
Torts - Strict Liability - Privity as a Defense for a Non-Negligent Manufacturer

Robert Breakstone

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cases, seems to be a growing and continuing trend. The conclusions of the *Teramano* case were preceded by the Illinois court's decision in the *Nudd* case,³⁴ which rejected Parental Immunity as to wanton and wilful torts. The court succinctly stated that

[w]hile this policy might be such justification to prevent suits for mere negligence within the scope of the parental relationship we do not conceive that public policy should prevent a minor from obtaining redress for wilful and wanton misconduct on the part of a parent.³⁵

In view of such statements it is inevitable that the doctrine of Parental Immunity will eventually disappear and be replaced by a more appropriate doctrine which imposes Parental Liability in all cases except those involving ordinary negligence.³⁶

Melvin Rishe

³⁴ *Supra* note 32.

³⁵ *Supra* note 32 at 619, 131 N.E.2d at 531 (1956).

³⁶ The apparent trend to allow minors to recover against their parents for injuries sustained through wanton torts or while the parent is engaged in a business activity indicates that "Parental Immunity" is too inclusive a term. "Parental Liability except in ordinary negligence cases" would be a more accurate and descriptive title for this tort area.

TORTS—STRICT LIABILITY—PRIVITY AS A DEFENSE FOR A NON-NEGLIGENT MANUFACTURER

On February 11, 1957, Messrs. Suvada and Konecnik purchased a re-conditioned tractor-trailer from White Motor Company. The unit was equipped with a braking system manufactured by co-defendant, Bendix. On June 24, 1960, while plaintiffs' agent was driving the tractor, the brake system failed due to a defective component part and the tractor collided with a passenger bus, causing personal injuries to several passengers and damaging the bus and plaintiffs' tractor-trailer. The plaintiffs were compelled to pay personal injury claims to the injured bus passengers, the cost of repairs to the bus, and the repairs on their tractor unit. Subsequently, they filed an indemnity suit against the defendants, predicating liability on the grounds of negligence and breach of implied warranty. The trial court sustained Bendix's motion to strike the warranty count upon the grounds that the plaintiffs failed to allege privity of contract. On plaintiffs' appeal, the Illinois Appellate Court held that plaintiff's had stated causes of action against defendants and reversed the trial court.¹

¹ *Suvada v. White Motor Co.*, 51 Ill. App.2d 318, 201 N.E.2d 313 (1964).

Bendix Corporation appealed to the Illinois Supreme Court, which decided for the plaintiffs on the theory that the defendants were strictly liable in tort. The court emphasized that privity of contract is not a prerequisite to bringing such an action. *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

Whether a non-negligent manufacturer who places in the stream of commerce a dangerous and defective product, can insulate himself from liability by invoking the defense of privity of contract is the precise issue presented to the court.²

The decision in *Suvada* exemplifies a continued and persistent "assault upon the citadel"³ of privity since its inception in *Winterbottom v. Wright*.⁴ The general rule derived from the *Winterbottom* decision was that no action could lie, in tort or contract, unless privity was present. Inevitably, exceptions to the requirement of privity in actions based on common law negligence developed,⁵ and as a result of the much celebrated case of *MacPherson v. Buick Motor Co.*,⁶ the privity requirement in tort actions was no longer necessary.⁷

The traditional proposition that privity of contract is indispensable to recovery against the manufacturer or seller of a product which has caused injury where the defendant's breach of an express or implied warranty is

² There were ancillary issues presented to the court for adjudication, but these issues were not concerned with the doctrine of privity and received only brief comment by the court.

³ Taken from an article of that name: Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099 (1960).

⁴ 10 Mees. & W. 109, 152 Eng. Rep. 402 (1842), where the court, in holding that a third party could not maintain an action against the manufacturer of a mail-coach for injuries sustained due to the defective construction of the coach because the parties were not in privity, stated: "... if we allow this action it might be the means of letting in upon us an infinity of actions."

⁵ The principal exceptions were: (a) *Levy v. Langridge*, 2 Mees. & W. 519, 150 Eng. Rep. 1458 (1838), wherein a seller who knows that a product is dangerous for its intended use, fails to disclose this fact to the buyer and a third person is injured by such use; (b) *Thomas v. Winchester*, 6 N.Y. 397, 57 Am. Dec. 455 (1852), where the article was "imminently" or "inherently" dangerous to human life or safety; (c) *Coughtry v. Globe Woolen Co.*, 56 N.Y. 124, 15 A.R. 387 (1874), where the defective product was furnished by the defendant for use on his land and the one injured was invited on the land by defendant to use the defective product.

⁶ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁷ See *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693, (1946), where the court stated, "[t]he *MacPherson* case caused the exception to swallow the asserted rule of non-liability 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." (*Id.* at 103, 64 N.E.2d at 700). See *Suvada v. White Motor Co.*, No. 38952, May 20, 1965, where the court stated, "[l]ack of privity is not a defense in a tort action against the manufacturer."

asserted,⁸ first came under assault in the food cases.⁹ Of the numerous arguments advanced for imposing liability, the theory acquiring the widest acceptance was succinctly stated by the Texas court in *Jacob E. Decker & Sons v. Capps*.¹⁰

Here the liability of the manufacturer and vendor (of food) is imposed by operation of law as a matter of public policy for the protection of the public, and is not dependent on any provision of the contract, either express or implied.¹¹

The present status of the law in an overwhelming majority of jurisdictions does not require privity in food cases.¹²

The extension of the manufacturer's liability to cases other than food followed,¹³ and the holding in *Henningsen v. Bloomfield Motors, Inc.*¹⁴ provided the impetus for discarding the requirement of privity in non-food cases.¹⁵ The jurisdictions that rejected the privity requirement imposed strict liability on the theory of breach of implied warranty.¹⁶ With

⁸ See *Davidson v. Nichols*, 93 Mass. (11 Allen) 514 (1866), where the court stated: "Privity of contract is an essential element in the maintenance of an action founded on a breach of contract. When this does not exist, no action *ex contractu* can exist." (Id. at 517).

⁹ For various theories advanced by the courts to circumvent the privity barrier, see *Wiedeman v. Keller*, 171 Ill. 93, 49 N.E. 210 (1897) (public safety); *Coca Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927) (product carries a warranty which runs with the title); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913) (demands of social justice); *Madouros v. Kansas City Coca Cola Bottling Co.*, 230 Mo. App. 275, 90 S.W.2d 445 (1936) (sale by dealer carried an assignment of his warranty from the manufacturer); *Ward Packing Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928) (third party beneficiary). See generally, Gilliam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1957), wherein the writer cites 29 different theories used by the courts to evade the privity requirement.

¹⁰ 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479 (1942).

¹¹ *Id.* at 617, 164 S.W.2d at 831-2, 142 A.L.R. at 1485.

¹² See generally Prosser, *Assault upon the Citadel*, 69 YALE L.J. 1099 (1960).

¹³ See *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958). *Supra* note 12, wherein Dean Prosser credits this case as the start of the beginning of the change to strict liability.

¹⁴ 32 N.J. 358, 161 A.2d 69 (1960).

¹⁵ *Id.* at 383, 161 A.2d at 83, wherein the court, after noting that most of the decisions where lack of privity has not been permitted to interfere with recovery have involved food, stated: "We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants and others, demands even less adherence to the narrow barrier of privity."

¹⁶ See, e.g., *Putnam v. Erie City Manufacturing Co.*, 338 F.2d 911 (5th Cir. 1964); *Deveny v. Rheem Manufacturing Co.*, 319 F.2d 124 (2d Cir. 1963); *Chapman v. Brown*, 198 F. Supp. 78 *aff'd*, 304 F.2d 149 (9th Cir. 1962); *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, *supra* note 13; *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191

the advent of *Greenman v. Yuba Power Products, Inc.*,¹⁷ warranty concepts were questioned as to their necessity in establishing liability.

In the *Greenman* case, the California Supreme Court broke away from warranty concepts and held the manufacturer of a defective power tool, bought by plaintiff's wife from a retailer, liable to the plaintiff for resulting injuries caused by using the tool upon the theory of strict liability in tort.¹⁸ Justice Traynor, speaking for the court, stated:

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law (citations) and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products (citations) make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.¹⁹

The court's holding indicates that there is no necessity for establishing a breach of warranty to find strict liability without negligence.²⁰

The *Suvada* decision ratified the holding of the *Greenman* decision that ". . . the manufacturer is strictly liable in tort when an article he places on the market . . . proves to have a defect that causes injury to a human being."²¹ Realizing that the Illinois Appellate Court had imposed strict liability upon the theory of breach of implied warranty, as in *Henningsen*²² and *Goldberg*,²³ the Illinois Supreme Court's holding that the defendants were strictly liable in tort made it unnecessary for the high court to decide what effect section 2-318 of the Uniform Commercial Code has on an action for breach of an implied warranty.²⁴ Re-affirming

N.E.2d 81, 240 N.Y.S.2d 592 (1963). *Contra*, *Schultz v. Tecumseh Products*, 310 F.2d 426 (6th Cir. 1962); *Long v. Flannigan Warehouse Co.*, 382 P.2d 399 (Nev. 1963). See generally, FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 16-16A, at 357-442 (1963) for a complete listing of all the jurisdictions going beyond the food products cases in finding manufacturers liable without fault.

¹⁷ 59 Cal. 2d 57, 377 P.2d 897 (1963).

¹⁸ *Ibid.* See also, *Escola v. Coca Cola Bottling Co.* 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring opinion).

¹⁹ *Id.* at 63, 377 P.2d at 901.

²⁰ See generally, Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446 (1964).

²¹ *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 62, 377 P.2d 897, 900 (1963). See also, *Vandermark v. Ford Motor Co.*, 37 Cal. Rptr. 896, 391 P.2d 168 (1964), which cites the *Greenman* case as precedent.

²² *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 14.

²³ *Goldberg v. Kollsman Instrument Corp.*, *supra* note 16.

²⁴ ILL. REV. STAT. ch. 26, § 2-318 (1963) which provides: "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 per-

the rule that privity is no longer necessary where the basis of the act is negligence,²⁵ the court approves the extension of the *Greenman* rule, and states, ". . . today, negligence is no longer necessary."²⁶

The resulting liability established by *Suvada* does not infer that the manufacturer is an absolute insurer, since the plaintiff must trace his injury to a defective condition of the product, and such defective condition must be unreasonably dangerous and exist when the product leaves the manufacturer's control.²⁷ The responsibility for a user's injury and subsequent loss from a dangerous and defective product is thrust upon the manufacturer rather than upon the consumer even under circumstances where the producer is not negligent in manufacturing the item.

Coinciding with these approaches on strict tort liability, is section 402A of the American Law Institute's revised Restatement of the Law of Torts, which states:

Sec. 402A: Special Liability of Seller of Products for Physical Harm to User or Consumer.

(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.²⁸

Dean Prosser, the Reporter for the *Restatement*, is cited as saying that this section "is the law of the immediate future . . . and with the exception of the changes in the law with respect to prenatal injuries, this is the most radical and spectacular development in tort law during this century."²⁹

son 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." Comment 3 to section 2-318 indicates that it is neutral and not intended to enlarge or restrict the developing case law on whether the manufacturer's warranties which are given to his dealers extend to other persons in the distributive chain.

²⁵ See *Carter v. Yardley & Co.*, *supra* note 7.

²⁶ *Suvada v. White Motor Co.*, No. 38952, May 20, 1965.

²⁷ *Ibid.* See generally, James, *General Products—Should Manufacturers Be Liable Without Negligence?* 24 TENN. L. REV. 923, 927, (1957).

²⁸ RESTATEMENT (SECOND), TORTS § 402A (1964).

²⁹ *Putnam v. Eric City Manufacturing Co.*, 338 F.2d 911, 919 (5th Cir. 1964).

There are five reasons advanced for adopting strict tort liability.³⁰ First, public policy demands that maximum protection be given consumers against dangerous defects in products.³¹ Second, manufacturers can best reduce the hazards to life and health inherent in defective products.³² Third, the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.³³ Fourth, the retailer is but a conduit, through whom the product is sold, and when such product leads to disaster, the manufacturer should not be permitted to avoid responsibility by saying he has made no contract with the consumer.³⁴ And fifth, it is already possible to enforce strict liability by resorting to a series of actions where the retailer is first held liable and then indemnity is sought against the manufacturer. This is an expensive, time-consuming and wasteful process.³⁵

Presently, the concept of strict tort liability has been established in only two states—California and Illinois. Other jurisdictions have maintained that liability is predicated upon warranty and have eluded the privity requirement in one way or another. However, as Dean Prosser suggests, “[i]f there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask.”³⁶

Careful analysis reveals that there are now four forms of action available to persons injured by reasons of defects in products; negligence, breach of express warranty, breach of implied warranty of merchantability or fitness, or strict liability in tort.³⁷ All of these actions may co-exist with each other, and, as pertaining to pleadings, a plaintiff may find certain advantages in each of them.

It is important to note that strict liability in tort requires only that the plaintiff's injury “resulted from a condition of the product, that the condition was an unreasonably dangerous one and that the condition existed at the time it left the manufacturer's control.”³⁸ This required burden contains the least pitfalls for the plaintiff. There is no requirement that

³⁰ See generally Note, 14 DE PAUL L. REV. 488 (1965), wherein the writer cites arguments supporting the imposition of strict liability and arguments contrary to such imposition.

³¹ See *Escola v. Coca-Cola Bottling Co. of Fresno*, *supra* note 18.

³² See generally, James, *supra* note 27.

³³ *Ibid.* See also, *Greenman v. Yuba Power Products, Inc.*, *supra* note 17.

³⁴ See PROSSER, LAW OF TORTS, § 97, p. 673 (3rd ed. 1964).

³⁵ *Ibid.*

³⁶ See Prosser, *Assault upon the Citadel*, *supra* note 3 at 1134.

³⁷ Address by Mr. Leonard Ring, noted Chicago attorney, The Annual Meeting, Illinois State Bar Association, June 16, 1965, “Products Without Privity.”

³⁸ *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

plaintiff predicate liability on the theory of breach of warranty in order to impose strict liability on the manufacturer. Thus, the assault upon the citadel continues, and one can anticipate that other jurisdictions will follow the precedent set out by *Greenman* and *Suvada*. Strict tort liability is a revolutionary concept and surely is "the law of the immediate future."³⁰

Robert Breakstone

³⁰ Putnam v. Erie City Manufacturing Co., *supra* note 29.

TRUSTS—TOTTEN TRUST—INITIAL ILLINOIS RECOGNITION

For a number of years, the decedent, Antonio Petralia, was the sole owner of a savings account in his own name at the First National Bank of Chicago. On November 8, 1948, he closed this account and transferred all funds therein to an account in his own name as Trustee for his daughter, Dominica DiMaggio.¹ From the time the account was opened to the date of his death, Antonio Petralia had, and exercised, the power to make deposits and withdrawals from the account. At the death of Antonio Petralia, the beneficiary of the trust instituted a citation proceeding against the administrator of the estate, claiming title to the account. The probate court entered a decree in favor of the beneficiary, and it was affirmed by the appellate court. The Illinois Supreme Court upheld the decree on the grounds that a valid and enforceable inter vivos trust was created since the beneficiary had acquired a present interest during the lifetime of the decedent. *In re Petralia*, 32 Ill. 2d 134, 204 N.E.2d 1 (1965).

This decision marks the first judicial recognition of the tentative, or "Totten" Trust, in Illinois. A tentative trust was first defined in New York² and is now incorporated in the *Restatement of Trusts*.³ This note

¹ Signature card showed the words "Tony Petralia, Trustee" on the front, and on the reverse side the following language: "All the deposits in this account are made for the benefit of Domenica DiMaggio to whom or to whose legal representative said deposits or any part thereof together with the interest thereon, may be paid in the event of the death of the undersigned trustee."

² *In re Totten*, 179 N.Y. 112, 125, 71 N.E. 748, 752 (1904): "A savings bank trust is a deposit by one person of his in his own name as trustee for another. Such a deposit, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."

³ RESTATEMENT, TRUSTS, § 58 (2d ed. 1958).