He was worthless for the purpose for which he was purchased.

*Id.* at 887-8; *cf.* *Mitchell v. Rudasill*, 332 S.W.2d 91 (Mo. App. 1960).

<sup>135</sup> Introducing the issues, the court remarked:

This is a bull case, and I sincerely regret that I agreed to decide it rather than have it tried before a jury composed of stockmen and farmers who through experience would have been more familiar with the commercial "Love of Life" of a "blooded" bull than I.

While my youth was spent in rather close association with bulls, they were not the kind involved here. They were common plebian bulls which at this time of the year roamed the woods and fields and walked the fence rows, challenging with low growling moans or shrill bellows every animate or inanimate object. They were bulls which pawed the dirt and rolled their heads in impassioned frenzied wrath that

Judgment was rendered for the plaintiff. The United States District Court continued in this jocular vein and held that there was a breach of warranty since the bull was totally unfit for breeding purposes.<sup>136</sup>

The trend towards increased consumer protection is highlighted by a remarkably lucid opinion in a case where the plaintiffs were breeders of cattle who had purchased feed which had noxious qualities and damaged the herd. In *Kassab v. Central Soya*,<sup>137</sup> the trial court found that the feed which had been purchased did not "meet the requirements of merchantability."<sup>138</sup> Thereupon, the defendant-manufacturer defended on the ground of lack of privity.<sup>139</sup>

After reviewing the case-law in various jurisdictions which have discarded privity,<sup>140</sup> and discussing one of its earlier decisions,<sup>141</sup> the Pennsylvania court cogently observed:

Courts<sup>142</sup> and scholars alike<sup>143</sup> have recognized that the typical con-

knew no bounds and respected no normal enclosure. But Eileenmere 627th, 735647, is an aristocrat of the kine world, a product of this age of high prices. *Miller v. Penney*, 77 F. Supp. 887, 888 (W.D. Mo. 1948).

<sup>136</sup> In addition to *Miller v. Penney*, 77 F. Supp. 887 (W.D. Mo. 1948), there have been any number of similar cases involving warranties of animals; among these may be cited: *Ver Steegh v. Flaugh*, 251 Iowa 1011, 103 N.W.2d 718 (1960), boar for breeding; *Vander Eyk v. Bones*, 77 S.D. 345, 91 N.W.2d 897 (1958), Battle Pioneer, a bull, failed to breed; however, as notice of breach was not given within a reasonable time, the buyer could not rescind; *Grovedale Feed Co. v. Corron*, 155 N.E.2d 291 (Mun. Ct. Ohio 1957), chickens were sick, held that warranty was breached; *Lyle v. W.H. Hodges & Co.*, 82 So. 2d 457 (La. App. 1955), bull calf died three days after purchase, warranty held breached.

<sup>137</sup> 432 Pa. 217, 246 A.2d 848 (1968).

<sup>138</sup> *Id.* at 226, 246 A.2d at 852. Uniform Commercial Code § 2-314.

<sup>139</sup> Relying on *Miller v. Preitz*, 422 Pa. 382, 221 A.2d 320 (1966); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963).

<sup>140</sup> The court reviews and discusses the leading precedents including: *State Farm Mutual Automobile Insurance Co. v. Anderson-Weber*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942).

<sup>141</sup> *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966).

<sup>142</sup> Citing *Gherna v. Ford Motor Co.*, 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966); *Smith v. Platt Motors, Inc.*, 137 So. 2d 239 (Fla. App. 1962); *State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961); *Chandler v. Anchor Serum Co.*, 198 Kan. 571, 426 P.2d 82 (1967); *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958); *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963); *Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399 (1962); *General Motors Corp. v. Dodson*, 47 Tenn. App. 438, 338 S.W.2d 655 (1960); *Ford Motor Co. v. Grimes*, 408 S.W.2d 313 (Tex. Civ. App. 1966). *Cf. Graham v. John R. Watts & Son*, 238 Ky. 96, 36 S.W.2d 859 (1931); *Hempstead v. General Fire Extinguisher Corp.*, 269 F. Supp. 109 (D. Del. 1967) (applying Va. Law). *Cf. Ford Motor Co. v. Olive*, 234 So.2d 910 (Miss. 1970).

<sup>143</sup> Here, the court suggests:

*See, e.g., Jaeger, Privity of Warranty: Has the Tocsin Sounded?* 1 *Duquesne L. Rev.*

sumer does not deal at arms length with the party whose product he buys. Rather, he buys from a retail merchant who is usually little more than an economic conduit. It is not the merchant who has defectively manufactured the product. Nor is it usually the merchant who advertises the product on such a large scale as to attract consumers. We have in our society literally scores of large, financially responsible manufacturers who place their wares in the stream of commerce not only with the realization, but with the avowed purpose, that these goods will find their way into the hands of the consumer. Only the consumer will use these products; and only the consumer will be injured by them should they prove defective.<sup>144</sup>

Somehow, in spite of an overly optimistic opinion to the contrary by a federal appellate court in *Mannsz v. Macwhyte Co.*,<sup>145</sup> Pennsylvania law has continued to permit manufacturers to escape contractual liability for harm caused consumers by defective merchandise simply because the manufacturer technically did not *sell* directly to the consumer. There was no privity of contract between them. No one denied the *existence* of absolute liability under the code for breach of implied warranty. But this warranty ran not to the injured party, but rather to the middleman who merely sold to the injured party, thus ignoring commercial reality and encouraging multiplicity of litigation.<sup>146</sup> However,

1 (1963); Jaeger, *How Strict is the Manufacturer's Liability?: Recent Developments*, 48 Marq. L. Rev. 293 (1965); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 Texas L. Rev. 855 (1963); Prosser, *The Fall of the Citadel*, 50 Minn. L.R. 791 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960); Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability under the Uniform Commercial Code*, 51 Va. L. Rev. 804 (1965); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363 (1965). . . .

*Kassab v. Central Soya*, 432 Pa. 217, 227 & n.4, 246 A.2d 848, 853 & n.4.

<sup>144</sup> *Kassab v. Central Soya*, 432 Pa. 217, 227-28, 246 A.2d 848, 853 (1968).

"Consumer" as here used is not restricted only to the "Purchaser" of the defective product, but also extends under section 2-318 of the U.C.C. to others who in fact use the defective goods and whose persons or property is injured thereby. The exact limits of the class of such other persons (not the purchaser) who may sue a remote manufacturer in assumpsit, or for that matter anyone in the distributive chain, without a showing of privity involves the question of so-called "horizontal" privity, an issue not before us in the present case. See *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963).

*Id.* at 228 & n.5, 246 A.2d at 853 & n.5. *Cf. Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205 (3d Cir. 1970).

<sup>145</sup> 155 F.2d 445 (3d Cir. 1946).

<sup>146</sup> We realize that prior to the adoption of section 402a of the Restatement of Torts by this Court, see *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), a rather compelling argument against discarding privity in assumpsit actions for breach of warranty existed. Under the Uniform Commercial Code, once a breach of warranty has been shown, the defendant's liability, assuming of course the presence of proximate cause and damages, is absolute. Lack of negligence on the seller's part is no defense. Therefore, prior to the adoption of section 402a, it could be said that to dispense with privity would be to allow recovery in contract without proof of negligence, while requiring a showing of negligence in order to recover for the same wrong against the same defendant if suit were brought in tort. To permit the result of a lawsuit to depend solely on the caption atop plaintiff's complaint is not now, and has never been, a sound resolution of identical controversies.

there appears to be an inclination to limit the protection of privity as is indicated by the following excerpt from *Kassab v. Central Soya*:

Thus, in the present case, for example, appellants' complaint alleging that their property (cattle) was damaged (rendered valueless as breeding stock) by virtue of the physical harm caused when these animals ate appellee-Soya's defective feed would have been sufficient to state a valid cause of action had it been captioned "Complaint in Trespass." However, because appellants elected to style their complaint as one in assumpsit for breach of warranty under the code, the requirement of privity would prevent these identical allegations from making out a good cause of action.<sup>147</sup> This dichotomy of result is precisely the same evil which, prior to the Restatement, prevented the abolition of privity. It now compels this abolition.

The majority opinion in *Miller*<sup>148</sup> candidly admits that the policy considerations underlying the imposition of strict liability in tort are precisely the same as those which dictate the abolition of privity in contract actions for breach of warranty.<sup>149</sup> Yet, the Court in *Miller* nevertheless retreated from the modern view because of a belief that section 2-318 of the Uniform Commercial Code requires privity in suits against a remote manufacturer.<sup>150</sup> We no longer adhere to such a belief for we are convinced that, on this issue, the code must be coextensive with Restatement section 402a in the case of product liability.<sup>151</sup>

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However, with Pennsylvania's adoption of Restatement 402a, the same demands of legal symmetry which once supported privity now destroy it. Under the Restatement, if an action be commenced in tort by a purchaser of a defective product against a remote manufacturer, recovery may be had without a showing of negligence, and without a showing of privity, for any damage inflicted upon the person or property of the plaintiff as a result of this defective product. The language of the Restatement is both clear and emphatic: (quoting Rest. Torts § 402a). *Kassab v. Central Soya*, 432 Pa. 217, 229, 246 A.2d 848, 853-54 (1968).

<sup>147</sup> In consequence of this outworn and archaic adherence to form rather than giving due heed to substance and consumer protection, some jurisdictions have gone over to the concept of *strict liability*, as, for example, California, which has adopted the principles stated in Restatement (Second) Torts § 402A *infra* note 259.

<sup>148</sup> *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966).

<sup>149</sup> The opinion in *Miller v. Preitz*, *Id.* at 392-93, 221 A.2d at 325 declares:

It must be emphasized that all we have said with regard to the requirement of "privity of contract" and the requirement of a family relationship applies only to actions in assumpsit for breach of implied warranty under the Uniform Commercial Code. The "privity" requirement has long been abandoned in Pennsylvania in actions in trespass for negligently caused injuries. See *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 28-30, 68 A.2d 517, 530-532 (1949). Furthermore, we recognize the social policy considerations behind imposing strict liability in tort upon all those who make or market any kind of defective product, notwithstanding an absence of negligence on their part. *A similar result would follow from abandoning the requirement of 'privity of contract' in warranty actions.* (Emphasis supplied).

<sup>150</sup> Uniform Commercial Code § 2-318 reads:

A seller's warranty whether express or implied extends to *any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.* (Emphasis as supplied in *Miller v. Preitz*, *supra*)

<sup>151</sup> Restatement (Second) of Torts § 402 (1964), cited by the court, is quoted *infra* note 259. In this connection, it might be pointed out that contract cases from other jurisdictions dispensing with privity have allowed recovery for three types of injury; "economic loss," *State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110

The explanation offered by the Court in *Miller* for not abolishing 'vertical' privity of contract in breach of warranty actions brought under the UCC was that section 2-318 of the code, limiting the persons benefited by an express or implied warranty to the buyer himself, to members of the buyer's family or household, and to guests in his home, impliedly prohibited any further relaxation of privity strictures. However, although the code sets an absolute limit on those injured parties who may seek shelter under the umbrella of a manufacturer's warranty, section 2-318 says nothing whatsoever about the second problem that confronted the Court in *Miller*<sup>152</sup> and is before us again today. That is: how far back up the distributive chain may an injured party go in seeking to enforce an implied warranty?<sup>153</sup> Must he be satisfied with recovery only against his immediate seller, or may he also hold liable the manufacturer with whom he had no personal contact?<sup>154</sup> In short, given the code's pronouncement on "horizontal privity"<sup>155</sup> (who, besides the

N.W.2d 449 (1961); injury to plaintiff's property other than the defective article itself, *Morrow v. Caloric Appliance Co.*, 372 S.W.2d 41 (Mo. 1963) citing with approval Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 Duquesne U.L. Rev. 1 (1963); and personal injury, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), discussed in Jaeger, *Warranties of Merchantability and Fitness*, 16 Rutgers L. Rev. 493 (1962).

<sup>152</sup> *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966).

<sup>153</sup> *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575, crit. in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 Duquesne U.L. Rev. 1 (1963); the court refers to the "distributive chain." Finding, that the plaintiff was not within the chain, and was not in privity, he was denied recovery although he had been injured when a bottle of Canada Dry exploded. Not a very satisfactory decision.

<sup>154</sup> This question is answered in the second concurring and dissenting (in part) opinion in *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320, 338-39 (1966).

In my view, the arguments for extending the full protection of strict liability to consumers in non-food cases, widely accepted by other jurisdictions, as well as by legal commentators, are compelling, just as those same arguments were compelling in food cases. The public interest in affording the maximum protection possible under the law to human life, health and safety; the inability of the consumer to protect himself; the seller's implied assurance of the safety of a product on the open market; the superior ability of the manufacturer or seller to distribute the risk of loss; the needless circuitry of recovery and the expensive, time consuming, wasteful and often unjust process which insistence upon privity frequently occasions—all support the extension of the protection of strict liability beyond the food cases to those involving other consumer goods as well.

See, e.g., Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 Duquesne U.L. Rev. 1 (1963); Jaeger, *How Strict is the Manufacturer's Liability? Recent Developments*, 48 Marq. L. Rev. 293 (1965); Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 Texas L. Rev. 855 (1963); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960); Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 Va. L. Rev. 804 (1965); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 Tenn. L. Rev. 363 (1965); Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965) . . . [Most footnotes have been omitted.]

*Id.* at 419 & n.6, 221 A.2d at 338 & n.6.

<sup>155</sup> Our decision today has no impact on "horizontal privity," our holding being confined solely to the issue of whether a purchaser, a member of his family or household, or a guest in his house, may sue the remote manufacturer of a defective product for breach of warranty. Our decision therefore leaves undisturbed *Hochgertel* or any other Pennsylvania decision involving the extent of the class of product users entitled to the protection of a seller's or manufacturer's warranty.

*Kassab v. Central Soya*, 432 Pa. 217, 232 n.8, 246 A.2d 848, 855 n.8.

I believe that the time has arrived for this Court to settle the long perplexing problem of strict liability in cases involving defective products causing personal injuries by discarding privity as a predicate to the maintenance of such actions. [Citations omitted.]

*Miller v. Preitz*, 422 Pa. 383, 422, 221 A.2d 320, 340.

purchaser, has a right of action against the manufacturer or seller of a defective product), what, if anything, does this signify concerning the code's complete silence on the issue of "vertical privity" (who, besides the immediate seller, is liable to the consumer for injuries caused by the defective product)?

The Uniform Commercial Code answers this question.<sup>156</sup> It is clear that its draftsmen did not fix any limits as to the elimination—or retention—of privity.<sup>157</sup> Nor was it intended that changes would be restricted to the action of legislative bodies.<sup>158</sup> The court answered this contention:

Curiously, the imagined limits on the Court's power under the code to discard vertical privity have not prevented us from eliminating the privity requirement in cases involving tainted food.<sup>159</sup> We now believe that the time has come to recognize that the same policy reasons underlying the food cases also underly cases involving defective non-edibles which cause injury. When it is considered that continued adherence to the requirements of vertical privity results merely in perpetuating a needless chain of actions whereby each buyer must seek redress for breach of warranty from his own immediate seller until the actual manufacturer is eventually reached, and in memorializing the unwarranted notion that a change in the caption of a complaint can completely alter the result of a lawsuit, our course becomes well marked. Vertical privity can no longer commend itself to this Court.<sup>160</sup>

As the lower court had held that there had been no breach of warranty by the dealer, it had refused to hear any evidence as to the damages occasioned by the deleterious cattle feed. Accordingly, the judgment of the trial court was vacated, and the record remanded. This case is a clear and logical illustration of the manner in which courts have been discarding the so-called privity requirement.

<sup>156</sup> Uniform Commercial Code § 2-318 quoted *supra* note 150.

<sup>157</sup> Any development beyond the limits suggested in § 2-318 was left to the individual jurisdictions; thus, problems of vertical privity were simply not covered.

<sup>158</sup> That all changes in the law were to come only from the legislature was suggested by the court in *Henry v. John W. Eshelman & Sons*, 99 R.I. 518, 209 A.2d 46 (1965); *but cf. Rusch Factors, Inc. v. Levin*, 284 F. Supp. 85 (D.R.I. 1968).

Of course, it is well understood that a legislature, such as, for example, in Virginia and Georgia, may abolish privity, *Hempstead v. General Fire Extinguisher Corp.*, 269 F. Supp. 109 (D. Del. 1967) applying Va. law; Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 Va. L. Rev. 804 (1965).

<sup>159</sup> Citing *Caskie v. Coca-Cola Bottling Co.*, 373 Pa. 614, 96 A.2d 901 (1953); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), *crit. in Jaeger, Privity of Warranty: Has the Tocsin Sounded?* 1 Duquesne U.L. Rev. 1 (1963).

<sup>160</sup> *Kassab v. Central Soya*, 432 Pa. 217, 234, 246 A.2d 848, 854-56 (1968). *Cf. Wyatt Industries, Inc. v. Publicker Industries, Inc.*, 420 F.2d (5th Cir. 1969), as to disclaimer under the UCC § 2-316 as adopted in Pennsylvania.

*Breach of Warranty and the Notice Requirement*

In a case of novel impression, *L.A. Green Seed Co. v. Williams*,<sup>161</sup> certain tomato seeds had been bought by a commercial grower from a seed store. The plants that grew from the seeds were inferior and not of the quality represented on the package. Thereupon, plaintiff grower brought this action for breach of warranty against the immediate vendor and the remote distributor. The trial court entered judgment for the plaintiff and the distributor appealed. Said the appellate court:

A cause of action exists, based upon a breach of warranty, where one sells seed to an immediate purchaser upon a misrepresentation of a certain variety and fitness, and the purchaser, who relied upon the warranty, is entitled to recover damages from the seller for the breach of warranty. And the same is true where inferior plants are sold and the purchaser relies upon a warranty of fitness.<sup>162</sup>

The appellant argued that the plaintiff appellee's cause of action, if any, was against the vendor of the tomato plants and not the appellant since the latter had sold nothing to plaintiff. A further contention was that it had made no warranty, express or implied, with respect to the tomato plants purchased by appellee and that its warranty, with respect to the seed, did not extend to and reach appellee, a remote purchaser, because appellee was a purchaser of the tomato plant and not the seed which was distributed by the appellant.

However, since there was a statute<sup>163</sup> which abolished the defense of lack of privity in actions for breach of warranty, "express or implied," the court concluded: "We think appellant's argument is without merit." However, the appellant raised the further defense of lack of notice as required by the Uniform Commercial Code.<sup>164</sup> As there was no allegation of notice in the complaint, the court said:

We must agree with the appellant that the appellee's complaint is subject to a demurrer since it does not contain an allegation of notice.

<sup>161</sup> 438 S.W.2d 717 (Ark. 1969).

<sup>162</sup> Citing *Earle v. Boyer*, 172 Ark. 535, 289 S.W. 490 (1927); *Smeltzer v. Tippin*, 109 Ark. 275, 160 S.W. 221 (1913).

<sup>163</sup> That statute reads:

The lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although 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.

Ark. Stat. Ann. § 85-2-318.1 (Supp. 1967).

<sup>164</sup> Uniform Commercial Code § 2-607; Ark. Stat. Ann. § 85-2-607(3)(a).

The issue of allegation of notice, under this section, seems to be one of first impression in our state. However, it appears that in jurisdictions which have had occasion to interpret this section, the giving of notice must be pleaded as a condition precedent to recovery. . . [A] majority of the American Courts which have considered the problem have held the notice requirement applicable in a case of the nature now before this court and that such notice should be alleged in the complaint as a condition precedent to recovery.<sup>165</sup>

### *Are Warranties Limited to Contracts of Sale?*

A somewhat general and rather unfortunate misconception exists that warranties are limited to sales.<sup>166</sup> Illustrative of this fallacious supposition is a case of novel impression in which an employee of a chemical manufacturing company met his death allegedly as a result of the inhalation of vanadium dust in the course of his employment.<sup>167</sup> The trial court dismissed the counts of breach of express and implied warranties and the jury returned a verdict in favor of the defendant on the negligence count. Appellant alleged error on the part of the lower court in dismissing the warranty counts.<sup>168</sup>

Since the action was based on diversity of citizenship, and the main contention of appellant was breach of implied warranty, the court examined the state law to determine liability:

We must, therefore, determine the extent of the development in New Jersey of the doctrine of strict liability which has grown out of

<sup>165</sup> L.A. Green Seed Co. v. Williams, 438 S.W.2d 717, 719 (Ark. 1969), quoting Smith v. Pizitz of Bessemer, Inc., 271 Ala. 101, 122 So. 2d 591 (1960) and citing: Maxwell Co. v. Southern Oregon Gas Corp., 158 Or. 168, 74 P.2d 594, 75 P.2d 9, 114 A.L.R. 697 (1937); Mawhinney v. Jensen, 120 Utah 142, 232 P.2d 769 (1951); Sweetheart Baby Needs v. Texilon Co., 8 Misc. 2d 921, 166 N.Y.S.2d 838 (1957); Hellenbrand v. Bower, 16 Wis. 2d 264, 114 N.W.2d 418, 115 N.W.2d 533 (1962); Nekuda v. Allis-Chalmers Mfg. Co., 175 Neb. 396, 121 N.W.2d 819 (1963); Salecki v. Coca Cola Bottling Co. of Hartford, 20 Conn. Supp. 143, 127 A.2d 497 (1956); Title Ins. & Trust Co. v. Affiliated Gas Equipment, 191 Cal. App. 2d 313, 12 Cal. Rptr. 729 (1961); Faucette v. Lucky Stores, Inc., 219 Cal. App. 2d 196, 33 Cal. Rptr. 215 (1963).

<sup>166</sup> If proof were needed to show that this is not so, all that is required is to refer to the cases dealing with the warranty of workmanlike service common to stevedoring contracts, or the warranty of seaworthiness, the breach of which has occasioned so much litigation, treated hereinafter.

<sup>167</sup> La Rossa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968).

<sup>168</sup> As to the express warranty count, the appellate court found that the defendant company had simply promised to perform its services in a workmanlike manner and to construct a plant suitable for its intended purpose. The promises as to performance, therefore, are limited to "good and workmanlike" execution and this indicates only the exercise of due care or the absence of negligence. It does not support an interpretation which would absolutely require safe performance under whatever circumstances might arise. On the claim of express warranty arising from the contract between Scientific Design and Witco there is, therefore, *no basis for liability without proof of negligence* (Emphasis supplied).

*Id.* at 940.



the expanded principle of implied warranty in products liability cases and its applicability to the facts in this case. Our judgment necessarily must be speculative for there is no New Jersey decision expressly ruling a case such as this, which does not present the usual situation of a product mass produced for consumer use but instead involves professional engineering, design and construction services performed under contract for a large manufacturer.

New Jersey stands in the forefront of those states which have abandoned the need to stand in privity of contract and eliminated any requirement of proof of negligence in cases where a consumer has suffered injury in the use of a mass produced article. . . .<sup>169</sup>

In this developing field of the law, courts have necessarily been proceeding step by step in their search for a stable principle which can stand on its own base as a permanent part of the substantive law. . . . As we indicated in *Henningsen*,<sup>170</sup> the great mass of the purchasing public has neither adequate knowledge nor sufficient opportunity to determine if articles bought or used are defective. Obviously they must rely upon the skill, care and reputation of the maker. . . . It must be said, therefore, that when the manufacturer presents his goods to the public for sale he accompanies them with a representation that they are suitable and safe for the intended use. . . . The obligation of the manufacturer thus becomes what in justice it ought to be—an enterprise liability, and one which should not depend on the intricacies of the law of sales.<sup>171</sup>

Although the doctrine of strict tort liability of a manufacturer without proof of negligence has thus been recognized in New Jersey, it still bears the imprint of its origin in contractual warranty. . . .

<sup>169</sup> The New Jersey Supreme Court led the way in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960), which held that

the wife of the purchaser of a defective automobile was entitled to recover damages for personal injury from the dealer and the manufacturer although there was no showing of negligence and there was no privity of contract, and despite attempted limitations on the express warranties contained in the contract of sale.

*Id.*

<sup>170</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), discussed in Jaeger, *Warranties of Merchantability and Fitness for Use*, 16 Rutgers L. Rev. 493 (1962).

In *Henningsen*, the principle on which liability was made to rest was that an implied warranty existed which ran in favor of the wife of the purchaser of the automobile since she must have been within the anticipation of the parties when the automobile was sold to her husband.

*Id.*

<sup>171</sup> Quoting *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), quoting 8 Williston, *Contracts* third (Jaeger) edition: emphasis supplied. There seems to be no need to be concerned about the "intricacies of the law of sales," since warranties are not limited to sales; cf. *Klein v. Duchess Sandwich Co.*, *supra* note 4.

The federal court cites and discusses a number of the leading New Jersey precedents including: *Santor v. A & M Karagheusian, Inc.*, *supra*. New Jersey formerly recognized the concept as embodied in the Uniform Sales Act, N.J.S.A. 46:30-21, and has since adopted the Uniform Commercial Code, which codifies the doctrine of implied warranty in sales of goods, N.J.S.A. 12A:2-314, 315. Cf. *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

In all the cases decided by the New Jersey courts there existed a defect in the product which caused the injury to the ultimate consumer. Even when described as strict liability in tort the underlying principle has been analogized to the sale of goods.<sup>172</sup> . . . Indeed, it has been suggested that whatever the label given to the modern rule, the analogy to sales cases should form the limit of liability.<sup>173</sup>

This conclusion seems open to question. There are situations where there has been no sale, yet a warranty has been implied. Perhaps the best example is furnished by the many cases where a warranty of workmanlike service is imposed on builders, repairmen, and stevedores, for example.

However, in the case of the shipowner, the liability for breach of the warranty of seaworthiness is *absolute*, as distinguished from the liability of the manufacturer which is described as "strict."<sup>174</sup>

A situation which has needed corrective action for some time is presented by the dismissal of actions where injury or death results from transfusion of blood, whether contaminated or of an improper or unassimilable type.<sup>175</sup> In a number of cases, this has been described

<sup>172</sup> For example, in *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965), an infant child was permitted to recover from the builder of mass produced homes for injuries caused by a defective heating system in a home which her parents had leased from the purchaser.

Following this, in *Totten v. Gruzen*, 52 N.J. 202, 245 A.2d 1 (1968), the court overthrew the long-established "completed and accepted" rule in New Jersey under which one not a party to a contract was barred from suing the contractor or architect for negligence in building houses, once the structure was accepted by the owners.

While it is true, as the court suggests, that the "New Jersey Supreme Court has recognized that the element of mass production is important in determining whether to attach strict liability to construction work," *Schipper v. Levitt & Sons, Inc.*, *supra*, that court also recognized the breach of an implied in law, or better stated, a *constructive* warranty in the *Schipper* case and has gone on from there, *Jackson v. Muhlenberg Hospital*, 53 N.J. 138, 249 A.2d 65 (1967).

<sup>173</sup> *Newmark v. Gimbel's, Inc.*, 102 N.J. Super. 279, 246 A.2d 11 (1965), a beauty parlor was held chargeable for injury to plaintiff's scalp as a result of a permanent wave in which a lotion manufactured by another was used. The court held that the issue of breach of implied warranty should have been submitted to the jury in addition to the issue of negligence which the jury had decided in favor of the defendant.

The trial court had refused to submit the implied warranty issue to the jury on the ground that the application of a permanent wave by the beauty parlor amounted to the rendition of a service rather than the sale of a product and that no implied warranty of reasonable fitness existed.

This holding by the trial court is reminiscent of the early view the common law took of the service of food and drink in taverns and inns now corrected by the Uniform Commercial Code § 2-314(1) which makes the serving of food and drink "a sale." A similar anachronism exists in regard to blood transfusions.

<sup>174</sup> Leading cases on the doctrine of "strict liability" as it has gradually evolved are discussed *infra*.

<sup>175</sup> The leading exponent of this restrictive and unfortunate type of holding is *Perlmutter v. Beth David Hospital*, 308 N.Y. 100, 123 N.E.2d 792 (1954).

as a "service," as though that should make any difference in the end result—recovery for the injured patient, or if killed by the deadly blood, then for the surviving next of kin.<sup>176</sup>

Whether "service" or "sale," there is no adequate or logical reason why a warranty implied in law, or imposed by law, in short, a constructive warranty that the blood is wholesome and fit for its intended purpose should not exist.<sup>177</sup>

In light of all the confusion that has surrounded this artificial and much-to-be deplored "distinction" between *servicing* and *selling* blood, a decision in *Jackson v. Muhlenberg Hospital*<sup>178</sup> by the Supreme Court of New Jersey (which is leading the way in consumer protection) has reassuring overtones.

When a patient was hospitalized and operated on, it was determined that blood transfusions were essential. After the fifth transfusion, hepatitis resulted, and this action was brought for breach of the implied

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However, it appears that the rationale imposing warranty upon retail druggists filling prescriptions that the drug prescribed has been compounded, that due and proper care in filling prescription has been used, and that the drug has not been infected with some adulterating foreign substances should be applied to processors of blood which is to be used by purchasers for transfusions into human beings, *Hoder v. Sayet*, 196 So. 2d 205 (Fla. 1967). Cf. *Balkowitsch v. Minneapolis War Memorial Blood Bank Inc.*, *infra* note 176.

<sup>176</sup> The following may be deemed representative of this outworn concept:

Furnishing of blood for transfusion by a hospital to a patient is incidental to service provided by hospital in course of treatment, and is not a "sales transaction" covered by an implied warranty under the Code or otherwise, *Lovett v. Emory University, Inc.*, 116 Ga. App. 277, 156 S.E.2d 923 (1967).

A patient who contracts disease from transfusion of impure human blood purchased from nonprofit public service corporation may not recover damages in breach of implied warranty of fitness, where presence of the disease in the blood was not ascertainable, and patient's physician was as fully aware of such facts as seller, *Balkowitsch v. Minneapolis War Memorial Blood Bank Inc.*, 270 Minn. 151, 132 N.W.2d 805 (1965); the court described the transfusion as involving acts common to legal concepts of both a sale and a service, though more in the nature of a service.

Cf. *White v. Sarasota County Public Hospital Board*, 206 So. 2d 19 (Fla. 1968).

<sup>177</sup> Indeed, if there is to be a warranty of workmanlike service in the case of repairs or stevedoring service, there is an even more cogent reason for imposing one where blood is being transfused—the patient's life may be at stake.

<sup>178</sup> *Jackson v. Muhlenberg Hospital*, 52 N.J. 138, 249 A.2d 65 (1969), action in damages against hospital and blood banks for injuries resulting from hepatitis following blood transfusion. Judgment of lower court granting partial summary judgment was unanimously reversed.

Cf. *Community Blood Bank, Inc. v. Russell*, 196 So. 2d 115 (Fla. 1967), where it was held that a complaint which alleged, *inter alia*, that blood bank sold certain blood to plaintiff which was impure and unfit for use intended as it contained certain virus commonly known as serum hepatitis, and that an implied warranty arose between the blood bank, as seller, and plaintiff, as buyer, of the blood, stated a cause of action.

Complaint seeking recovery for death of blood donee who died from homologous serum hepatitis allegedly contracted from blood received by transfusion on ground that commercial blood bank had breached implied warranty that blood was fit for human use stated cause of action against the blood bank. *Hoder v. Sayet*, 196 So. 2d 205 (Fla. 1967).

warranties of merchantability and fitness for the purpose intended, as well as negligence.<sup>179</sup> Defendants' motions for summary judgment were partially granted,<sup>180</sup> and this appeal followed.

The court found the issue to be

whether a commercial blood bank and a hospital may be held accountable on the basis of implied warranty or strict liability where their furnishing of blood containing viral hepatitis has resulted in consequential injury to the complaining party. The issue is a very important one involving highly significant policy considerations and obviously should not be decided on the wholly inadequate record before us.<sup>181</sup>

Quoting the Supreme Court of the United States:<sup>182</sup>

A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case.<sup>183</sup>

The case was remanded for a more comprehensive and careful examination.

### *Is Recovery Available for Property Damage?*

Although for many years, lack of privity was a complete defense in actions not involving personal injury, within the past decade, a re-

<sup>179</sup> The lower court held that the transfer of blood which hospital had purchased from blood bank for \$18 per container and for which hospital charged patient, who contracted hepatitis as result of blood transfusions, \$25 per container involved a "sale" within Uniform Commercial Code, Sec. 2-106 defining sale as the passage of title from seller to buyer for a price and referring to the sale of goods, *Jackson v. Muhlenberg Hospital*, 96 N.J. Super. 314, 232 A.2d 879 (1967). *Cf.* *Cunningham v. MacNeal Memorial Hospital*, 114 Ill. App. 2d 294, 251 N.E.2d 773 (1969).

<sup>180</sup> This was based on the court's finding that there was no implied representation by blood bank nor by hospital which procured blood from blood bank and used it in transfusions that it was free of virus of homologous serum hepatitis, in view of lack of any test known to science for determining whether human blood contained that virus.

<sup>181</sup> Citing, *inter alia*, *Community Blood Bank, Inc. v. Russell*, 196 So. 2d 115 (Fla. 1967); 2 *Frumer & Friedman, Products Liability*, 3-49, *et seq.*

<sup>182</sup> *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237 (1952).

<sup>183</sup> The court noted that:

Despite the meagre nature of the evidence before it, the trial court entertained the motions, made findings, and granted partial summary judgments. . . .

And concluded:

We are satisfied that it should now be vacated and that the entire matter should proceed to trial. To that end the partial summary judgments are set aside and the plaintiffs' claims on their alternative theories against all of the parties including the Essex County Blood Bank are reinstated. At the trial, a complete record should be made, including not only detailed testimony as to the nature of the defendants' operations, but also expert testimony as to the availability of any tests to ascertain the presence of viral hepatitis in blood, the respective incidences of hepatitis in blood received from commercial blood banks and other sources, and such other available testimony and materials as may be relevant to any of the questions presented by the parties, including such economic and other factors as may bear on the question of whether the doctrine of implied warranty or strict liability should apply to deliveries and transfusions of blood. *Jackson v. Muhlenberg Hospital*, 53 N.J. 138, 142, 249 A.2d 65, 67-8 (1969).

assuring tendency has been noted to grant recovery where the defective goods have caused property damage. Among the leading cases may be noted *Spence v. Three Rivers Builders & Masonry Supply*,<sup>184</sup> *Randy Knitwear, Inc. v. American Cyanamid Co.*<sup>185</sup> and *Santor v. A. & M. Karagheusian, Inc.*<sup>186</sup>

Textile materials were deficient in the last two cases, and recovery was granted regardless of privity. In the first, now a classic, cinder blocks used in building a home were found to be "bleeding" and crumbled. Breaking with tradition and precedent, the Supreme Court of Michigan in a sharply divided opinion granted recovery to the homeowner.<sup>187</sup>

After running through the entire gamut of variations, exceptions, the fate of privity in the negligence cases as exemplified by *MacPherson*<sup>188</sup> and its interposition in breach of warranty cases, the Michigan court concluded that it might be well simply to eliminate the so-called "general rule" entirely in line with the suggestion of the Supreme Judicial Court of Massachusetts in *Carter v. Yardley*:<sup>189</sup>

The long opinion in the *Yardley Case* concludes very simply: The time has come for us to recognize that the asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth.

To these sentiments we utter a fervent amen.<sup>190</sup>

In *Randy Knitwear, Inc. v. American Cyanamid Co.*,<sup>191</sup> decided by the New York Court of Appeals, there appears to be a further departure from the doctrine of privity. The plaintiff had entered into a number of contracts for the purchase of certain textile material. When some of this material did not conform to written representations regarding its qualities, breach of warranty was relied on in an action against

<sup>184</sup> 353 Mich. 120, 90 N.W.2d 873 (1958).

<sup>185</sup> 11 N.Y.2d 5, 181 N.E.2d 399 (1962).

<sup>186</sup> 44 N.J. 52, 207 A.2d 305 (1965).

<sup>187</sup> *Spence v. Three Rivers Builders & Masonry Supply*, 353 Mich. 120, 90 N.W.2d 873 (1958).

<sup>188</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1015 (1916).

<sup>189</sup> 319 Mass. 92, 64 N.E.2d 693 (1946), described by the court as "a leading modern case in this field."

<sup>190</sup> *Spence v. Three Rivers Builders & Masonry Supply*, 353 Mich. 120, 135, 90 N.W.2d 873, 881 (1958).

<sup>191</sup> 11 N.Y.2d 5, 181 N.E.2d 399 (1962).

the manufacturer. Lack of privity was, of course, the defense introduced by the defendant who had produced the resins with which the textile material had been treated to prevent the very shrinkage which had nevertheless occurred.

The court was asked by the plaintiff to extend the rationale of *Greenberg v. Lorenz*<sup>192</sup> to an action for breach of an express warranty by a remote purchaser against a manufacturer who induced the purchase by representing the quality of the goods in public and on labels which accompanied the goods. The court found that privity should be dispensed with here, particularly in the context of the modern world of merchandising in which the manufacturer launches a direct appeal to the ultimate consumer through the use of mass media advertising and "sanguine" representations on packages and labels.<sup>193</sup>

The rationale underlying the decisions rejecting the privity requirement is easily understood in the light of present-day commercial practices. It may once have been true that the warranty which really induced the sale was normally an actual term of the contract of sale. Today, however, the significant warranty, the one which effectively induces the purchase, is frequently that given by the manufacturer through mass advertising and labeling to ultimate business users or to consumers with whom he has no direct contractual relationship.

Although strongly urged by the defendant not to impose strict liability since there had been no personal injury from the defective goods delivered, the court nevertheless imposed strict liability on the defendant.

In the *Santor* case, the purchaser of defective carpeting was held, entitled to recover from the manufacturer, although not in privity; the

<sup>192</sup> 9 N.Y.2d 195, 213 N.Y.S.2d 39 (1961).

<sup>193</sup> On this point, the court noted:

The world of merchandising is, in brief, no longer a world of direct contract; it is, rather, a world of advertising and, when representations expressed and disseminated in the mass communications media and on labels (attached to the goods themselves) prove false and the user or consumer is damaged by reason of his reliance on those representations, it is difficult to justify the manufacturer's denial of liability on the sole ground of the absence of technical privity. Manufacturers make extensive use of newspapers, periodicals and other media to call attention, in glowing terms, to the qualities and virtues of their products, and this advertising is directed at the ultimate consumer or at some manufacturer or supplier who is not in privity with them. Equally sanguine representations on packages and labels frequently accompanying the article throughout its journey to the ultimate consumer and, as intended, are relied upon by remote purchasers. Under these circumstances, it is highly unrealistic to limit a purchaser's protection to warranties made directly to him by his immediate seller. The protection he really needs is against the manufacturer whose published representations caused him to make the purchase.

*Randy Knitwear v. American Cyanamid Co.*, 11 N.Y.2d 5, 12-13, 181 N.E.2d 399, 402 (1962).

Supreme Court of New Jersey remarked, "the basis of liability turns not upon the character of the product [*i.e.*, whether, if defective, it is likely to cause personal injury] but upon the representation, there is no justification for a distinction on the basis of the type of injury suffered or the type of article or goods involved."<sup>194</sup>

### *Should the "Innocent Bystander" Recover?*

At least three jurisdictions have answered this question affirmatively. California, in *Elmore v. American Motors Corp.*,<sup>195</sup> Michigan, in *Piercefield v. Remington Arms Co.*,<sup>196</sup> and New Jersey in *Cintrone v. Hertz Truck Leasing & Rental Service*.<sup>197</sup> In each of these cases, by the application of the strict liability doctrine, it was held that if the manufacturer placed a defective product on the market, such as an automobile,<sup>198</sup> or a shotgun,<sup>199</sup> or a truck,<sup>200</sup> he would be liable to a bystander who was injured thereby.

In a recent case, *Johnson v. Standard Brands Paint Co.*,<sup>201</sup> decided last year, a plumbing contractor was killed when a stepladder on which he was standing was knocked over by an aluminum extension ladder on which another workman was standing. The aluminum ladder, which had been purchased from defendant, slipped away from the wall against which it was standing and struck the step ladder. In holding for the widow of the deceased plumbing contractor, the court reviewed the applicable law in California, stating: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."<sup>202</sup>

Although defendant contended that the doctrine was not available to an injured innocent bystander, the court found that this had been

<sup>194</sup> *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

<sup>195</sup> 75 Cal. Rptr. 652, 451 P.2d 84 (1969).

<sup>196</sup> 375 Mich. 85, 133 N.W.2d 129 (1965).

<sup>197</sup> 45 N.J. 434, 212 A.2d 769 (1965).

<sup>198</sup> *Elmore v. American Motors Corp.*, 75 Cal. Rptr. 652, 451 P.2d 84 (1969), noted 72 West Va. 200 (1970).

<sup>199</sup> *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965).

<sup>200</sup> *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965).

<sup>201</sup> 274 A.C.A. 369, 79 Cal. Rptr. 194 (1969).

<sup>202</sup> *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900 (1962).

answered by *Elmore v. American Motors Corp.*,<sup>203</sup> “a major decision in the development of the law of strict liability in this state.”<sup>204</sup> In the *Elmore* case, the court held that strict liability would extend to an injured bystander who brought an action against the manufacturer and retailer of “an allegedly defective automobile.”<sup>205</sup>

The mere fact that the injury was caused by a ladder and not by an automobile did not prevent the application of the doctrine of strict liability, especially since “loss distribution” has been adopted by California as “the rationale for imposition of strict liability on manufacturers and retailers.”<sup>206</sup> As the court phrased it in *Elmore*:

If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable.<sup>207</sup>

Under the strict liability tort theory, where notions of privity have no part, the bystander could probably recover if injury to him was foreseeable under generally applicable tests.<sup>208</sup>

In cases where the law imposes a duty, the question of foreseeability of injury is an issue for the jury.<sup>209</sup> In the instant case, the jury found that the defective design of the ladder was the proximate cause of death. The court held that the defect in the article “as well as proximate cause” may be established by circumstantial evidence.<sup>210</sup> Judgment in favor of plaintiff was affirmed.

In an action for injuries sustained by a bystander from a bolt picked up by a rotary lawn mower and hurled at him, defendant manufacturer moved to dismiss the complaint.<sup>211</sup> The motion was denied

<sup>203</sup> *Elmore v. American Motors Corp.*, 75 Cal. Rptr. 652, 451 P.2d 84 (1969), noted 72 West Va. 200 (1970).

<sup>204</sup> *Johnson v. Standard Brands Paint Co.*, 274 A.C.A. 369, 371, 79 Cal. Rptr. 194, 197 (1969).

<sup>205</sup> *Elmore v. American Motors Corp.*, 75 Cal. Rptr. 652, 451 P.2d 84 (1969), noted 72 West Va. 200 (1970).

<sup>206</sup> *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1962).

<sup>207</sup> *Elmore v. American Motors Corp.*, 75 Cal. Rptr. at 657, 451 P.2d at 89.

<sup>208</sup> *Johnson v. Standard Brands Paint Co.*, 274 A.C.A. 369, 372, 79 Cal. Rptr. 194, 198 (1969), quoting Harper & James, Torts, Supplement to Volume II, p. 246.

<sup>209</sup> Citing *Hergenrether v. East*, 61 Cal. 2d 440, 39 Cal. Rptr. 4, 393 P.2d 164 (1964); *Richards v. Stanley*, 43 Cal. 2d 60, 62-63, 271 P.2d 23 (1954); *Wright v. Arcade School Dist.*, 230 Cal. App. 2d 272, 277, 40 Cal. Rptr. 812 (1964).

<sup>210</sup> Citing *Elmore v. American Motors Corp.*, 75 Cal. Rptr. 652, 451 P.2d 84 (1969), noted 72 West Va. 200 (1970).

<sup>211</sup> *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776 (N.D. Ind. 1969); cf. *Matthews v. Lawnlite Co.*, 88 So. 2d 299 (Fla. 1953).



after the court reviewed the leading cases.<sup>212</sup> Since diversity of citizenship was the basis for federal jurisdiction in this case, state law was applicable.<sup>218</sup> Theories upon which the plaintiff rested his claim were:

1. Breach of implied warranty;<sup>214</sup>
2. Negligence; and
3. Strict liability.<sup>215</sup>

In disposing of the motion to dismiss, the court adopted an admirably straightforward and realistic approach; as suggested in an earlier case,<sup>216</sup> "the difference between implied warranty as it has been developed in products liability law and strict liability as defined in the Restatement is more semantic than real."<sup>217</sup> Under both theories, the conditions of liability are a "defective condition," which exists when the product leaves the seller's control, and which proximately causes the plaintiff's injury. "While this court is unwilling to hold that there is *never* a significant difference between the two theories, it is plain that

<sup>212</sup> Cases cited or quoted include: *Speed Fasteners, Inc. v. Newsom*, 382 F.2d 395 (10th Cir. 1967), decided under Oklahoma law; *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

<sup>213</sup> Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, (1938), this court is committed to the law of Indiana in this diversity action. Reasonable foreseeability is the fundamental test of proximate cause, and this rule is not changed by the fact of an alleged intervening act or agency. *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *New York Central R.R. Co. v. Cavinder*, Ind. App., 211 N.E.2d 502 (1965); *Phares v. Carr*, 122 Ind. App. 597, 106 N.E.2d 242 (1952); *Buddenberg v. Morgan*, 110 Ind. App. 609, 38 N.E.2d 287 (1941); *McIntosh v. Pennsylvania R.R. Co.*, 111 Ind. App. 550, 38 N.E.2d 263 (1941). Unless reasonable minds could not differ, the determination is one for the trier of the facts. *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Phares v. Carr*, 122 Ind. App. 597, 106 N.E.2d 242 (1952). It cannot be said as a matter of law that defendant's conduct was not a proximate cause of plaintiff's alleged injuries.

*Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776, 778 (N.D. Ind. 1969).

<sup>214</sup> *Supra* notes 4, 48, 50, 140, 142, 151.

<sup>215</sup> As defined in Restatement (Second) of Torts § 402A (1964).

<sup>216</sup> In *Mitchell v. Miller*, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965), a defective transmission, although the gear shift was placed in "park," permitted a parked car to roll down a slope and kill plaintiff's decedent as he was playing golf. The court, applying strict liability under § 402A, refused to dismiss the complaint against the manufacturer of the automobile and suggested that foreseeability and reasonable anticipation of injury from a defect were the proper tests. It was recognized that the likelihood of injury from the use of a defective automobile existed not only for the driver or passenger, but for pedestrians as well:

The public policy which protects the user and the consumer should also protect the innocent bystander.

*Id.* at 150, 214 A.2d at 699, cited in *Cottom v. McGuire Funeral Service, Inc.*, *supra* note 48, as "26 Cum. Supp. 142, 214 A.2d 694 (Super. Ct. 1965)."

<sup>217</sup> The court observes, "Compare *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960)." *Id.* at 146, 214 A.2d at 696.

the outcome of the vast majority of cases is not affected by this fine legal distinction. . . ."<sup>218</sup>

Grounds for dismissal of the action advanced by the defendant may be enumerated:

1. Plaintiff was a mere bystander who may not recover because he is not in privity with the defendant;

2. The alleged injuries arose from the *use* of the product rather than from a defect in the product which existed when it passed from the defendant's hands;

3. The hazards, if any, were sufficiently obvious that plaintiff incurred the risk;

4. That the product was not defective; and

5. No warning was required because the hazards, if any, were sufficiently obvious to the plaintiff.

This being a case of novel impression, there being no local precedents to guide the federal court, it concluded that it would have to look "to all available data and adopt the rule which it believes" the state supreme court would choose. That court "would unquestionably adopt the best reasoned and most intrinsically fair position, and presumably a determination by this court on such a basis would find approval. . . ."<sup>219</sup>

The court explored a number of theories under which a bystander might recover where he was injured by a defectively made product:

1. A seller or manufacturer owes a duty to those who, according to reasonable foreseeability, will be affected by his product if defectively manufactured or designed; or

<sup>218</sup> *Sills v. Massey-Ferguson, Inc.*, 296 F. Supp. 776, 779 (1969), citing *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427, 430 (N.D. Ind. 1965). Nor does the plaintiff care.

<sup>219</sup> Citing *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427 (N.D. Ind. 1965).

In this connection, a rather unfortunate, and to say the least, astonishing decision, *Green v. American Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969), flatly rejected the suggestion that under an appropriate statute of Florida, the Supreme Court of that state be asked for an advisory opinion as to the local law. It would appear that the majority *en banc* was apprehensive that the answer from the Supreme Court of Florida would be far from consonant with its own *un-Erie* minded decision. The refusal of the majority to seek the advisory opinion of the state court cannot be supported.

2. Strict liability should be imposed in favor of *all* persons regardless of foreseeability.

The court, however, need not choose between these theories because under either defendant in this case owed a duty to the plaintiff. Plaintiff is within the "any person" test. As to the foreseeability test, this court holds that a person standing approximately 150 feet from a lawn mower utilizing rotary blades is foreseeably within the zone of danger that exists if the product is defective in design or manufacture.

To hold otherwise would be to exalt form over substance. There is nothing inherent in the status of bystander that requires the denial of the right to sue the manufacturer in strict liability. . . .

Referring to a leading precedent,<sup>220</sup> the court observed:

Would anyone, having read the court's exhaustive opinion, expect a result reasoned differently had, say, the plaintiff been a pedestrian who, when the Henningsen car "veered sharply to the right and crashed into a highway sign and a brick wall," suffered crushed legs as the car struck the wall?

Or, taking another example, "and assume that the plaintiff there had been a bystander or visitor injured by a crumbling and buckling of some wall of the cottage. Would our result have been different?"<sup>221</sup>

The court concluded that a different result in either of the cases adduced would not have been warranted whether the injured party had been a pedestrian, bystander or visitor. This is certainly logical, and consistent with the public policy of greater protection against defectively produced goods. It may even bring about that much to be desired result—more careful scrutiny and better quality control by the manufacturer.

#### ILLINOIS CASE LAW

Just five years ago, the Supreme Court of Illinois in *Suvada v. White Motor Co.*,<sup>222</sup> delivered a definitive opinion in which it firmly declared that lack of privity would be no defense where a defective product caused injury.<sup>223</sup>

<sup>220</sup> Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

<sup>221</sup> Citing Spence v. Three Rivers Builders & Masonry Supply, 353 Mich. 120, 90 N.W.2d 873 (1958), and quoting Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965).

*Cf.* Keener v. Dayton Electric Mfg. Co., 445 S.W.2d 362 (Mo. 1970), *rehearing denied*, adopting the doctrine of strict liability in an action for the death of a third party who was electrocuted when attempting to lift a sump pump which had no ground wire.

<sup>222</sup> 32 Ill. 2d 612, 210 N.E.2d 182 (1965). *Cf.* Little v. Maxem, Inc., 310 F. Supp. (S.D. Ill. 1970), quoting *Suvada v. White Motor Co.*, *supra* at 623.

<sup>223</sup> Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970); the Supreme Court of Iowa, after reviewing a number of the leading cases, including *Escola v.*

In this case, the plaintiffs had purchased a reconditioned tractor unit from the defendant company in which the brake system failed. The tractor collided with a bus causing personal injuries and substantial property damage. Thereupon the plaintiffs, owners of the tractor unit, filed this action against the truck manufacturer and the brake supplier (Bendix-Westinghouse Automotive Air Brake Company) to recover costs incurred in the settlement of personal injury claims and repair of the bus and their tractor-trailer unit.

The trial court held for the plaintiffs as to the damages to the tractor-trailer unit, but denied recovery as to personal injury claims, damage to the bus and related expenses. On appeal by the plaintiffs, the Court of Appeals held for the plaintiffs as to all elements of damage pleaded against White and Bendix on the basis of breach of an *implied* warranty.<sup>224</sup> This appeal was perfected by Bendix. Defenses advanced by Bendix included:

1. That any warranty as to its product ran to White; since there was no privity between plaintiffs and Bendix there could be no recovery;

2. Therefore, any liability of Bendix to plaintiffs must be predicated on negligence, and if both Bendix and plaintiffs were negligent, they would be joint tortfeasors and no contribution could be obtained from Bendix.

After tracing the gradual erosion or final obliteration of privity from its original enunciation in *Winterbottom v. Wright*<sup>225</sup> to the present, the court signaled such outstanding precedents as *Thomas v. Winchester*<sup>226</sup> and *Davidson v. Montgomery Ward & Co.*<sup>227</sup> which adopted the three recognized exceptions to the so-called privity rule:

1. Where the negligence of a manufacturer or vendor is with reference to an article imminently dangerous to human life or health;

Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944), *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1963), and *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), quoted *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965), to the effect that "public policy is the primary factor for imposing strict liability on the seller and manufacturer . . ."

<sup>224</sup> 8 Williston, *Contracts* §§ 982 *et seq.* (3d ed. Jaeger 1964).

<sup>225</sup> 152 Eng. Rep. 402 (Ex. 1842).

<sup>226</sup> 6 N.Y. 397 (1852).

<sup>227</sup> 171 Ill. App. 355 (1912).

2. Where an owner's negligence causes injury to one invited on the premises, and

3. Where one knowing the qualities of an article dangerous to health or life sells the article without giving notice of these qualities.

By 1934, the Supreme Court of Illinois had recognized and adopted the reasoning of *MacPherson v. Buick Motor Co.*<sup>228</sup> which held that "any article negligently manufactured, which is reasonably certain to place life and limb in peril, is a thing of danger."<sup>229</sup> The court added:

We agree with the reasoning of the Massachusetts court in *Carter v. Yardley & Co.* where it observed:<sup>230</sup> "The *MacPherson* case caused the exception to swallow the asserted general rule of nonliability, leaving nothing upon which that rule could operate. Wherever that case is accepted, that rule in truth is abolished, and ceases to be part of the law."<sup>231</sup> Implicit in *Lindroth v. Walgreen Co.* was the view that the general rule, rather than the exception to a so-called "general rule," is that a manufacturer may be liable for injuries to a person not in privity with him and that such liability is governed by the same principles governing any action for negligence.<sup>232</sup> That defendant understood this to be the rule is shown in its reply brief when it stated "Where *negligence* is the basis of the action, let us not permit talk of privity, for it is neither necessary, nor proper." We now make explicit that which was implicit in *Lindroth*, lack of privity is not a defense in a tort action against the manufacturer.<sup>233</sup>

The court then declared that in addition to the manufacturer, liability would extend to the following:

1. The seller;<sup>234</sup>
2. A contractor;<sup>235</sup>
3. A supplier;<sup>236</sup>
4. One who holds himself out to be the manufacturer;<sup>237</sup>

<sup>228</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>229</sup> *Rotche v. Buick Motor Co.*, 358 Ill. 507, 514, 193 N.E. 529, 532 (1934), approving and adopting the reasoning of the Court in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, 1053 (1916).

<sup>230</sup> 319 Mass. 92, 103, 64 N.E.2d 693, 700 (1946).

<sup>231</sup> 407 Ill. 121, 94 N.E.2d 847 (1950).

<sup>232</sup> Citing *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961); cf. *Watts v. Bacon & Van Buskirk*, 18 Ill. 2d 226, 163 N.E.2d 425 (1959).

<sup>233</sup> *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

<sup>234</sup> *Lindroth v. Walgreen Co.*, 407 Ill. 121, 94 N.E.2d 847 (1950).

<sup>235</sup> *Paul Harris Furniture Co. v. Morse*, 10 Ill. 2d 28, 139 N.E.2d 275 (1956).

<sup>236</sup> *Watts v. Bacon & Van Buskirk*, 18 Ill. 2d 226, 163 N.E.2d 425 (1959).

<sup>237</sup> *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328 (1937).

5. The assembler of parts;<sup>238</sup> and
6. The manufacturer of a component part.<sup>239</sup>

The court next considered the nature of the manufacturer's liability and found that the earliest cases applying the doctrine of liability were those where unwholesome food was sold;<sup>240</sup> this was based on considerations of public policy as, it might be added, is the constructive warranty in general:

Where, however, articles of foods are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it was purchased.<sup>241</sup>

While the Illinois courts have held that an action for breach of warranty is an action *ex contractu* and can only be maintained by a party to the contract,<sup>242</sup> the supreme court has stated that privity of contract is not essential in an action for breach of *implied*, that is, *constructive* warranty in the sale of food.<sup>243</sup> In *Welter v. Bowman Dairy Co.*<sup>244</sup> and *Patargias v. Coca-Cola Bottling Co.*,<sup>245</sup> other Illinois courts sanctioned actions for breach of warranty in food or beverage cases by parties not in privity with the vendor or manufacturer on the ground that the implied warranty of the manufacturer or vendor "runs with the sale of the article."<sup>246</sup>

The Supreme Court of Illinois has forthrightly declared its complete agreement with the unequivocal statement of the high court of Texas in *Decker & Sons v. Capps*:<sup>247</sup>

Here the liability of the manufacturer and vendor [of food] is imposed by operation of law as a matter of public policy for the pro-

<sup>238</sup> *Rotche v. Buick Motor Co.*, 358 Ill. 507, 193 N.E. 529 (1934).

<sup>239</sup> *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

<sup>240</sup> *Van Bracklin v. Fonda*, 12 Johns. 468 (N.Y. 1815).

<sup>241</sup> *Wiedeman v. Keller*, 171 Ill. 93, 99, 49 N.E. 210, 211 (1897).

<sup>242</sup> *Paul Harris Furniture Co. v. Morse*, 10 Ill. 2d 28, 139 N.E.2d 275 (1956).

<sup>243</sup> *Tiffin v. Great Atlantic & Pacific Tea Co.*, 18 Ill. 2d 48, 162 N.E.2d 406 (1959).

<sup>244</sup> 318 Ill. App. 305, 47 N.E.2d 739 (1943).

<sup>245</sup> 332 Ill. App. 117, 74 N.E.2d 162 (1947).

<sup>246</sup> Citing *Gillam, Products Liability in a Nutshell*, 37 Ore. L. Rev. 119, 153-155 (1957).

<sup>247</sup> 139 Tex. 609, 164 S.W.2d 828 (1942).

tection of the public, and is not dependent on any provision of the contract, either expressed or implied.<sup>248</sup>

The Illinois court summarized the reasons that had been advanced to support the imposition of strict liability in food cases:

1. The public interest in human life and health requires all the protection the law can give against the sale of unwholesome or noxious food or beverages;<sup>249</sup>

2. Manufacturers solicit and invite the use of their products by advertising in various media, especially television, representing to the public that these products are safe and suitable for use; in consequence, the law imposes liability for any damage these products cause;<sup>250</sup> and

3. Losses caused by unwholesome food or beverages should be borne by those who have created the risk and reap the profit by placing the product in the stream of commerce.<sup>251</sup>

At this point, the Court added:

Without extended discussion, it seems obvious that public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present and as compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases.

The recent and oft-cited cases of *Henningsen v. Bloomfield Motors, Inc.*,<sup>252</sup> *Greenman v. Yuba Power Products, Inc.*<sup>253</sup> and *Goldberg v. Kollsman Instrument Corporation*<sup>254</sup> typify the increasing number of decisions which are extending the concept of strict liability to the manufacturers of products whose defective condition makes them unreasonably dangerous to the user or consumer.<sup>255</sup>

Following a review of various arguments directed towards the use of the "strict liability" concept, including quotations from various authorities,<sup>256</sup> the court pointed out that the Supreme Court of New Jersey

<sup>248</sup> *Id.* at 617, 164 S.W.2d at 831-32; see *Wiedeman v. Keller*, 171 Ill. 93, 49 N.E. 210 (1897).

<sup>249</sup> *Wiedeman v. Keller*, 171 Ill. 93, 49 N.E. 210 (1897).

<sup>250</sup> *Patargias v. Coca-Cola Bottling Co.*, 332 Ill. App. 117, 74 N.E.2d 162 (1947).

<sup>251</sup> *Wiedeman v. Keller*, 171 Ill. 93, 49 N.E. 210 (1897).

<sup>252</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>253</sup> 59 Cal. 2d 57, 377 P.2d 897 (1963).

<sup>254</sup> 12 N.Y.2d 432, 191 N.E.2d 81 (1963).

<sup>255</sup> *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965).

<sup>256</sup> Including *Noel, Strict Liability of Manufacturers*, 50 A.B.A.J. 446 (1964); *James*,

in its *Henningsen* decision had imposed strict liability on the theory of implied warranty. In California, the supreme court in *Greenman* had arrived at the same result using the theory of strict liability in tort. Finally, in *Goldberg v. Kollsman Instruments Corporation*, the Court of Appeals of New York predicated liability upon the theory of implied warranty, although suggesting that "strict tort liability" might be a more accurate characterization.

However, as pointed out above, in a case decided early this year, *Mendel v. Pittsburgh Plate Glass Co.*,<sup>257</sup> the New York court reverted to its position that the action for damages based upon personal injuries "arising from a breach of warranty" was essentially one sounding in contract and that therefore, the applicable Statute of Limitations "is six years from the time the sale was consummated," and the action was time-barred.<sup>258</sup>

The court then noted that the cases wherein liability was based upon strict liability in tort could be grounded on the provisions of Section 402A of the Revised Restatement of the Law of Torts as approved in May 1964 by the American Law Institute,<sup>259</sup> as was done in *Goldberg v. Kollsman Instrument Corp.*

Holding that the defendants were strictly liable in tort, the court found it unnecessary to decide what effect Section 2-318 of the Uni-

*Products Liability*, 44 Tex. L. Rev. 44 (1955); Prosser, *Assault Upon the Citadel*, 69 Yale L.J. 1099 (1960).

<sup>257</sup> 25 N.Y.2d 340, 253 N.E.2d 207 (1969).

<sup>258</sup> Citing C.P.L.R. § 213, subd. 2.

<sup>259</sup> Restatement (Second) of Torts § 402A (1964) reads:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to reach the user or consumer in the condition in which it is sold.
- (2) The rule stated in subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Of this section, the Illinois court said:

The rapid development of the law on this subject is typified by the development of section 402A. The original Restatement of Torts had no provision for strict liability. In April 1961, Tentative Draft No. 6 recommended adoption of a new section, section 402A, which recognized a seller's strict liability for food for human consumption. In April 1962, Tentative Draft No. 7 expanded the coverage of the section to products intended for intimate bodily use. Tentative Draft No. 10 applies to all products and expanded coverage to property damages as well as bodily harm. *Suveda v. White Motor Co.*, 32 Ill. 2d 612, 622, 210 N.E.2d 182, 187 (1965).



form Commercial Code would have upon an action for breach of implied warranty.<sup>260</sup> Pointing out that heretofore a showing of negligence was necessary to discard privity,<sup>261</sup> the court declared that currently "negligence is no longer necessary."<sup>262</sup>

To the argument that abolition of privity and negligence should properly come from the legislature, the court simply stated that what the courts have done, they can undo. As these concepts were of judicial creation, they could also be judicially eliminated.<sup>263</sup>

In *Capital Equipment Enterprises, Inc. v. North Pier Terminal Co.*,<sup>264</sup> an action was brought by the buyer against the seller for breach of express warranties as to the condition and quality of a used crane and its lifting capacity. Judgment was rendered for the buyer in the trial court, and the vendor appealed. The appellate court held that the evidence supported a finding that: (1) a warranty had been made to the buyer as to the condition of the crane; (2) the buyer had relied upon the warranty in purchasing the crane; and (3) there was a breach of warranty. Accordingly, the judgment of the lower court was affirmed.

During the negotiations for the sale of the crane, the representation had been made by the vendor that the crane "was in very good condition" and that it could lift thirty tons.

However, when the crane was tested, it failed to function entirely and various parts of it were totally inoperable.

In its opinion, the court quoted the Uniform Commercial Code<sup>265</sup> as to express warranties. The court pointed out that in order to create an express warranty, no formal words such as "warrant" or "guarantee" need be used by the vendor nor is a specific intention to make a warranty necessary since an affirmation as to the quality of the chattel is enough to create the warranty. However, whether an express warranty has been made is basically a factual issue.<sup>266</sup>

<sup>260</sup> Uniform Commercial Code § 2-318 is quoted *supra* note 150.

<sup>261</sup> Citing *Lindroth v. Walgreen Co.*, 407 Ill. 121, 94 N.E.2d 547 (1950).

<sup>262</sup> *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

<sup>263</sup> Quoting *Molitor v. Kaneland Community Unit District*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

<sup>264</sup> 117 Ill. App. 2d 264, 254 N.E.2d 542 (1969).

<sup>265</sup> Uniform Commercial Code § 2-313; Ill. Rev. Stat., ch. 26, § 313 (1969).

<sup>266</sup> 8 Williston, Contracts §§ 955-1011 (3d ed. Jaeger 1964).

Although the vendor argued that the plaintiff did not rely upon the warranty and that there had been a demonstration of the crane's ability to operate, it appeared that a thorough examination of the crane would require eight hours; no such inspection or examination was made by the plaintiff. Consequently, an inspection "does not include reliance upon an express warranty if the facts are not discovered by means of the inspection." The evidence was held sufficient to support a finding that plaintiff, in purchasing the crane, relied upon the warranty.

It is noteworthy that although the crane was a used machine, this did not preclude the making of a warranty; it was so held in the instant case.<sup>267</sup>

In *Moore v. Jewel Tea Company*,<sup>268</sup> an action was brought by the buyer against the manufacturer-distributor of a drain-cleaning product when a can containing the drain cleaner exploded and serious injuries were sustained by the buyer. After judgment in favor of the plaintiff and her husband, the appellate court held that the jury could properly conclude that there was an unreasonably dangerous element in this product and accordingly affirmed the judgment below.

The facts indicated that the plaintiff's wife had purchased an 18-ounce can of Drano from the Jewel Tea Company store in Chicago. The next day, she took the can of Drano into the bathroom, put it down beside the sink and reached across to turn on the cold water faucet. Suddenly, she heard the sound of an explosion and experienced "a terrific burning" in her eyes. The can of Drano had burst apart at the seams.

After an extensive discussion of the effect of the Statute of Limitations upon the bill of complaint and the confusion existing between the names "Drackett Company" and "Drackett Products Company" (the manufacturers), the motion to dismiss was denied.

In its opinion, the court pointed out that the issue of strict liability in Illinois is governed by *Suvada v. White Motor Company*<sup>269</sup> and *Dunham v. Vaughan & Bushnell Manufacturing Co.*<sup>270</sup> The basic theory of *Suvada* was that the plaintiff had to prove that the injury resulted

<sup>267</sup> *Capital Equipment Enterprises, Inc. v. North Pier Terminal Co.*, 117 Ill. App. 2d 264, 254 N.E.2d 542 (1969).

<sup>268</sup> 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969).

<sup>269</sup> 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

<sup>270</sup> 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

from a condition of the product which was unreasonably dangerous and which existed at the time the product left the manufacturer's control. In the *Dunham* case, the court stated that "the requirement that the defect must have existed when the product left the manufacturer's control does not mean that the defect must manifest itself at once."<sup>271</sup>

The concept of a defect, said the court, rests upon the premise that "those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function."<sup>272</sup>

In the *Dunham* case, the plaintiff had used a hammer for eleven months before it chipped and injured him. The judgment against the manufacturer was affirmed because the jury could properly conclude that, considering the length and type of its use, the hammer failed to perform in the manner that would reasonably have been expected and that this failure was responsible for the plaintiff's injury.

The court discussed at some length the theory of *res ipsa loquitur*. The function of this theory, said the court, is to create the existence of negligence from otherwise inexplicable facts.<sup>273</sup>

Whether the doctrine of *res ipsa loquitur* applies in a given case is a question of law which must be decided in the first instance by the trial court.<sup>274</sup> However, the defect does not have to manifest itself immediately; there may be a passage of time before it becomes apparent. This applies to negligence as well as strict liability cases.

Citing *Nichols v. Nold*,<sup>275</sup> the court pointed out that the plaintiff had sued the bottler, a distributor and retailer of a bottle of Pepsi Cola which had inexplicably exploded. Plaintiff therein testified that after she had purchased the bottle, it had been handled carefully. The trial court overruled the demurrers of the respective defendants and judgment was entered for the plaintiff. Affirming, the Kansas Supreme Court said:

The real test is whether the defendants were in control at the time

<sup>271</sup> *Id.* at 342, 247 N.E.2d at 403.

<sup>272</sup> *Id.*

<sup>273</sup> Citing *Drewick v. Interstate Terminals, Inc.*, 42 Ill. 2d 345, 351, 247 N.E.2d 877, 880 (1969).

<sup>274</sup> *Id.*

<sup>275</sup> 174 Kan. 613, 258 P.2d 317 (1953).

of the negligent act or omission which either at that time or later produced the accident.<sup>276</sup>

*Nichols v. Nold* is considered one of the leading precedents on the doctrine of *res ipsa loquitur*.

On the subject of damages, the court observed, “[i]t is well established in Illinois that where there is evidence of willful, wanton conduct, punitive damages may be allowed.”<sup>277</sup>

“It is difficult,” said the court, “if not impossible, to lay down a short and simple governing rule on this subject.”<sup>278</sup>

In this case, the plaintiff’s wife lost the sight of both her eyes and she was awarded \$900,000 in compensatory damages and \$10,000 in the form of punitive damages; the husband-plaintiff was awarded \$20,000 as compensatory damages. The judgment was affirmed in all particulars by the appellate court, *Moore v. Jewel Tea Company*.

In the next case, *Texaco, Inc. v. McGrew Lumber Co.*,<sup>279</sup> the question of liability arose in connection with certain scaffolding which had been supplied by a lumber company. The workman who was on the scaffolding was injured when a plank broke and he fell. This resulted in the indemnity suit by the plaintiff which had settled the claims of its injured workmen. The lumber company, in turn, instituted a third party complaint against another lumber company which had furnished the wood for the scaffolding.

Judgment was rendered for the plaintiffs in the trial court and a directed verdict entered for the third party plaintiff, whereupon the lumber companies appealed. The appellate court affirmed, holding that the theory of strict liability for a defective product applied to sellers and suppliers of defective products and that accordingly, judgment was properly rendered in favor of the plaintiffs on their indemnity claim against defendant lumber company. Here, once again reliance was placed upon *Suvada v. White Motor Co.*<sup>280</sup>

The defendant alleged that there was no authority under the *Suvada* theory for allowing indemnity against persons in the distributive

<sup>276</sup> *Id.* at 620, 258 P.2d at 323.

<sup>277</sup> *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d 109, 134, 253 N.E.2d 636, 648 (1969).

<sup>278</sup> *Id.*

<sup>279</sup> 118 Ill. App. 2d 65, 254 N.E.2d 584 (1969).

<sup>280</sup> 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

chain of defective products. The defendant concluded that no indemnity could be given to the plaintiff since the law does not allow indemnity among tortfeasors who have been equally negligent with regard to the injured party.

However, this argument was rejected by the court and the doctrine of strict liability was held to be applicable to suppliers of multipurpose products which are placed in the stream of commerce with knowledge of the product's intended use. Accordingly, it was held that the supreme court in *Suvada* intended that the decision was to apply to sellers and suppliers of defective products as well as the manufacturer who is involved in that decision.<sup>281</sup> The following was then quoted from *Suvada v. White Motor Company*:<sup>282</sup>

Without extended discussion, it seems obvious that public interest in human life and health, the invitations and solicitations to purchase the product and the justice of imposing the loss on the one creating the risk and reaping the profit are present and is compelling in cases involving motor vehicles and other products, where the defective condition makes them unreasonably dangerous to the user, as they are in food cases.<sup>283</sup>

This statement manifests a strong public policy that insists upon the distribution of the economic burden in the most socially desirable manner, even to the extent of ignoring the indemnitee's fault.<sup>284</sup>

Finally, as to the sufficiency of the evidence the court decided that there was "substantial evidence" introduced which would allow the jury to conclude upon the proof of causation.

In the case of *Van Winkle v. Firestone Tire & Rubber Co.*,<sup>285</sup> the court held, in a breach of warranty action against the manufacturer and vendor of a re-treaded tire which allegedly blew out and caused a serious accident, that there had been no sufficient proof to establish a defect. Accordingly, there was no basis for an action for breach of warranty; the trial court, which had entered judgment for the plaintiff, was reversed. The court cited *Schramek v. General Motors Corp.*,<sup>286</sup>

<sup>281</sup> 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966), the court cites Restatement (Second) of Torts § 402A (1964) and Comments.

<sup>282</sup> 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

<sup>283</sup> *Id.* at 619, 210 N.E.2d at 186; 8 Williston, Contracts §§ 955-1011 (3d ed. Jaeger 1964).

<sup>284</sup> 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968).

<sup>285</sup> 117 Ill. App. 2d 324, 253 N.E.2d 588 (1969).

<sup>286</sup> 69 Ill. App. 2d 72, 216 N.E. 244 (1966).

where recovery was sought for injuries resulting from the blowout of a tire which caused an accident. There, the court had said,

The cornerstone of plaintiff's cause of action is the existence of a defect in the tire at the time it left the control of the manufacturer or seller. Without this proof his case must fall.

The mere fact of a tire blowout does not demonstrate the manufacturer's negligence, nor tend to establish that the tire was defective. Blowouts can be attributed to myriad causes, including not only the care with which the tires are maintained but the condition of the roads over which they are driven and the happenstance striking of damaging objects.<sup>287</sup>

With reference to the case of *Sweeney v. Matthew*,<sup>288</sup> the court said that it did not control the *Van Winkle* case since in the *Sweeney* case a nail had broken off and lodged in the eye of the carpenter who was driving the nail into the wood. Evidence of metal tests made on other nails in the same sack was admitted to show a defect in the metal causing brittleness which in turn caused the accident.

However, in *Van Winkle* there was nothing to show that the blowout of the tire in question was caused by any neglect, negligence or any defect of the tire when it left the manufacturer. Accordingly, it was held that the record did not support the judgment in favor of plaintiff and it was therefore reversed.

In *Endurance Paving Co. v. Pappas*,<sup>289</sup> an action was brought by a contractor to recover a balance due on a paving contract and a counter claim was filed by the owners for damages. The trial court rendered judgment for the contractor and the owners appealed.

The contention of the defendant was that the paving which the contractor was to do on a parking lot had not been done in accordance with the specifications and had not been accomplished in a "workman-like manner." In the course of the trial court's instructions, it gave one (numbered 4) which reads as follows:

The Court instructs the jury that if you fail to find from the evidence that any defects in the parking lots of the Defendant-Counterplaintiffs were caused by the Plaintiff-Counterdefendant and that the work of the Plaintiff-Counterdefendant was not done in accordance

<sup>287</sup> *Van Winkle v. Firestone Tire & Rubber Co.*, 117 Ill. App. 2d 324, 253 N.E.2d 588, 591 (1969).

<sup>288</sup> 94 Ill. App. 6, 236 N.E.2d 439 (1968).

<sup>289</sup> 117 Ill. App. 2d 81, 253 N.E.2d 895 (1969).

with the specifications then the jury will find for the Plaintiff-Counterdefendant and against the Defendant-Counterplaintiffs' on the Defendants-Counterplaintiffs' Counter claim.<sup>290</sup>

This failed to take into account the further requirement that the job had to be done in "a workmanlike manner."<sup>291</sup> Consequently, this instruction failed to state the law accurately and thereupon, the appellate court reversed and remanded.

In *Blade v. Sloan*,<sup>292</sup> an action was brought by the sellers to recover the amount bid at an auction sale for a used combine. It had been stated that the combine was in good condition, but it turned out that it was unfit for the use intended, namely, to combine corn. The Uniform Commercial Code was referred to since this was an express warranty;<sup>293</sup> also, no specific word such as "warrant" need be used in order to create an express warranty. Although this was a used machine, it was nevertheless held that an *express* warranty had been made. Specifically, there was a crack in the engine block which caused the combine to break down. However, judgment was given for the plaintiffs for the amount of the sale price of the combine because the warranty was only effective *at the time of delivery* and when the combine thereafter failed it was no longer covered by the warranty.<sup>294</sup>

#### Other Current Cases

In *Lopez v. Brackett Stripping Machine Co.*,<sup>295</sup> an action was brought against a manufacturer of a machine in the United States District Court for the Northern District of Illinois for injuries sustained by the plaintiff while attempting to clean the machine. It was shown that the book-trimming machine had not worked properly and accordingly there was a motion to dismiss the indemnity action which the manufacturer had filed against the plaintiff's employer. Because of the malfunctioning of the machine, the manufacturer could not obtain in-

<sup>290</sup> *Id.* at 86-87, 253 N.E.2d at 897-98.

<sup>291</sup> Discussed further in Part II of this article, 47 Chi.-Kent L. Rev. 1 (1970).

<sup>292</sup> 108 Ill. App. 2d 7, 248 N.E.2d 142 (1969). *Cf.* Capital Equipment Enterprises, Inc., v. North Pier Terminal Co., *supra* note 267.

<sup>293</sup> Uniform Commercial Code § 2-313.

<sup>294</sup> This would appear to be a failure of the proof necessary to establish a breach at the time of delivery.

<sup>295</sup> 303 F. Supp. 669 (N.D. Illinois 1969).

demnity from the plaintiff's employer under Illinois law on the theory that active negligence could only be attributed to the employer.<sup>296</sup>

When a motor boat engine exploded, the buyer brought this action alleging breach of the warranty of fitness for use, *McKee v. Brunswick Corporation*.<sup>297</sup> The federal court, applying Illinois law, held that the evidence did not compel the inference that the boat was purchased under its trade name or that the purchaser did not rely upon the seller in selecting the boat. Also, it did not compel the inference that the ignition coil, which caused the explosion, was not defective, or not in the boat, when the sale occurred.

In a negligence and breach of warranty action against a designer and assembler of a fire truck aerial ladder and the seller who had installed the ladder on the truck, recovery was barred by evidence that the plaintiff climbed the ladder knowing that fly locks, intended to lock the ladder in place as a safety measure and a stability feature, were disengaged. Such evidence established as matter of law that the injuries resulted from the misuse of the equipment, or contributory negligence, rather than from any fault of the defendants, *Neusus v. Sponholtz*.<sup>298</sup>

In *Pitts v. Basile*,<sup>299</sup> the Supreme Court of Illinois held that the distributor of a dart game was not liable for an injury to the playmate of an eight-year old purchaser from a retailer; darts were not dangerous instrumentalities. It was not negligence to fail to warn that the darts should not be used by children or thrown in the direction of another person; assuming that the packing and arrangement of darts were designed to induce the purchase of the darts by children who would not appreciate the risk involved, any negligence in this respect was not the proximate cause of injury.

Causes of action in strict liability in tort and in negligence were stated by a complaint, in an action for injury when the plaintiff's hand was caught in the rollers of a 1953 Massey-Harris corn picker, manufactured by defendant, alleging that the defendant negligently designed and manufactured the corn picker so that it was dangerously defective

<sup>296</sup> *Lopez v. Brackett Stripping Machine Co.*, 303 F. Supp. 669 (N.D. Illinois 1969).

<sup>297</sup> 354 F.2d 577 (7th Cir. 1965).

<sup>298</sup> 369 F.2d 259 (7th Cir. 1966).

<sup>299</sup> 35 Ill. 2d 49, 219 N.E.2d 472 (1966), *rev'g* 55 Ill. App. 2d 37, 204 N.E.2d 43 (1965).



and unfit for the purpose for which it was intended, *Wright v. Massey-Harris*.<sup>300</sup>

The manufacturer had a duty to warn of latent limitations of even a perfectly made Allis Chalmers WD-45L-P tractor if use of the tractor might be dangerous if the user was ignorant of its limitations and the manufacturer had no reason to believe he would recognize the danger, *Biller v. Allis Chalmers Mfg. Co.*<sup>301</sup> The Court held a cause of action was stated against a manufacturer for injury to an employee of the purchaser of a farm tractor caused by escape of propane gas from the tractor's fuel tank, lack of privity was held no bar to recovery.

In an action against the manufacturer of a punch press for personal injury when the press, used to stamp television frames, struck plaintiff's arms as he was endeavoring to remove the frame from the press, the evidence supported a finding that the press had been delivered by defendant with a selector switch which was negligently wired so as to eliminate safety features otherwise present, and that such negligence proximately caused the injury. Recovery was not barred by the fact that the press was used, without incident, for some five years prior to the accident, *Mitchell v. Four States Machinery Co.*<sup>302</sup>

Complaint in an action by a hotel against air conditioner manufacturer to recover for property damage and loss of rent due to malfunction of machinery held to state cause of action for breach of implied warranty of merchantability and for negligent design, construction and manufacture of units; lack of privity did not bar recovery for negligence, *Admiral Oasis Hotel Corp. v. Home Gas Industries, Inc.*<sup>303</sup>

In an action against a rope manufacturer for injury to the plaintiff when the rope, being used to move a wooden beam in a building under construction, broke, the trial court erred in granting judgment for the defendant notwithstanding a verdict for the plaintiff. The plaintiff was entitled to the benefit of *res ipsa loquitur*, notwithstanding that the rope was not in defendant's physical control at the time of the accident, where plaintiff's evidence was that the rope was new and broke while holding less than 1/25th of its rated capacity; but the defendant was entitled to

<sup>300</sup> 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).

<sup>301</sup> 34 Ill. App. 2d 47, 180 N.E.2d 46 (1962).

<sup>302</sup> 74 Ill. App. 2d 59, 220 N.E.2d 109 (1966).

<sup>303</sup> 68 Ill. App. 2d 297, 216 N.E.2d 282 (1966).

a new trial where the question whether the rope was new was disputed, *May v. Columbian Rope Co.*<sup>304</sup>

In an action for injury from the presence of a mouse in Coca-Cola allegedly bottled by defendant, defendant could not complain of instruction because of lack of proof that the Coca-Cola bottle from which the plaintiff drank was defendant's product where the defendant's proffered instruction impliedly told the jury that the bottle of Coca-Cola was its product, *Harris v. Coca-Cola Bottling Co.*<sup>305</sup>

In *Rhodes Pharmacal Co. v. Continental Can Co.*, it was held that the strict liability doctrine did not permit recovery by a cosmetic manufacturer against manufacturer of can from which cosmetic leaked, with resulting commercial loss to the plaintiff; but, notwithstanding lack of privity, the plaintiff could recover on an implied warranty of fitness, the manufacturer having been aware of purpose to which the product was to be put and having known of plaintiff's reliance that the product would be fit for the purpose intended, reversing judgment denying recovery.<sup>306</sup>

The manufacturer of "Lanolin Discovery," was not liable, on the ground of negligence, for an injury allegedly caused by ignition of the product notwithstanding failure to warn of flammability, where there was no evidence that the manufacturer knew or should have known of the danger; the question of manufacturer's liability on ground of breach of implied warranty of fitness was for jury, *Hardman v. Helene Curtis Industries, Inc.*<sup>307</sup>

<sup>304</sup> 40 Ill. App. 2d 264, 189 N.E.2d 394 (1963).

The manufacturer of construction hoists was not held liable, on the grounds of negligence or breach of warranty of fitness, for injuries and death caused by the fall of the hoist, where the hoist was not intended to carry personnel, *Nelson v. Union Wire Rope Corp.*, 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963) applying Florida law; also holding the manufacturer of cable used on the hoist, not liable for negligence or breach of warranty.

The trial court properly directed a verdict for the defendant in a personal injury action against the manufacturer of an automobile jack from which a Cadillac slipped and fell on the plaintiff, where there was evidence that the plaintiff knew that the jack was unsuitable for use on a Cadillac and that his own lack of care in dealing with the known condition proximately caused the accident, *Brandenburg v. Weaver Mfg. Co.*, 77 Ill. App. 2d 374, 222 N.E.2d 348 (1967).

<sup>305</sup> 35 Ill. App. 2d 406, 183 N.E.2d 56 (1962).

<sup>306</sup> 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966).

<sup>307</sup> 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964).

The manufacturer of "Ryoles" wall plastering material was not held liable, for the failure of the plaster, to plaintiff, with whom he was not in privity, where the failure was not caused by inherent defect in the plaster but by the contractor's failure to follow the manufacturer's instructions, *Dittmar v. Ahern*, 37 Ill. App. 2d 167, 185 N.E.2d 264 (1962).

*Does Warranty Apply to the Professions?*

In the final case to be discussed in this section, a decision handed down by the supreme court, it was held that a warranty may apply to transactions other than sales of goods or, more recently, houses.<sup>308</sup> In this instance, a survey of a building lot was made and based thereon, a house was built. It turned out later that a mistake had been made in consequence of which the house and garage were erected in such a manner that each encroached upon a neighboring lot. Cost of moving and "rehabilitating both" was \$13,030.

In the trial court, judgment was for the plaintiff, but the intermediate appellate court reversed,<sup>309</sup> and granted leave to appeal. Plaintiffs predicated their case on certain specified theories including:

1. Strict liability in tort;<sup>310</sup>
2. Implied warranty "free of the privity requirement";<sup>311</sup>
3. The third-party beneficiary doctrine;<sup>312</sup>
4. Express warranty "free of the privity requirement;"<sup>313</sup> and
5. Tortious misrepresentation.<sup>314</sup>

The supreme court, after summarizing the facts, referred to the leading precedent, *Suvada v. White Motor Co.*,<sup>315</sup> and pointed out that strict liability in tort was imposed on "sellers of products in a defective condition unreasonably dangerous to the user or consumer."<sup>316</sup>

However, the court emphasized that there was nothing to indicate in what manner "this survey could be found to be an unreasonably dangerous product within the language or rationale of section 402A."<sup>317</sup>

<sup>308</sup> *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

<sup>309</sup> *Rozny v. Marnul*, 83 Ill. App. 2d 110, 227 N.E.2d 156 (1966).

<sup>310</sup> Restatement (Second) of Torts § 402 (1965).

<sup>311</sup> 8 Williston, Contracts §§ 982 *et seq.* (3d ed. Jaeger 1964).

<sup>312</sup> 2 Williston, Contracts §§ 347-403 (3d. Jaeger 1959).

<sup>313</sup> 8 Williston, Contracts §§ 970 *et seq.* (3d ed. Jaeger 1964).

<sup>314</sup> *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1963); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932); *Prosser, Misrepresentations and Third Persons*, 19 Vand. L. Rev. 231 (1966); Restatement (Second) of Torts § 402B (1965).

<sup>315</sup> 32 Ill. 2d 612, 210 N.E.2d 182 (1965) *aff'g* 51 Ill. App. 2d 318, 201 N.E.2d 313 (1964).

<sup>316</sup> *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

<sup>317</sup> Restatement (Second) of Torts § 402A (1964), quoted note 259 *supra*.

There was no need to determine what warranties the law might imply since the essential basis of the plaintiffs' claim was the "express representation of accuracy made by the defendant" who was a registered Illinois land surveyor.<sup>318</sup>

Adverting to the plaintiffs' theory of third-party beneficiary recovery on the "express written warranty contract" between the builder and defendant surveyor, the court observed,

[i]t is clear that the contract was not made for the direct benefit of the plaintiffs as "direct benefit" has been traditionally interpreted in connection with third-party beneficiary actions.<sup>319</sup> Although we are aware of cases<sup>320</sup> which evidence the increasing disregard for the privity requirement through continued expansion of the class of permissible plaintiffs under the third-party beneficiary doctrine, and realize that in factual situations similar to the instant case recovery has been granted under this theory,<sup>321</sup> we believe the fundamental reasoning underlying the tortious misrepresentation theory more nearly accommodates this case than the expanded third-party beneficiary doctrine.<sup>322</sup>

The court recognized the existence of many product liability cases which have granted recovery to third parties on the theory of express warranty to the consumer.<sup>323</sup> However, if the term "warranty" is used in this connection, it must be understood that a different kind of warranty is meant than when the warranty is made between the "immediate contracting parties."<sup>324</sup> The privity requirement (?) alleged to be necessary in the latter case has been largely discarded in the former.<sup>325</sup> After discussing the elimination of privity in connection with tort warranty, the court added:

<sup>318</sup> Printed on the survey plat was the following statement:  
IMPORTANT

Before starting any excavating or building, excavators and builders are requested to compare all measurements and should any discrepancies be found, report same to our home office at once.

This plat of survey carries our absolute guarantee for accuracy, and is issued subject to faithful carrying out of the above and foregoing instructions and conditions before any liability will be assumed on part of the Jens K. Doe Survey Service. *Rozny v. Marnul*, 43 Ill. 2d 54, 58-59, 250 N.E.2d 656, 658-59 (1969).

<sup>319</sup> Citing *Cherry v. Aetna Casualty & Surety Co.*, 372 Ill. 534, 25 N.E.2d 11 (1939); *Carson Pirie Scott & Co. v. Parrett*, 346 Ill. 252, 178 N.E. 498 (1931).

<sup>320</sup> Citing *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966); *50 New Walden, Inc. v. Federal Ins. Co.*, 39 Misc. 2d 460, 241 N.Y.S.2d 128 (1963).

<sup>321</sup> Citing *e.g.*, *Vandewater & Lapp v. Sacks Builders, Inc.*, 20 Misc. 2d 677, 186 N.Y.S.2d 103 (1959).

<sup>322</sup> *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

<sup>323</sup> These cases are discussed in Jaeger, *Privity of Warranty: Has The Tocsin Sounded?*, 1 *Duquesne U.L. Rev.* 1 (1963).

<sup>324</sup> Restatement (Second) of Torts § 402A, Comment (c) ; § 402B, Comment (e) (1964).

<sup>325</sup> *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1962).

This process of adhering to or eliminating the privity requirement has proved to be an unsatisfactory method of establishing the scope of tort liability to third persons. Because of the difficulties in applying the rule, courts created exceptions deemed necessary to achieve desirable results which were not always completely reconcilable.<sup>326</sup> To eliminate any uncertainty still remaining after *Suvada v. White Motor Company*,<sup>327</sup> we emphasize that lack of direct contractual relationship between the parties is not a defense in a tort action in this jurisdiction. Thus, tort liability will henceforth be measured by the scope of the duty owed rather than the artificial concepts of privity.

Having discarded any remnants of the privity concept, we now concern ourselves with the scope of defendant's liability using traditional tortious misrepresentation standards.<sup>328</sup>

Charting the development of the concept that "performance of a private contract can give rise to duties in tort," the court cited *Thomas v. Winchester*<sup>329</sup> as the first case to have departed from the privity requirement following its articulation in *Winterbottom v. Wright*.<sup>330</sup> Where physical injuries resulted from the use of the defective product, recovery was allowed regardless of privity; the landmark case was, of course, *MacPherson v. Buick Motor Co.*<sup>331</sup>

While at first, there had to be a palpable physical injury, an extension to intangible economic interests soon resulted, *Glanzer v. Shepard*.<sup>332</sup> In that case, liability was predicated upon the fact that "the public weigher of beans at a seller's request was liable to the buyer damaged by negligent overstatement of the weight because the weigher knew the buyer would rely on the erroneous weight statement."<sup>333</sup>

Subsequently, however, the same court in *Ultramares Corp. v. Touche, Niven & Co.*<sup>334</sup> declined to hold an auditing firm liable when it negligently certified an inaccurate audit although it was used as a basis for the loan of money "to an actually insolvent firm." The distinction between the two cases was alleged to be that the statement of weight in *Glanzer* was "primarily" for the use of the purchaser while

<sup>326</sup> Citing *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958).

<sup>327</sup> *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1964).

<sup>328</sup> *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

<sup>329</sup> 6 N.Y. 397 (1852).

<sup>330</sup> 152 Eng. Rep. 402 (Ex. 1842).

<sup>331</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>332</sup> 233 N.Y. 236, 135 N.E. 275 (1922).

<sup>333</sup> *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

<sup>334</sup> 255 N.Y. 170, 174 N.E. 441 (1931).

the audit statement in *Ultramares* was only "incidentally" for the use of third parties.<sup>335</sup>

While the courts were not adverse to imposing liability when the reliance of third persons was *known*,<sup>336</sup> there was a distinct disinclination where such reliance was merely "foreseeable."<sup>337</sup> After an extensive discussion of various theories of liability,<sup>338</sup> the court examined two significant but conflicting decisions: *M. Miller Co. v. Central Contra Costa Sanitary District*,<sup>339</sup> and *Texas Tunneling Co. v. City of Chattanooga*.<sup>340</sup> In the former, the California court held an engineering company liable for the negligent preparation of a soil report where it was known that it would be used in the preparation of a bid for work on a sewer system.

In the *Texas Tunneling* case, however, a federal circuit court of appeals, on similar facts, held that there was no liability although the trial court had given judgment for the plaintiff.<sup>341</sup> But it should be pointed out that the federal appellate court's decision was rendered prior to the decision of the Supreme Court of Tennessee in *Ford Motor Co. v. Lonon*<sup>342</sup> which expanded the scope of recovery for misrepresentation in that State. Also, the report under consideration in *Texas Tunneling* expressly disclaimed responsibility for any inaccuracies.<sup>343</sup>

The court then cited a much more recent case, *Rusch Factors, Inc. v. Levin*<sup>344</sup> which was decided in accordance with the *Miller* case. This, too, was an accountancy case similar to the New York decision in *Ultramares*. The basis for liability was that reliance by third parties was *foreseeable* by the negligent accountant. Another federal district court

<sup>335</sup> The facts of these two cases, *Glanzer* and *Ultramares*, seem to make it clear that a more persuasive factor was that in *Ultramares* there was potential "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931).

<sup>336</sup> *Brown v. Sims*, 22 Ind. App. 317, 53 N.E. 779 (1899).

<sup>337</sup> *National Iron & Steel Co. v. Hunt*, 312 Ill. 245, 143 N.E. 833 (1924).

<sup>338</sup> And an examination of "an excellent article by Dean Prosser, *Misrepresentation and Third Persons*," 19 Vand. L. Rev. 231 (1966).

<sup>339</sup> 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (1961).

<sup>340</sup> 329 F.2d 102 (6th Cir. 1962).

<sup>341</sup> *Texas Tunneling Co. v. City of Chattanooga*, 204 F. Supp. 821 (E.D. Tenn. 1962).

<sup>342</sup> 217 Tenn. 400, 398 S.W.2d 240 (1966).

<sup>343</sup> In the case under consideration, *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969), as the court pointed out, there was an express "absolute guarantee for accuracy"; see note 318.

<sup>344</sup> 284 F. Supp. 85 (D.R.I. 1968).

in *Fischer v. Kletz*,<sup>345</sup> applying New York law, held the defendant liable for a failure to disclose after-acquired information which invalidated the accuracy of facts which had previously been certified as accurate.

As is apparent from the foregoing discussion, the factors we consider relevant to our holding are:

(1) The express, unrestricted and wholly voluntary "absolute guarantee for accuracy" appearing on the face of the inaccurate plat;

(2) Defendant's knowledge that this plat would be used and relied on by others than the person ordering it, including plaintiffs;

(3) The fact that potential liability in this case is restricted to a comparatively small group, and that, ordinarily, only one member of that group will suffer loss;

(4) The absence of proof that copies of the corrected plat were delivered to anyone;

(5) The undesirability of requiring an innocent reliant party to carry the burden of a surveyor's professional mistakes;

(6) That recovery here by a reliant user whose ultimate use was foreseeable will promote cautionary techniques among surveyors.<sup>346</sup>

Basing its decision upon the aforequoted considerations, the court held that the plaintiffs were entitled to judgment,<sup>347</sup> and added:

To the extent that this holding may be thought contrary to prior decisional law of this State, particularly *National Iron and Steel Co. v. Hunt*,<sup>348</sup> and *Albin T. Illinois v. Crop Improvement Ass'n, Inc.*,<sup>349</sup> such decisions are no longer the law.<sup>350</sup>

Although this determination disposed of the question of liability, two issues remained unresolved: (1) the applicable Statute of Limitations, and (2) the allegedly excessive damages. The court rejected the defendant's contention that the Statute of Limitations was one governing actions *ex contractu*, and held that "all civil actions not otherwise provided for, shall be commenced within 5 years next *after the cause of action accrued*."<sup>351</sup> This, said the court, "encompasses actions for tortious misrepresentations; thus, the limitation period is 5 years."<sup>352</sup>

<sup>345</sup> 266 F. Supp. 180 (S.D.N.Y. 1967).

<sup>346</sup> *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

<sup>347</sup> Citations omitted.

<sup>348</sup> 312 Ill. 245, 143 N.E. 833 (1924).

<sup>349</sup> 30 Ill. App. 2d, 174 N.E.2d 697 (1961).

<sup>350</sup> *Rozny v. Marnul*, 43 Ill. 2d 54, 68, 250 N.E. 656, 663 (1969).

<sup>351</sup> Quoting § 15 of the Limitations Act, Ill. Rev. Stat. ch. 83, § 16 (1961).

<sup>352</sup> Citing *Keithley v. Mutual Life Ins. Co.*, 271 Ill. 584, 111 N.E. 503 (1916); *Bates v. Bates Machine Co.*, 230 Ill. 619, 82 N.E. 911 (1907).

The more difficult question presented by the appeal was when "the cause of action accrued." The plaintiffs had purchased the property early in 1956, but did not become aware of the encroachment of the house and garage upon the neighboring lot until 1962. The defendant argued that the statute began to run when the survey plat was delivered to the builder, or, at the latest, when the plaintiffs relied on the surveyor's "guarantee."<sup>353</sup>

The plaintiff urged that the "discovery rule" should be adopted, pointing out that this had not been passed on but that "policy considerations" should dictate acceptance of this rule; said the court:

The basic problem is one of balancing the increase in difficulty of proof which accompanies the passage of time against the hardship to the plaintiff who neither knows nor should have known of the existence of his right to sue. There are some actions in which the passage of time, from the instant when the facts giving rise to liability occurred, so greatly increases the problems of proof that it has been deemed necessary to bar plaintiffs who had not become aware of their rights of action within the statutory period as measured from the time such facts occurred.<sup>354</sup> But where the passage of time does little to increase the problems of proof, the ends of justice are served by permitting plaintiff to sue within the statutory period computed from the time at which he knew or should have known of the existence of the right to sue.<sup>355</sup> Currently, this area of the law is receiving considerable attention as a great majority of the courts adopt a discovery ("known or should have known") rule as to the time at which a cause of action for medical malpractice accrues, particularly where the negligence charged involves leaving foreign objects within the patient at the conclusion of an operation,<sup>356</sup> although some courts have not limited this development to foreign object cases.<sup>357</sup>

After a review of the decision in *New Market Poultry Farm v.*

<sup>353</sup> See note 318 where the terms of the "guarantee" are quoted.

<sup>354</sup> Citing *Skinner v. Anderson*, 38 Ill. 2d 455, 458, 231 N.E.2d 588 (1967); *New Market Poultry Farms, Inc. v. Fellows*, 51 N.J. 419, 241 A.2d 633 (1968).

<sup>355</sup> Citing *Wanless v. Peabody Coal Co.*, 294 Ill. App. 401, 13 N.E.2d 996 (1938); *cf. Eichelberger v. Homerding*, 317 Ill. App. 125, 45 N.E.2d 493 (1942).

<sup>356</sup> Citing *Flanagan v. Mt. Eden General Hospital*, 24 N.Y.2d 427, 301 N.Y.S.2d 23, 248 N.E. 871; *Layton v. Allen*, 246 A.2d 794 (Del. 1968); *Gaddis v. Smith*, 417 S.W.2d 577 (Tex. 1967); *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961).

<sup>357</sup> Citing *Frohs v. Greene*, 88 Or. 131, 452 P.2d 564 (1969); *Yoshizaki v. Hilo Hospital*, 433 P.2d 220, 223 (Hawaii 1967); *Owens v. White*, 342 F.2d 817 (9th Cir. 1965). Here, the court added:

Illinois has been involved in this development. In 1964, an Illinois appellate court (*Mosby v. Michael Reese Hospital*, 49 Ill. App. 2d 336, 199 N.E.2d 633) felt compelled to hold that the statute commenced to run at the date of the wrong and not from the date of discovery. The legislature responded by enacting section 21.1 of the Limitations Act (Ill. Rev. Stat. 1965, ch. 83 par. 22.1) providing for a discovery rule as to accrual of foreign object medical malpractice actions. *Rozny v. Marnul*, 43 Ill. 2d 54, 71, 250 N.E.2d 656, 665 (1969).



*Fellows*,<sup>358</sup> the supreme court concluded that the state legislature had clearly indicated its intent that the Statute of Limitations should run from the time when "the person claiming such damages actually knows or should have known of such negligence, errors or omissions [of surveyors]."<sup>359</sup>

"We accordingly hold," said the court, "in keeping with the more recent authorities and the legislative policy manifested by our General Assembly, that the statute of limitations does not bar plaintiffs' recovery. . . ."<sup>360</sup>

As to the plaintiffs' failure to mitigate damages, which had not been presented before, it was abundantly clear "that defendant may not now complain that plaintiffs failed to mitigate damages."<sup>361</sup>

In sum, the cases which have been reviewed indicate certain trends when defective products or services are manufactured, sold or tendered which result in physical injury or property damage:

<sup>358</sup> 51 N.J. 419, 241 A.2d 633 (1968); in this case the Supreme Court of New Jersey had to determine the date when the limitation period commenced to run on an error in a plat made in 1952 but not discovered to be inaccurate until 1963. The court recognized that in almost identical circumstances courts of that jurisdiction had held the statute ran from the date of the breach of duty. (241 A.2d at 635.) However, after analyzing the problem in light of the purpose of Statutes of Limitations ably stated in an earlier opinion (*Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277, which established a discovery rule in foreign object medical malpractice cases) that court stated:

Here as in *Fernandi*, \* \* \* the credibility of plaintiff's claim is not questioned and the incontestable factual pattern presented to us on this motion bespeaks the probability of defendant's negligent fault in the acreage calculation. The passage of time does not entail the danger of a fraudulent, false, frivolous, speculative or uncertain claim. Nor is such danger even suggested by defendants. Further, under the said facts it does not appear possible that by reason of the passage of time defendant's testimonial proof of a defense would be made more difficult. The circumstances so portrayed do not permit a suggestion that Mrs. Pack knowingly slept on her right but to the contrary establish that she brought suit expeditiously after she discovered her alleged actual damage. Accordingly we hold that under the facts and circumstances as presented, the motion for summary judgment should have been denied. Such a result, as noted, is consistent with *Fernandi* and in harmony with the trend in other jurisdictions. (Citations omitted.)

*Id.* at 421-22, 241 A.2d at 636-37.

<sup>359</sup> Quoting Ill. Rev. Stat. ch. 83, par. 24g (1967).

<sup>360</sup> *Rozny v. Marnul*, 43 Ill. 2d 54, 72-3, 250 N.E.2d 656, 665-66 (1969), referring to *New Market Poultry Farms v. Fellows*, 51 N.J. 419, 241 A.2d 633 (1968) and *Fernandi v. Strully*, 35 N.J. 434, 173 A.2d 277 (1961).

<sup>361</sup> *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969).

As this article goes to press, the opinion of the federal court for the Southern District of Illinois in *Little v. Maxam, Inc.*, 310 F. Supp. 875 (S.D. Ill. 1970), has just been published. Summary judgment was denied in an action by an employee who was injured while using a machine bought by her employer. The court quoted the opinion in *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965), as to the public policy of Illinois, and its extension by *Dunham v. Vaughan & Bushnell Manufacturing Co.*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969).

1. Privity of warranty is being discarded at a growing rate;
2. Liability is being extended to include “innocent bystanders” who are injured by the product; and
3. Recovery is gradually being allowed when there is no physical injury but only property damage.\*

\* Editor's Note: In the second and final part of his article, Dr. Jaeger describes the warranty of habitability and reviews its current status in the courts.