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concept of fault, which is the principle at stake. With ingenuity the difficulties largely disappear. But now that the court has made it so clear that the liabilities of joint and co-tortfeasors are not necessarily identical with the other members of their respective classes, it is hoped that the law of contribution will be updated accordingly by legislative change.

Donald P. Simet

PRODUCTS LIABILITY CASES—PRIVITY NO LONGER REQUIRED

An American Airlines carrier crashed in New York killing plaintiff's intestate, a passenger. An action for wrongful death was commenced against American for negligence, and against both the manufacturer of the aircraft, Lockheed Aircraft Corporation, and the manufacturer of an allegedly defective altimeter in the said aircraft, Kollsman Instrument Corp., both for breach of implied warranty of fitness. Motions brought by both Lockheed and Kollsman to dismiss the complaint for failure to state facts sufficient to constitute causes of action pursuant to Rule 106(4) of the Rules of Civil Practice were granted. On affirmance by the Appellate Division, plaintiff appealed by permission to the Court of Appeals. *Held,* (4-3)—reversed as to the manufacturer of the aircraft, Lockheed, affirmed as to the manufacturer of the altimeter, Kollsman. The implied warranty of fitness of the manufacturer which put the assembled aircraft into the market runs in favor of all intended users of the product despite lack of privity of contract between such users and the manufacturer; no remedy lies against the manufacturer of the defective component part since there is adequate remedy against the manufacturer of the aircraft. *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963).

In *Winterbottom v. Wright*,[1] the general rule that a manufacturer of a defective product is not liable to users not in privity of contract entered the realm of Anglo-American jurisprudence. From the outset, the privity doctrine, at best, proved to be a hard pill for courts to prescribe. An exception early arose as to articles of manufacture "inherently dangerous to life and health."[2] Judge Cardozo's landmark *MacPherson* decision[3] in 1916, citing prior New York cases which had created exceptions to the privity doctrine,[4] imposed liability in negligence, regardless of privity, upon a manufacturer in favor of the ultimate consumer. *MacPherson* dealt the death blow to the vestige of the strict *Winterbottom* influence in New York and rapidly became accepted in the vast majority

1. 10 Mees. & W. 109, 152 Eng. Rep. 402 (Ex. 1842); see, *e.g.*, National Sav. Bank v. Ward, 100 U.S. 195 (1879).
2. Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852). See generally Prosser, Torts § 84 (2d ed. 1955).
3. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
4. *E.g.*, Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852) (mislabeled poison bottle); Statler v. George A. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063 (1909) (exploding coffee urn: liability to bystanders).

of American jurisdictions.[5] However, *MacPherson* predicated liability on negligence. There followed upon *MacPherson* a trend to impose strict warranty liability which would, in effect, make the manufacturer "a guarantor of his product, even though he had exercised all reasonable care."[6] This trend has found acceptance mainly in food cases, and strict warranty liability in food cases is the rule in the majority of American jurisdictions that have considered the problem.[7] Of the concept of strict warranty liability, Dean Prosser maintains:

> The preoccupation with contract in connection with warranty has no sound foundation. The action for breach of warranty was originally a tort action for breach of a duty assumed, and it is by no means clear that it was anything more than the accident that the cases which arose involved contracts which led to its being regarded as a matter of contract at all. The original tort theory is very much alive, and a return to it is possible whenever the courts choose to find that the manufacturer has assumed a duty to those who use his product.[8]

Courts have frequently ignored the privity doctrine in products cases. The several exceptions to the doctrine in American jurisdictions provide ample basis for its complete abolition in the products area and, in effect, it has been completely abolished in certain leading jurisdictions.[9]

The privity doctrine in New York was recently notably shaken by the Court of Appeals in two significant decisions. In *Greenberg v. Lorenz*,[10] a purchaser purchased from a retailer a can of salmon containing a piece of tin; purchaser's daughter was injured, and despite lack of privity between the retailer and the purchaser's daughter, the Court imposed strict warranty liability upon the retailer, holding that such liability would apply as to food and household goods and extend at least to the members of a purchaser's household. In *Randy Knitwear, Inc. v. American Cyanamid Co.*,[11] defendant manufacturer publicly advertised the quality of its goods, the labels upon which also made claims as to quality. Relying upon these representations, plaintiff purchased certain goods of the defendant from defendant's subpur-

5. Prosser, Torts § 84, at 500 (2d ed. 1955).
6. *Id.* at 506. See generally Prosser, *The Assault Upon the Citadel*, 69 Yale L.J. 1099 (1960).
7. Prosser & Smith, Cases and Materials on Torts 839 (3d ed. 1962); see Pompilio v. McGeory, 283 App. Div. 826, 129 N.Y.S.2d 13 (2d Dep't 1954); *accord*, Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).
8. Prosser, Torts § 84, at 507 (2d ed. 1955) (Footnotes omitted.); see, *e.g.*, Randy Knitwear Inc. v. American Cyanamid Co., 11 N.Y.S.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); Greco v. S.S. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1938); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932). See generally Lambert, *Sucessful Storming of the Citadel of Privity in New York*, Plaintiff's Advocate, July 1963, p.7.
9. See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960); Swift & Co. v. Wells, 201 Va. 213, 110 S.E.2d 203 (1959).
10. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).
11. 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962). See generally 36 St. John's L. Rev. 325 (1962).

chaser. The goods proving defective, plaintiff proceeded directly against defendant, and despite lack of privity, recovery was allowed upon a theory of breach of express warranty. Although it appeared that privity was thus virtually destroyed in New York, neither of these decisions explicitly so held; such generalization was left open to question,[12] for the *Greenberg* decision seemed limited to food cases and the *Randy Knitwear* decision, expressed in language of contractual reliance, seemed to abolish privity in express warranty cases only. There remained, at least, the remnant of privity in the implied warranty area.

On its face, the *Goldberg* case seems to answer all doubts with regard to the abolition of the privity doctrine with respect to products liability in New York. Writing the majority opinion, Chief Judge Desmond stated that leave to appeal had been granted in order that the "problem partially cleared up"[13] in the *Greenberg* and *Randy Knitwear* cases might be brought nearer to complete solution. He stated that the issue was whether "a manufacturer's implied warranty of fitness of his product for its contemplated use runs in favor of all its intended users, despite lack of privity of contract."[14] Referring to the *MacPherson* decision as an " 'extension' of existing court-made liability law,"[15] the Chief Judge described the *Greenberg* and *Randy Knitwear* decisions as extensions of warranty liability in favor of non-contracting consumers. The California Court's "strict tort liability"[16] was expressly equated to *Goldberg's* "strict warranty liability," and the reasoning underlying the California Court's theory of liability was set forth approvingly:

> The California Court said that the purpose of such a holding is to see to it that the costs of injuries resulting from defective products are borne by the manufacturers who put the products on the market rather than by injured persons who are powerless to protect themselves and that implicit in putting such articles on the market are representations that they will safely do the job for which they were built.[17]

However, the Court refused to extend liability to the manufacturer of the alleged defective altimeter:

> [F]or the present at least we do not think it necessary so to extend this rule as to hold liable the manufacturer (defendant Kollsman) of a component part. Adequate protection is provided for the passengers by casting in liability the airplane manufacturer which put into the market the completed aircraft.[18]

The dissent[19] deems incongruous the majority's creation of strict warranty liability in favor of airline passengers against a manufacturer with which such

12. See 2 Warren, Negligence in the New York Courts § 2.67 (Supp. 1962, at 132-136).
13. Instant case at 434, 191 N.E.2d at 81, 240 N.Y.S.2d at 593.
14. *Id.* at 434-35, 191 N.E.2d at 81, 240 N.Y.S.2d at 593.
15. *Id.* at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.
16. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
17. Instant case at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.
18. *Ibid.*
19. *Ibid.*

passengers have no contract. Citing the fact that the actual contracting party, the airline, owes no greater duty to passengers than "an undertaking of reasonably safe carriage . . . discharged by the use of due care,"[20] it is asserted by the dissent that this duty would not be altered if the airline manufactured its own planes. This assertion fails to distinguish between the liability imposed by the duty of care of a carrier and a manufacturer's warranty liability for his product. The distinction is between an action for negligence and an action for breach of warranty. Further criticized is the majority's choice of defendant and the theory upon which he is charged:

> We cannot accept the implication of the majority that the difference between warranty and strict products liability is merely one of phrasing.
>
> Inherent in the question of strict products or enterprise liability is the question of the proper enterprise on which to fasten it. In a theory of liability based, not on the regulation of conduct, but on economic considerations of distributing the risk of accidents that occur through no one's neglect, the enterprise most strategically placed to perform this function—the carrier rather than the enterprise that supplies an assembled chattel thereto, is the logical subject of the liability, if liability there is to be.
>
> Only in this way do we meet and resolve . . . the anomaly presented by . . . the majority, which, through reliance on warranty incident to sales, grants a recovery to a passenger injured through a nonnegligent failure of equipment but denies it to one injured through a nonnegligent failure of maintenance or operation.[21]

The dissent placed some reliance on the fact that following manufacture, inspection and certification of the aircraft were made by the Federal Aviation Agency, and sees this as distinguishing the aircraft manufacturer's situation from the usual warranty case where the manufacturer foreseeably knows that his product will not be inspected after it leaves his custody.[22] This supposed distinction, however, fails to account for the activities of federal regulative agencies operative in other product areas such as food, drugs and cosmetics. The fact of government inspection and regulation in those areas has not created any obstacle to the imposition of strict liability for warranty. Additionally, this distinction unwarrantedly assumes that such government inspection and regulation constitutes a panacea to product defects, an assumption rebutted by the very facts in this case.

Further, the dissent points out that "all are aware of the hazards attending air travel and accident and special insurance is readily available at moderate

20. Instant case at 438, 191 N.E.2d at 85-6, 240 N.Y.S.2d at 596.

21. *Id.* at 440-42, 191 N.E.2d at 85-6, 240 N.Y.S.2d at 597-99. *But see* Keeton, *Conditional Fault in the Law of Torts*, 72 Harv. L. Rev. 401 (1959) (recent developments in strict liability not warranting conclusion of social engineering rather than fault as the trend); James, *Nature of Negligence*, 3 Utah L. Rev. 275, 284 (1953) (argument that strict liability is based on conduct, cautioning against confusion of negligence concepts into area of strict liability).

22. Instant case at 438, 191 N.E.2d at 84, 240 N.Y.S.2d at 596.

rates."[23] This argument is unconvincing, considering that air transportation, widely and publicly advertised as being safe, has become the accepted mode of travel. It is also unrealistic to suggest that passengers insure themselves against risk of harm from defects in the manufacture of the aircraft, especially considering the lack of any such requirement in other product areas. To the dissent, the airline is the "dominant enterprise"[24] upon which liability should be attached, and the selection by the majority, applying its rule of strict warranty liability "not to the enterprise with which plaintiff dealt and relied upon, or to the enterprise which manufactured the alleged defective part, but to the assembler of the aircraft used by the carrier, involves a principle of selection which is purely arbitrary."[25] But in considering the dissenters' argument for imposition of strict liability upon the airline, it should be observed that the airline also is an aggrieved party. American did not make the defective part or assemble the plane but purchased the same from Lockheed. As a result of the accident, American lost a multi-million dollar asset, valuable trained personnel, and good will.

Regardless of the question of the propriety of imposing strict liability against the manufacturer-assembler rather than the carrier, the *Goldberg* decision, applicable to all manufacturers, represents the final step in the progression away from privity and toward strict warranty liability. The dissent's assertion that warranty at best is a useful fiction[26] is properly made. But by the implication of the majority that the concept of strict warranty liability would perhaps be more adequately described by the California Court's "strict tort liability," it seems clear that the warranty concept in this decision is nominal only. The theory that historically the warranty action was a tort action which became confused and adulterated by the imposition of contractual conceptions[27] seemingly has here been embraced and the contractual influence upon the action removed.

The dissent asserted further that because of the economic considerations involved, the selection of the enterprise to which strict liability should be imposed would best be left to the Legislature.[28] This position disregards the historical role of the Court in dealing with the problem of privity. It also disregards the tradition of such a case as the *MacPherson* decision where the Court definitively decided new law rather than leave the problem there involved to the Legislature.[29] It must be remembered that the Court here was called upon to consider the sufficiency of causes of action brought against manufacturers for breach of implied warranty of fitness, not the extent of the liability of the airline. The decision rendered is a logical step forward from the Court's

23. *Ibid.*
24. Instant case at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 598.
25. *Id.* at 443, 191 N.E.2d at 87, 240 N.Y.S.2d at 600.
26. *Id.* at 439-40, 191 N.E.2d at 85, 240 N.Y.S.2d at 597.
27. See authorities cited note 8 *supra* and accompanying text.
28. Instant case at 443, 191 N.E.2d at 87, 240 N.Y.S.2d at 600.
29. See note 3 *supra* and accompanying text.

decisions in the *Greenberg* and *Randy Knitwear* cases; *Goldberg* supplies the needed generalization not provided in those two cases: strict warranty liability to *all* intended users despite privity.

A serious question is posed by the dissent as to the propriety of a theory of products liability based on strict liability rather than on negligence. To the dissent, the purpose of strict liability is not regulation of conduct with a "view to eliminating accidents, but rather to remove the economic consequences of accidents from the victim who is unprepared to bear them and place the risk on the enterprise in the course of whose business they arise."[30] The dissent feels that removal of the defense of due care by the imposition of strict liability is too drastic a measure. The dissent would rather impose liability in negligence only, asserting that lack of care can easily be "brought to light through devices such as *res ipsa loquitur*."[31] But this reasoning supposes lack of care, and fails to provide a remedy where harm results from conduct which is nonnegligent in nature.

The *Goldberg* fact situation is one where due care might possibly constitute a good defense to an action for negligence. And if the conduct of Lockheed, of Kollsman or of both in concurrence could be classified as negligent, any negligent acts involved would seem too remote and hidden to be adequately uncovered by such devices as *res ipsa loquitur*. The plaintiff in such situations has virtually no remedy. At best he has the hollow theory of an action for negligence which, in cases where due care can be proved or where devices such as *res ipsa loquitur* cannot uncover negligent conduct, will subject him to nonsuit. This lack of effective remedy presents a social problem which warrants the imposition of a theory of liability other than negligence. A theory of strict liability where negligence need not be proved seems the obvious solution. Such a theory, based not on fault, imposes liability upon the actor whose conduct, although not necessarily negligent, is the source of the "creation of an undue risk of harm to other members of the community."[32] Such imposition is justifiable because of the economic position of the manufacturer to bear the losses and spread the risks as contrasted with the economic position and risk-spreading capacity of the innocent user.[33] It is also justifiable from the consideration of the relative positions of the manufacturer and the user with respect to the creation of the risk of harm. A further justification for strict liability here is the imposition of strict liability in other product areas such as food and inherently dangerous instrumentalities, as well as express warranty cases.

Goldberg is of great significance because it creates liability where none existed before. Manufacturers are now strictly liable to all intended users of their products. But the Court's limitation of liability to the manufacturer-

30. Instant case at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 598 (Footnote omitted.).
31. *Ibid.*
32. Prosser, Torts § 56, at 318 (2d ed. 1955) (Footnote omitted.). See generally Keeton, *supra* note 21.
33. See Keeton, *supra* note 21, at 441.

assembler alone, where adequacy of remedy is present, raises problems that may well outweigh the beneficial aspects of the decision. First, the limitation as to defendants on the basis of adequacy is unexplained and unprecedented; it does not follow logically from the reasoning of the Court with respect to the basis upon which it created its rule of strict liability. Second, this tenuous test of adequacy, vague and unexplained by the Court, will necessarily prove difficult in application.

With respect to the first problem, the Court here created a rule attributing strict liability to manufacturers, but refused to apply it to the manufacturer of a defective component part. The more active conduct in the creation of the risk of harm was that of the manufacturer of the altimeter. Nonnegligent creation of risk of harm to airline passengers from defective altimeters could reasonably and justly be made the predicate for strict warranty liability.[34] The majority's implication is strong that where the remedy is inadequate as against the manufacturer-assembler, strict liability will be extended to the component part manufacturer. Yet, no explanation is given by the Court for this limitation. Considering that the conduct of both manufacturers concurred in the creation of the risk, this conclusion of limitation does not logically follow. One effect of the limitation is that it renders joinder impossible where adequacy of remedy is present, thus depriving the manufacturer-assembler of pro rata contribution.[35] Multiple litigation will be another undesirable result, for the manufacturer-assembler may seek to recover its losses against the component part manufacturer in a separate action, or implead the component part manufacturer into the original action. The active participation of the component part manufacturer should be made the basis of strict liability if the manufacturer-assembler's participation, which appears less consequential by comparison, is so remediable. The most just solution, in cases where a manufacturer of a defective component part is involved, would seem to be to allow proceeding against both manufacturers jointly, regardless of adequacy of remedy.

The second, and more perplexing problem arises out of the Court's undefined test of adequacy of remedy. Foremost in doubt is the question of what standards adequacy of remedy consists. Does the financial stability of the manufacturer-assembler constitute adequacy? Will inability or difficulty in obtaining jurisdiction over the manufacturer-assembler amount to inadequacy of remedy? Will difficulties in the enforcement of a possible judgment enter into the question of adequacy? Or is adequacy of remedy a combination of all of these and other factors? Further in issue is whether a prospective plaintiff is in a position to determine adequacy of remedy prior to commencing his action. Among other adverse effects of this vague test will be the hindrance of

34. *Cf.* Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576 (1932) (exploding pop bottle: bottle manufacturer liable in action against manufacturer and bottler); Mueller v. Teichner, 6 N.Y.2d 903, 161 N.E.2d 14, 190 N.Y.S.2d 709 (1959). See generally 1 Frumer & Friedman, Products Liability § 10.02 (1963).

35. N.Y. CPLR § 1401; *cf.* McFall v. Compagnie Maritime Belge (Lloyd Royal) S.A., 304 N.Y. 314, 107 N.E.2d 463 (1952).

the lawyer in his role as predictor, *e.g.*, determining against whom to proceed. Also, the test forces prospective plaintiffs to establish adequacy or inadequacy of remedy prior to commencing suit, a burden of no little consequence. A further problem can be conceived where a plaintiff proceeds against the manufacturer-assembler alone, and it subsequently develops that the remedy is not adequate, *e.g.*, by reason of intervening bankruptcy of the manufacturer-assembler. How is this plaintiff to proceed against the component part manufacturer if the statute of limitations has run? Further will be the results of causing plaintiffs to possibly undergo the time and expense of several suits should inadequacy of remedy rear its head late in the proceeding against the manufacturer-assembler. A complete prediction of the adverse effects of the adequacy of remedy test would approach the impossible.

The test of adequacy of remedy detracts from the major holding of the case. It places burdens upon the action against a manufacturer for strict liability that will only impair the beneficial aspects of the remedy, in cases where component part manufacturers are involved. Judicial elaboration of the test could conceivably develop a monster of the law. The only solution is to abolish the test. Otherwise the evil of privity will have been replaced by an evil of undetermined nature and scope.

Goldberg represents a tremendously significant step in the development of New York tort law. The rule is clear: strict liability to all intended users despite privity of contract between such users and the manufacturer. But, the problems that will arise from the tenuous test of adequacy of remedy are many. The test serves no apparent purpose, and its main effects will be devastatingly detrimental to the rule of strict liability in products cases involving manufacturers of component parts. Unless the Court can come forward with both a convincing rationale for the failure to extend strict liability to a component part manufacturer where the remedy against the manufacturer-assembler is adequate, and define workable standards for the test of adequate remedy, this limitation should be overruled at the first opportunity.

Thomas C. Mack

Contributory Negligence as a Matter of Law

Plaintiff, a construction inspector for the New York City Transit Authority, sued to recover for a personal injury allegedly resulting from the negligent maintenance of a trench dug by defendant. While inspecting a subway construction site, plaintiff suffered a broken leg when the side of an unsupported trench collapsed as he stepped across it. A contract between the defendant and the Authority provided that defendant shore up the sides of excavations, provide "necessary or convenient" facilities for personnel, and be responsible for work connected injuries. Judgment for plaintiff was reversed on the law and the facts, and the complaint dismissed by the Appellate Division, which found that there was no actionable negligence on defendant's part and addition-