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# BENEFICIARIES OF SALES WARRANTIES IN NEW YORK: SOME QUESTIONS AND COMMENTS ON NEW LEGAL DOCTRINE

CARL M. SELINGER\*

The particular legal data to be considered comes from the state of New York and from the field of commercial law. But, the data raises issues of wider significance geographically and legally.<sup>1</sup>

## I. THE *Greenberg* DECISION

Oh, it's fine to be a genius of course  
But keep that old horse  
Before the cart  
First, you've gotta have heart.

From a popular tune of the period.<sup>2</sup>

In the spring of 1961, the New York Court of Appeals showed New York citizens, and the legal world, that it had heart. Sheila Greenberg, a fifteen-year old high school student, was injured at the family dinner table when she bit into a piece of canned salmon that concealed a metal fish tag. Sheila's father bought the can of salmon from a neighborhood retail store. More than three years of litigation and six judicial opinions (majority, concurring and dissenting) later, the Court of Appeals held in *Greenberg v. Lorenz*<sup>3</sup> that Sheila could recover damages from the retailer for breach of the statutory implied warranties of fitness and wholesomeness (merchantable quality),<sup>4</sup> although the parties had not been in privity of contract.

The opinion by Chief Judge Desmond first considers the New York authorities on the privity question:

Our difficulty is not in finding the applicable rule but in deciding whether or not to change it. The decisions are clear

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<sup>1</sup> The technique chosen for dealing with these issues is modeled in part after that employed by Professors Hart and Sacks, *The Legal Process* (tent. ed. 1958).

<sup>2</sup> *Heart*, from the Abbot & Wallop play, *DAMN YANKEES*, p. 25 (1955).

<sup>3</sup> 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

<sup>4</sup> N.Y. Pers. Prop. Law § 96 (Uniform Sales Act § 15) provides, in part, as follows:

1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

2. Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

enough. There can be no warranty, express or implied, without privity of contract (*Turner v. Edison Storage Battery Co.*<sup>5</sup> . . . ; *Pearlman v. Garrod Shoe Co.*<sup>6</sup> . . .) since a warranty is an incident of a contract of sale (*Fairbank Canning Co. v. Metzger*<sup>7</sup> . . .). The warranty does not run with the chattel (*Nichols v. Clark, MacMullen & Riley*<sup>8</sup> . . .). Therefore, as to food or other merchandise, there are no implied warranties of merchantability or fitness except as to the buyer (*Chysky v. Drake Bros. Co.*<sup>9</sup> . . . ; *Ryan v. Progressive Grocery Stores*<sup>10</sup> . . .). A wife buying food for her husband may be considered his agent so as to allow a recovery by him (*Ryan v. Progressive Grocery Stores* . . .) and she can bring an action of her own if she makes the purchase and suffers from the breach of warranty (*Gimenez v. Great A. & P. Tea Co.*<sup>11</sup> . . .). When two sisters lived in a common household, the one who bought the food was deemed an agent of the other (*Bowman v. Great A. & P. Tea Co.*<sup>12</sup> . . .). The same (*Bowman*) theory was expanded to let both husband and wife recover (*Mouren v. Great A. & P. Tea Co.*<sup>13</sup> . . .). But a dependent child is not a contracting party and cannot be a warrantee so no damages are due him (*Redmond v. Borden's Farm Products Co.*<sup>14</sup> . . .). [Footnotes added.]<sup>15</sup>

Then the court deals with the question of departing from the authorities:

The unfairness of the restriction has been argued in writings so numerous as to make a lengthy bibliography.<sup>16</sup> . . . About 20 states have abolished such requirements of

<sup>5</sup> 248 N.Y. 73, 74, 161 N.E. 423, 424 (1928).

<sup>6</sup> 276 N.Y. 172, 11 N.E.2d 718 (1937).

<sup>7</sup> 118 N.Y. 260, 265, 23 N.E. 372, 373 (1890).

<sup>8</sup> 261 N.Y. 118, 184 N.E. 729 (1933).

<sup>9</sup> 235 N.Y. 468, 139 N.E. 576 (1923).

<sup>10</sup> 255 N.Y. 388, 175 N.E. 105 (1931).

<sup>11</sup> 264 N.Y. 390, 191 N.E. 27 (1934).

<sup>12</sup> 308 N.Y. 780, 125 N.E.2d 165 (1955).

<sup>13</sup> 1 N.Y.2d 884, 154 N.Y.S.2d 642 (1956).

<sup>14</sup> 245 N.Y. 512, 157 N.E. 838 (1927).

<sup>15</sup> 9 N.Y.2d at 198-99, 173 N.E.2d at 774-75, 213 N.Y.S.2d at 41.

<sup>16</sup> Citing as examples: Starke, Implied Warranties of Quality and Wholesomeness in the Sale of Food, N.Y.L.J. April 8, 9, 10, 1957, p. 4, col. 1 (vol. 137, nos. 67-69); 1943 Report of N.Y. Law Rev. Comm'n 413; 1945 Report of N.Y. Law Rev. Comm'n 23; 1959 Report of N.Y. Law Rev. Comm'n 57; Miller, N.Y. State Bar Bulletin 313 (Oct. 1952); Melick, Sale of Food and Drink 94; Prosser, Torts 493 (2d ed. 1955); 29 Fordham L. Rev. 83 (1960); 44 Cornell L.Q. 608 (1959); 34 N.Y.U.L. Rev. 442 (1959); 35 St. John's L. Rev. 178 (1960).

privity, the latest being Virginia and New Jersey (*Swift & Co. v. Wells*<sup>17</sup> . . . ; *Henningsen v. Bloomfield Motors*<sup>18</sup> . . .). The Uniform Commercial Code (§ 2-318) provides that: '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.' In 1943, 1945 and 1959 the New York State Law Revision Commission, each time after careful study, recommended that the implied warranty of fitness for use should extend to the buyer's household, members, employees and guests. The Legislature did not act on any of the commission's proposals.

The injustice of denying damages to a child because of non-privity seems too plain for argument. The only real doubt is as to the propriety of changing the rule. Of course, objection will be made (as it has been made before in other such situations, see *Woods v. Lancet*<sup>19</sup> . . . ; *Bing v. Thunig*<sup>20</sup> . . .). But the present rule which we are being asked to modify is itself of judicial making since our statutes say nothing at all about privity and in early times such liabilities were thought to be in tort.<sup>21</sup> . . . Alteration of the law in such matters has been the business of the New York courts for many years (*MacPherson v. Buick Motor Co.*<sup>22</sup> . . . ; *Ultramares Corp. v. Touche*<sup>23</sup> . . .).

The *Ryan*, *Giminez* and *Bowman* cases<sup>24</sup> . . . in our court show an increasing tendency to lessen the rigors of the rule. In *Blessington v. McCrory Stores Corp.*<sup>25</sup> . . . we passed on a Statute of Limitations point only but we did not (as we could have under the old cases) dismiss for insufficiency a complaint which demanded damages for an infant's death when the dangerous article had been purchased by the infant's mother. There are a great many well-considered lower court decisions in this State which attest to the prevalent feeling that at least as to injured members of a buyer's

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<sup>17</sup> 201 Va. 213, 110 S.E.2d 203 (1959).

<sup>18</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>19</sup> 303 N.Y. 349, 102 N.E.2d 691 (1951).

<sup>20</sup> 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).

<sup>21</sup> Prosser, Torts 507 (2d ed. 1955); 1 Williston, Sales 502 (rev. ed. 1948).

<sup>22</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>23</sup> 255 N.Y. 170, 174 N.E. 441 (1931).

<sup>24</sup> *Supra* notes 10, 11 & 12, respectively.

<sup>25</sup> 305 N.Y. 140, 111 N.E.2d 421 (1953).

family the strict privity rule is unfair and should be revised. [Footnotes added.]<sup>26</sup>

Finally, the court reaches its decision with respect to the stare decisis problem and undertakes to spell out the significance of its present holding:

So convincing a showing of injustice and impracticality calls upon us to move but we should be cautious and take one step at a time. To decide the case before us, we should hold that the infant's cause of action should not have been dismissed solely on the ground that the food was purchased not by the child but by the child's father. Today when so much of our food is bought in packages it is not just or sensible to confine the warranty's protection to the individual buyer. At least as to food and household goods, the presumption should be that the purchase was made for all the members of the household.<sup>27</sup>

## II. *Greenberg* IN THE COURT OF APPEALS

### A. *The Court's Decision to Depart from Precedent*

Just why, *precisely*, did the court choose to depart from precedent? Because a lot of learned authors said it should, by a show of hands in books, reports and law review articles? Because courts in other jurisdictions had departed from similar precedents? Because statutes had been proposed to alter the precedents? Because, in the light of the prior warnings, the defendant should have insured against this damage liability and therefore could not claim unfair surprise?<sup>28</sup> Because, in the light of the actuarial process involved in fixing insurance rates, defendant's insurance company could not claim unfair surprise?<sup>29</sup>

Considering the potent values that support the doctrine of stare decisis, do the above reasons, taken singly or together, justify a failure to adhere to precedent in the absence of one or more good

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<sup>26</sup> *Supra* note 3, at 199-200, 173 N.E.2d at 775, 213 N.Y.S.2d at 41-42.

<sup>27</sup> *Id.* at 200, 173 N.E.2d 775-76, 213 N.Y.S.2d at 42.

<sup>28</sup> See Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463, 492 (1962).

<sup>29</sup> See Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 Yale L.J. 554, 569-74, 579-81 (1961). In the peculiar case of New York retailers, for whom rates are calculated on a state-wide rather than a nation-wide basis, the lack of unfair surprise is clearer under Professor Morris' analysis where the loss is ultimately borne by the manufacturer's insurer, either by way of action over against the manufacturer for breach of warranty or directly under an "additional interests of vendors" clause, protecting the retailer. In *Greenberg*, a third party claim against the canner was withdrawn, and the canner's attorneys assumed the defense of the retailer. Record, p. 58.

reasons why a contrary decision would be better?<sup>30</sup> Are such reasons set forth in the *Greenberg* opinion with any reasonable degree of clarity? Recall the statement that "the injustice of denying damages to a child because of non-privity seems too plain for argument."

Suppose there *were* good reasons for declining to adhere to precedent, and suppose these reasons *are* too plain for argument, does that make them too plain to be worth stating? Do the values upon which the doctrine of stare decisis is based become irrelevant once a court has rightly decided to depart from precedent? Perhaps not! At any rate, that which follows is an attempt to explore some of the implications of the last question.

### B. *The Peculiar Function of Courts of Last Resort*

The New York Court of Appeals stands, as do other courts of last resort, at the apex of what Professors Hart and Sacks have denoted a "great pyramid of legal order." The pyramid is grounded in those myriad individual and group decisions which happily are effectuated without dispute, and then ranges upward through the relatively small number of disputes that do arise and must be settled—privately in most instances, but sometimes officially, in trial courts or, infrequently, in appellate courts.<sup>31</sup> Focusing solely on matters of dispute, a great number of individuals at various levels of the pyramid are called upon to effect settlements. Yet society demands, and rightly so, evenhandedness of decision, from settler to settler, and from level to level. To satisfy this demand, it is necessary to have legal doctrines to which all decisions are expected to conform.<sup>32</sup> Apart from the legislature, only a court of last resort can announce such doctrines. Further, it must be recognized that a single court of last resort can only hear and conscientiously decide a minute fraction of the total number of disputes.

Given these circumstances, is a court of last resort doing its job adequately when it writes an opinion that merely tells "who wins"? Consider the following statement about opinions of the United States Supreme Court:

[T]he test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of thousands of judges who have to handle the great mass of litigation which ultimately develops.<sup>33</sup>

<sup>30</sup> See Hart & Sacks, *op. cit. supra* note 1, at 587-88, 601-02.

<sup>31</sup> *Id.* at 312-13.

<sup>32</sup> See Keeton, *supra* note 28, at 468-69.

<sup>33</sup> Hart, Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 96 (1959).

Would there be any merit to a belief that there is less necessity for guidance in a situation in which a court of last resort has chosen to depart from precedent than in a situation where the court has chosen to rely upon and extend precedent?

### C. *The Limited Utility of the Statement of Facts*

Like most full judicial opinions, the *Greenberg* opinion contains a statement of the facts of the case on which the decision is based. Certainly, an inquiry into what facts an opinion emphasizes and what facts it deemphasizes or excludes can be helpful in its interpretation. Significance may be attached to the omission in the present opinion of any mention of the fact that Sheila had requested her father to buy the can of salmon—a fact found by the trial judge,<sup>34</sup> mentioned in the opinion of the appellate term<sup>35</sup> and relied upon by Judge Froessel of the Court of Appeals in a concurring opinion.<sup>36</sup> In fact, a murmur from the factual chasm in the majority opinion all but says that “we are not deciding this case on any principal-agent relationship.” But, putting the concurring opinion aside, do harried trial lawyers and trial judges in the ordinary situation, have the time and inclination to deal adequately with such subtleties? As to the murmur in *Greenberg*, see the opinion of the trial court judge in *Waful v. Contractors Syracuse Sales Co.*,<sup>37</sup> as quoted, *infra*.<sup>38</sup>

### D. *The Choice of a Narrow Ground for Decision*

Plainly, the overall tenor of the *Greenberg* opinion is one of restraint, and there is evidence of a desire to place the decision on relatively narrow grounds.

Once a court has decided to depart from precedent, what limitations, if any, does a recognition of the function of a court of last resort impose on the court's freedom to state narrow grounds for decision? One limitation has been suggested by Professor Keeton. With regard to “the principle sometimes urged that a court in acting creatively should adopt the narrowest possible ground of departure that will cover the case at hand,” he says that

in fact, that principle, urged in the name of continuity, is less conducive to predictability of decisions than is the expression of broader grounds that actually guide the court to its decision, even though the expression of the broader grounds may befuddle efforts to find a clear line of demarcation between holding and dictum. Expression of a narrower ground

<sup>34</sup> 14 Misc. 2d 279, 178 N.Y.S.2d 404 (N.Y. City Ct. 1957).

<sup>35</sup> 12 Misc. 2d 883, 178 N.Y.S.2d 407 (App. T. 1958).

<sup>36</sup> *Supra* note 3, at 200, 173 N.E.2d at 776, 213 N.Y.S.2d at 43.

<sup>37</sup> 31 Misc. 2d 77, 219 N.Y.S.2d 1004 (Sup. Ct. 1961).

<sup>38</sup> See text following note 66 *infra*.

of decision may appropriately be chosen where the court's attraction to the broader principle falls short of conviction. But where conviction has been reached, an opinion placing the decision on a narrower ground is misleading.<sup>39</sup>

Are there even more obvious limitations? Consider the various narrow grounds for decision suggested by the *Greenberg* opinion.

Perhaps the clearest "reason" in the opinion for the majority's decision to depart from precedent is contained in the sentence: "Today when so much of our food is bought in packages it is not just or sensible to confine the warranty's protection to the individual buyer." But what has food sold in packages to do with who should win in the *Greenberg* case? In days before food was sold in packages did not teenage daughters eat food purchased by fathers? Or is this a matter of proof of causation? Obviously, the question of such proof does not differ significantly as between father and teenage daughter in the *Greenberg* situation today. Did it before food was sold in packages? Or is this a matter of the ability of the purchaser or ultimate consumer to detect the fish tag? Presumably, the fish tag was embedded in the fish. There is no indication in the record that Sheila ate the fish, can and all. And again, what difference between Sheila and her father, now or before the days of packaging?

Of course, the question of packaging is relevant to the ability of the *retailer* to detect and eliminate unsafe products. But, a lack of this ability would seem to cut *against* his liability,<sup>40</sup> or at least indicate that ultimate liability should fall, as expeditiously as possible, on the party who may have the ability, *i.e.*, the processor. There are other arguments for direct manufacturer's liability, but these involve the elimination of certain stumbling blocks in the road to a liability which the manufacturer was, in the ordinary situation, required to ultimately bear long before *Greenberg*.<sup>41</sup> In terms used by Professors Hogan and Penney, direct manufacturer's liability presents problems of "potential defendants," but the *Greenberg* situation raises questions of "potential plaintiffs."<sup>42</sup> Thus, the question of packaging takes one far afield. Is it ever proper for the sake of restraint to state as a ground for decision a principle that is irrelevant to the dispute to be decided?

<sup>39</sup> Keeton, *supra* note 28, at 488-89 (footnote omitted). For a general analysis of doctrinal formulation in light of the necessity for guidance, see *id.* at 497-99.

<sup>40</sup> See generally Waite, Retail Responsibility and Judicial Law Making, 34 Mich. L. Rev. 494 (1936).

<sup>41</sup> See Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1123-24 (1960).

<sup>42</sup> Hogan & Penney, Annotations to the Uniform Commercial Code to the Statutory and Decisional Law of New York State, N.Y. Comm'n On Uniform State Laws, New York Annotations to Uniform Commercial Code and Report of Commission on Uniform Commercial Code 47 (1961).



Notice next that the opinion states as the touchstone of liability the conclusion that "the purchase was made for" the plaintiff. If the court means that recovery is granted because Sheila was in a contractual relationship with the defendant retailer, would this be a legitimate narrow ground for decision? Presumably, the court intends to abandon the principal-agent rationale that had previously proved so troublesome.<sup>43</sup> Apparently, the only other justification for resting liability on such a conclusion would involve a finding that the plaintiff was a third party beneficiary, in the traditional contract sense, of the contract between the retailer and the purchaser. This analysis requires at the outset a search for an objective manifestation of the promisor's intention to benefit the third party. Thus, in the unlikely event that the retailer expressly warrants the goods in such a manner as to indicate an intention to benefit the ultimate consumer, this analysis might be useful.<sup>44</sup> Similarly, it might be useful if the retailer has reason to know that the product will be used by a third person.<sup>45</sup> But the present case involved neither of these situations. Therefore, would it be proper for the court, for the sake of restraint, to utilize without discussion a well-developed legal doctrine as a ground for decision in a case where the traditional requisites for its application are not obviously present?<sup>46</sup>

Finally, there are indications in the *Greenberg* opinion that, for the present, the privity bar is intended to be raised only as to certain products (food and household goods) and certain nonpurchasing plaintiffs (members of the buyer's household). If this is the court's intention, is it not of paramount importance that these categories accurately reflect some underlying legal principle? Is it likely that categories of the kind suggested in *Greenberg* will do so? If the relevant legal principles apply beyond the named categories, would a later judicial decision based solely on the fact that the case does not fall within the categories be entitled to the respect ordinarily accorded judicial decisions?<sup>47</sup> Can the problem with respect to a given category be side-stepped by pointing out that similar categories were used by the drafts-

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<sup>43</sup> The New York courts had held so often that a purchasing wife was merely her husband's agent, for purposes of permitting the husband to recover for his injuries, that at one point a trial court denied recovery where the purchasing wife was herself injured, on the ground that there was no privity between the wife and the seller. *Vaccaro v. Prudential Condensed Milk Co.*, 133 Misc. 556, 232 N.Y. Supp. 299 (N.Y. City Ct. 1927).

<sup>44</sup> 4 Corbin, Contracts § 773 (1951).

<sup>45</sup> Cf. *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928) (a case involving the direct liability of a manufacturer).

<sup>46</sup> The New York Court of Appeals seems more clearly to have done this sort of thing in a recent negotiable instruments case. See *First Nat'l Bank v. Fazzari*, 10 N.Y.2d 394, 179 N.E.2d 493, 223 N.Y.S.2d 483 (1961), 26 Albany L. Rev. 334 (1962).

<sup>47</sup> Cf. Excerpts from Fuller, *The Forms and Limits of Adjudication* (Unpublished paper, 1957), reproduced in Hart & Sacks, *op. cit. supra* note 1, at 421.

men of the Uniform Commercial Code or of some other proposed statute?<sup>48</sup>

Of course, once a court of last resort has announced certain categories, it is not foreclosed from re-examining these categories in later cases. The "one step at a time" language in *Greenberg* seems to anticipate such a process. Does the availability of re-examination on appeal relieve the court of the burden of testing the categories against underlying legal principle in the first instance? Consider the costs of appellate justice in time and money to the parties and to society generally. Consider also the extent to which the spectre of a necessary appeal may cast a distorting shadow over the efforts of litigants or prospective litigants to reach a private settlement before any judicial determination.

Do not these latter considerations also suggest another limitation on the kinds of narrow legal principles that may wisely be chosen as the basis for decision? For example, prior to *Greenberg*, a considerable number of courts outside of New York had carved out an "exception" to the privity requirement in food cases.<sup>49</sup> In one of the best known of these cases, *Jacob E. Decker & Son v. Capps*,<sup>50</sup> the Texas Supreme Court, after pointing out that the ultimate consumer of food is usually unable to ascertain whether it is fit for human consumption, further explains the food exception as follows:

It seems to be the rule that where food products sold for human consumption are unfit for that purpose, there is such an utter failure of the purpose for which the food is sold, and the consequences of eating unsound food are so disastrous to human health and life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.<sup>51</sup>

Would it have been wise for the Court of Appeals in 1961 to have based its decision on such reasoning with respect to the peculiar nature of food cases? In view of the fact that eminent legal scholars from Llewellyn<sup>52</sup> to James<sup>53</sup> and Prosser<sup>54</sup> had, after careful analysis, overwhelmingly rejected the notion that a public policy calling for protection of the ultimate consumer could be limited to injuries caused by

<sup>48</sup> Cf. Hart & Sacks, *op. cit. supra* note 1, at 397-98.

<sup>49</sup> See Prosser, *supra* note 41, at 1103-10.

<sup>50</sup> 139 Tex. 609, 164 S.W.2d 828 (1942).

<sup>51</sup> *Id.* at 612, 164 S.W.2d at 829.

<sup>52</sup> Llewellyn, *On Warranty of Quality, and Society: II*, 37 Colum. L. Rev. 341, 404-08 (1937).

<sup>53</sup> James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 Tenn. L. Rev. 923, 926 (1957).

<sup>54</sup> Prosser, *supra* note 41, at 1138-40.

bad food?<sup>55</sup> In view of the fact that two jurisdictions which had originally recognized an exception in the case of food had extended the "exception" in recent cases involving other products,<sup>56</sup> and the supreme court of a neighboring jurisdiction had reasoned as follows in breaking the bonds of privity for the first time?

We see no rational 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 barriers of privity.<sup>57</sup>

If, in choosing a narrow ground for decision, a court ignores the analytic work of legal scholars and the experience of courts in other jurisdictions, does the court not expose itself to an undue risk that it may be compelled to do by halves—at the cost of unnecessary appeals or worse—what ought to have been done at once?

Coming back to categories of products and plaintiffs, the court in *Greenberg* does qualify its categorization by the phrase "at least." Does this qualification obviate the necessity of basing the categorization on underlying legal principle? Of stating such principle? Is it possible for trial lawyers and trial judges to ascertain what situations are "at most" without knowing *why* those specified are "at least"?

Was there a sound, but relatively narrow, basis for decision available to the court of appeals in *Greenberg*? Could not such a basis for decision have been derived from those earlier decisions that had evaded the privity requirement in warranty cases? Indeed, if a court is not to go beyond the proper function of adjudication, must not each of its decisions—even one departing from precedents directly in point—be based upon some pre-existing legal principle?<sup>58</sup>

Suppose the Court of Appeals had said the following:

In previous cases, this court has held that a seller may be liable for breach of warranty to an injured plaintiff who did not pay for the goods. True, this liability has been stated in terms of a principal-agent relationship between the plaintiff and the person who paid for the goods. But, as the relationship has been presumed even in the absence of the evidence usually necessary to establish agency, the form of statement should not have concealed the actual basis for the decisions. In each case, the relationship between the person

<sup>55</sup> Cf. Llewellyn, *The Common Law Tradition: Deciding Appeals* 429 (1960).

<sup>56</sup> *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 353 P.2d 575 (1960) (grinding wheel); *Martin v. J. C. Penney Co.*, 50 Wash. 2d 560, 313 P.2d 689 (1957) (shirt).

<sup>57</sup> *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 383, 161 A.2d 69, 83 (1960).

<sup>58</sup> See Hart & Sacks, *The Legal Process* 588-89 (tent. ed. 1958).

paying for the goods and the plaintiff was such that the plaintiff would reasonably expect to use the particular purchased goods, even though he was not the one to pay the seller for them. When such a relationship exists, the plaintiff would further reasonably expect that nothing of the importance of compensation for injuries would turn on who paid for the goods. This expectation has not been disappointed by this court. Indeed, insofar as legal doctrine with respect to such a matter could influence pre-accident conduct, a contrary view could only have tended to interfere with the generally satisfactory kinds of relationships involved. The parent-minor child relationship with respect to food, which is involved in the present case, does not differ significantly from those with which we have already dealt. We therefore hold that the plaintiff is not barred by lack of privity of contract from recovering against defendant-retailer for breach of warranty.

Does the conjunction in the *Greenberg* opinion of the category of food and household goods with the category of members of the buyer's household indicate a basis for decision along the lines suggested? *Clearly* indicate such a basis for decision? If the basis had been spelled out more clearly, would the trial courts have subsequently interpreted *Greenberg* as they did?

### III. *Greenberg* IN THE TRIAL COURTS

In the months following the *Greenberg* decision, the trial courts of New York were called upon to interpret the decision in a considerable number of cases.<sup>59</sup> Of those trial court decisions that are disclosed in the reports, only one applies *Greenberg* beyond its precise facts.<sup>60</sup> In that case, the trial court awarded, *inter alia*, judgment to

<sup>59</sup> "Trial courts" in the text refers to courts of first impression. As will be indicated, these courts were typically called upon to interpret *Greenberg* in the context of a motion to dismiss the plaintiff's complaint for failure to state a cause of action.

<sup>60</sup> *Simpson v. Eichenbrunner*, 31 Misc. 2d 958, 959, 217 N.Y.S.2d 678 (App. T. 1961).

The author's reliance on reported cases for collection of data is, of course, subject to criticism on the ground of incompleteness and consequent possible distortion. There is no requirement in New York that an opinion be written in passing on a motion to dismiss a complaint. Where an opinion is written, its publication depends in the first instance on the discretion of the trial judge who renders the opinion. Opinions submitted to the State Reporter for official publication in the New York Miscellaneous Reports are further screened by him. However, there is no further screening of opinions submitted for publication in West Publishing Company's New York Supplement, and, in practice, many opinions published unofficially are later published officially, to assure equal access for subscribers. See Flavin, *Decisions and Opinions for Publication*, 12 *Syracuse L. Rev.* 137, 145 (1960) (Mr. Flavin is the New York State Reporter.). Among those unreported trial court decisions dealing with the beneficiary problem, one may well suppose that those taking a less restrictive view of *Greenberg* were less likely to be re-examined on appeal and thus are not revealed in the reports at that stage. Nevertheless, what is revealed in the reports is striking.

an employee against the retailer of machinery purchased by his employer. The appellate term affirmed on this aspect of the case, relying upon an "extension" of *Greenberg*.

*Amie v. Laure*<sup>61</sup>—The trial court dismissed the complaint of a wife who was injured mixing cement bought by her husband from defendant-retailer. With reference to the Court of Appeals opinion in *Greenberg*, the court said:

It did not . . . indicate any intention to vary the privity requirement—so clearly stated—in circumstances other than that there presented. . . . If, as would be required in the present case, this court should hold that the purchase of a bag of cement by a husband removed the requirement of privity of contract in an action by his wife it would be going far beyond the step just taken by this State's highest court.

However, the appellate division reversed in a memorandum opinion.<sup>62</sup>

*Rypins v. Rowan*<sup>63</sup>—A fourteen-year-old girl sought to recover against the person who installed a combination storm door at a home (presumably her's), and also against other parties defendant. The trial court granted a motion to dismiss by one of the other parties, alternatively on the ground that "while the rule with respect to privity of contract has been relaxed, the relaxation thus far is only with respect to food and household goods . . .," and plaintiff can not recover since a combination storm door does not "come within the category specified in the *Greenberg* case. . . ."

*Leavitt v. Ford Motor Co.*<sup>64</sup>—The trial court dismissed a claim by an automobile buyer, who was injured when a tire blew out, against the automobile manufacturer. Although the precise issue was that of direct manufacturer's liability, the opinion contained the statement:

Whether the rule in the *Greenberg* case should be extended to automobiles is a matter for the appellate courts to decide. As the law presently stands, it does not appear that the *Greenberg* case has abolished, with respect to all forms of merchandise, the ancient doctrine that privity of contract is necessary to support an action for breach of warranty.

*Sparling v. Podzielinski*<sup>65</sup>—The trial court granted a motion for summary judgment in favor of the wholesaler of a water ski tow rope in an action by the ultimate purchaser of the rope. Again the precise

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<sup>61</sup> 32 Misc. 2d 207, 223 N.Y.S.2d 41 (Sup. Ct. 1962).

<sup>62</sup> *Amie v. Laure*, 16 App. Div. 2d 736, 226 N.Y.S.2d 832 (1962).

<sup>63</sup> 30 Misc. 2d 568, 219 N.Y.S.2d 288 (Sup. Ct. 1961).

<sup>64</sup> 28 Misc. 2d 740, 215 N.Y.S.2d 679 (Sup. Ct. 1961).

<sup>65</sup> 32 Misc. 2d 227, 223 N.Y.S.2d 10 (Sup. Ct. 1962).

## BENEFICIARIES OF SALES WARRANTIES

question was one of direct liability and *Greenberg* was distinguished on that ground, but initially the court said:

[U]ntil the Court of Appeals sees fit to change the rule in other than food cases, this court is bound to hold that, in actions like the present one, without privity of contract between the parties there can be no action on an express or implied warranty.

*Wajul v. Contractors Syracuse Sales Co.*<sup>66</sup>—The defendant leased certain construction equipment to a corporation with knowledge that employees of that corporation and of a second corporation would use the equipment. The trial court dismissed complaints by three plaintiffs, one employee of each corporation and the president of both corporations who alleged that the corporations were simply his “alter egos.” The court did not discuss the question whether the sales warranties were applicable to a lease, but rather rested its decision on the following interpretation of *Greenberg*:

It is true that implicit in the *Greenberg* case is the recognition that the law will be called upon in the future, as it has in the past, to adapt itself to the changing realities of social conditions. This is not, however, a clarion call to revolution. It permits rather a ‘one step at a time’ orderly liberalization within the frame of reference to which the case addressed itself, i.e., food cases in which there is involved a principal-agent question as to the purchaser and the plaintiff.

*Serrano v. Riverside Dinette Prods. Co.*<sup>67</sup>—The trial court dismissed a claim against the manufacturer of a dinette chair by a social guest of the ultimate purchaser. With reference to the *Greenberg* case, the court said, “it is to be noted that this action was brought against the seller, not against the manufacturer, as in the instant case, nor was the doctrine extended to a casual social guest of the purchaser.”

*Thomas v. Leary*<sup>68</sup>—The appellate division reversed a trial court order dismissing a claim by a dental technician against an office equipment supplier who had sold a dental chair to the dentist by whom plaintiff was employed. The appellate division reasoned:

On logic, as distinguished from an arbitrary limitation, there should be no distinction between the *Greenberg* case and the present case, merely because food and family were involved in that case and a chair and an employer-employee

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<sup>66</sup> *Supra* note 37.

<sup>67</sup> 222 N.Y.S.2d 537 (Sup. Ct. 1961).

<sup>68</sup> 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (1962).

relationship in this. If the doctrine of strict privity, that is, answerability only to the immediate purchaser, is to be liberalized in this state and additional rights given, the distinguishing facts in these two cases seem to matter little on the basis of pure legal logic.

*Williams v. Union Carbide Corp.*<sup>69</sup>—The appellate division in a memorandum opinion, reversed a trial court order dismissing a complaint by an employee against the defendant who sold a safety mask to plaintiff's employer.

#### IV. THE WORK OF THE TRIAL COURTS

##### A. *The Importance of Wise Interpretation*

Notice that, save for the *Waful* case which was not appealed, in each instance where a restrictive interpretation of *Greenberg* was decisive, the decision was overturned by an intermediate appellate court. Does this mean then that the availability of appeal relieves a trial judge of the burden of doing his best to interpret wisely court of appeals opinions? Was the court in *Leavitt* right in saying that "whether the rule in the *Greenberg* case should be extended to automobiles is a matter for the appellate courts to decide?"<sup>70</sup>

Is it important that *Greenberg* was restrictively interpreted in some cases in which such an interpretation was not decisive, e.g., where there was also an issue of direct liability of the defendant? In this respect, consider the prospective influence of one published trial court opinion on others.<sup>71</sup> For example, the construction of *Greenberg* in the *Leavitt* case, where the interpretation was not decisive, was relied upon in *Waful*, in which it was. Consider also the way in which a restrictive interpretation of *Greenberg* may have tended to divert attention from the decisive question of direct liability. Later decisions give every indication that the New York courts are in the process of judicially recognizing such liability, even in the case of implied warranties.<sup>72</sup>

##### B. *The Trial Courts' Work Before Greenberg*

As the *Greenberg* opinion indicates, some lower New York courts, including trial courts, had previously refused to apply the privity

<sup>69</sup> 17 App. Div. 2d 661, 230 N.Y.S.2d 476 (1962).

<sup>70</sup> *Supra* note 64; see text following note 48 *supra*.

<sup>71</sup> The extensive publication of New York trial court opinions raises questions that range beyond the scope of the present problem. However, it should be noted that such publication affords a ready means for disclosing to appellate courts, legal scholars, law revision commissions and legislators significant "trouble spots" in the law at the stage of initial official application.

<sup>72</sup> *Hoffman v. Cox*, 35 Misc. 2d 103, 229 N.Y.S.2d 485 (Sup. Ct. 1962); see *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (case involving express warranties).

doctrine in beneficiary cases. Two such trial court cases were *Welch v. Schiebelhuth*,<sup>73</sup> an action against the retail seller of cake by the wife of the purchaser and members of his family who were his guests, and *Parish v. The Great Atl. & Pac. Tea Co.*,<sup>74</sup> an action against the retailer of jam by the minor children of the purchasing mother. Avoiding the temptation to fictionalize agency relationships, the opinions in these cases probe in some depth for principles underlying both the previous refusals to apply the privity doctrine and the implied warranty action for personal injuries itself. The decisions are made to rest directly upon the principles perceived.<sup>75</sup> Why the change in approach after *Greenberg*? Was it all, as it undoubtedly was in part, a matter of different judicial personnel rendering the decisions? Or does an opinion such as that written in *Greenberg* constitute an invitation to superficial thinking on the part of trial courts and to abdication of their responsibility for the creative development of the law? Can a trial court judge consciously accept such invitations without violating his oath of office?

C. *A Few Suggestions on Point of View in Interpretation of New Legal Doctrine*

"Some day we shall have a real study of how far courts of first instance really apply the rules laid down by courts of appeals. Interim studies suggest that the answer is: not too much."<sup>76</sup>

The problem, as Professor Llewellyn recognized, is largely one of crowded calendars that severely limit the trial judge's opportunities for research and reflection on difficult legal questions. To this extent, a solution lies beyond the scope of the present discussion. Perhaps, however, some progress might be achieved in dealing with decisions like *Greenberg* by a consideration of the point of view from which they ought to be interpreted.

The principal difficulty lies, does it not, in ascertaining the extent to which those prior precedents that were not expressly overruled possess continued vitality. In the present situation the most troublesome prior precedent is *Chysky v. Drake Bros. Co.*,<sup>77</sup> a 1923 decision in which the court of appeals denied warranty recovery to a waitress injured by a nail embedded in cake bought by her restaurant employer from defendant bakery and served to her at lunch. This is the principal case in New York which is regarded as establishing a "gen-

<sup>73</sup> 11 Misc. 2d 312, 169 N.Y.S.2d 309 (Sup. Ct. 1957).

<sup>74</sup> 177 N.Y.S.2d 7 (N.Y. City Munic. Ct. 1958).

<sup>75</sup> See also the trial court opinion in *Greenberg* itself. 14 Misc. 2d 279, 178 N.Y.S.2d 404 (N.Y. City Ct. 1957).

<sup>76</sup> Llewellyn, *On Warranty of Quality and Society*, 36 Colum. L. Rev. 710 n.36 (1936).

<sup>77</sup> 235 N.Y. 468, 139 N.E. 576 (1923).



eral rule" that sales warranties can benefit only the buyer. From this general rule, it is said, the *Greenberg* case carves out an area of exceptions. Thus, a non-buyer plaintiff is placed in the position of assuming a burden of showing that he comes within the exceptions. This, in turn, will often involve a showing that the court of appeals intended to base its decision on wider rather than narrower grounds.

But, consider the soundness of this point of view in the light of the following passage:

Although decided cases should be presumed valid as authority, the presumption should be a rebuttable one, for if a lower court can discern from the rationalized doctrinal trend of the highest court that an old precedent is no longer in harmony with the body of law which the latter is developing, it would be remiss in its duty if it did not refuse to follow the isolated precedent.<sup>78</sup>

In the view of its author, this approach involves

. . . an acceptance of the premise that stare decisis is the organizing principle of the legal system, and that if it is to work as such, it must be assumed that there are rational grounds for the decisions above.<sup>79</sup>

Can it be doubted that *Greenberg* was part of a doctrinal trend in the area of beneficiaries of sales warranties? That the doctrinal trend had been rationalized (albeit without great clarity) in the evolution from presumptive agency to considerations of "fairness" and "justice" relating at least to food and household goods used by members of the buyer's household?<sup>80</sup> Can the logical implications of this doctrinal trend be squared with a "general rule" that only buyers are benefited by sales warranties?<sup>81</sup> Notice that the Court of Appeals made no effort to square them.

Once a trial judge rids himself of the "general rule" of the *Chysky* case he ought then to be free to ascertain whether the logical implica-

<sup>78</sup> Comment, Stare Decisis in the Lower Courts, 59 Colum. L. Rev. 504, 508-09 (1959).

<sup>79</sup> Id. at 509.

<sup>80</sup> The significance of Judge Froessel's concurrence based upon factual evidence of agency should have been appreciated in the trial courts. In an important recent Court of Appeals decision involving direct manufacturer's liability, a concurring opinion by Judge Froessel is similarly useful in interpreting the majority opinion. *Randy Knitwear, Inc. v. American Cyanamid Co.*, supra note 72.

<sup>81</sup> Compare the following language from the appellate term opinion allowing recovery in *Greenberg*:

The wave of the present, as we have seen . . . has been sweeping away the spurious barrier of privity in these cases. The current of the law is sufficiently potent to clear its own channel. We conceive it to be our duty, therefore, to recognize the event and act on it.

12 Misc. 2d 883, 887, 178 N.Y.S.2d 407, 411.

tions of *Greenberg* extend to the particular case before him, and, if they do, whether there are other principles of greater persuasive force indicating a contrary result. Viewed in this light, the privity doctrine in beneficiary cases, even as applied to the precise facts of *Chysky*, must stand on its own merits. Could it have done so in any of the beneficiary cases which arose in the New York trial courts?

#### V. THE POSSIBILITY OF STATING BROADER REASONS FOR DECISION

In deciding *Greenberg* the Court of Appeals may have been concerned with more than preserving the integrity of certain kinds of relationships by satisfying the expectations generated by them.<sup>82</sup> The references to "injustice" and "unfairness" suggest that application of the privity doctrine in beneficiary cases results in something less than an even-handed application of the basic economic principles of absolute enterprise liability—of which implied warranty liability for personal injuries is a species.<sup>83</sup>

These economic principles are comprehensively analyzed in a thoughtful article by Professor Calabresi.<sup>84</sup> Briefly stated, enterprise liability involves, in the first place, the principle of *resource allocation*:

Not charging an enterprise with a cost which arises from it leads to an understatement of the true cost of producing its goods; the result is that people purchase more of those goods than they would want if their true cost were reflected in price. On the other hand, placing a cost not related to the scope of an enterprise on that enterprise results in an overstatement of the costs of those goods and leads to their underproduction. Either way the postulate that people are by and large best off if they can choose what they want, on the basis of what it costs our economy to produce it, would be violated.<sup>85</sup>

The shifting of losses from buying consumer to seller, while not

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<sup>82</sup> See 13 *Syracuse L. Rev.* 174, 176 (1961). The other law review case notes on *Greenberg* blithely took for granted that the decision was limited to its facts. See 25 *Albany L. Rev.* 332 (1961); 28 *Brooklyn L. Rev.* 171 (1961).

<sup>83</sup> See James, *supra* note 53, at 923-25. In his concurring opinion in *Greenberg*, Judge Froessel quotes with approval the statement of the dissenting justice in the appellate term that "it may be odd that the purchaser can recover while others cannot, but it is odder still that one without fault has to pay at all." 12 Misc. 2d at 890, 178 N.Y.S.2d at 414. Does this observation not come a little late in the day? In 1931, Judge Cardozo, speaking for the Court of Appeals, held the retailer of packaged and branded bread containing a pin liable for personal injuries sustained by the purchaser's husband, rejecting the argument that recovery for breach of the warranty of merchantable quality was limited to the value of a sound loaf. *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931).

<sup>84</sup> Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L.J.* 499 (1961).

<sup>85</sup> *Id.* at 514.

required by "pure" resource allocation theory, is necessary because buying consumers are not likely to insure, and, without insurance, accident costs are not likely to be reflected in the cost of goods to buyers generally.<sup>86</sup> If anything, there may be greater necessity for shifting the losses of nonbuying consumers.<sup>87</sup>

In the second place, enterprise liability in general, and implied warranty liability in particular, involves the principle of spreading losses:

[S]ocial dislocations, like economic dislocations, will occur more frequently if one person bears a heavy loss than if many people bear light ones. One can, of course, conceive of situations where the extra \$1 charged to one thousand people would be one thousand straws which would break one thousand backs and ruin one thousand homes or businesses, while \$1,000 charged to one person would only ruin him, albeit thoroughly. But such situations seem mildly unlikely.<sup>88</sup>

The principle of spreading losses certainly applies with equal force to non-buying consumers.

Viewed in the light of these principles, *Greenberg* was easy, was it not? So were most of the trial court beneficiary cases, were they not? As Justice Traynor has stated in a related context, "liability should not be determined mechanically by fortuitous circumstances. . . . It should not be controlling that the consumer is found to be in privity of contract with the defendant rather than not."<sup>89</sup>

Why then refrain from setting forth the underlying principles as reasons for decision in the *Greenberg* situation? Is it because the principles are not susceptible to judicial statement? Consider the following passage, also from the pen of Justice Traynor:

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>90</sup>

Or is it because these principles are foreign to the overall bargain character of the Uniform Sales Act in which the implied warranty of merchantable quality is contained? As a matter of first impression, much could be said for this position in terms of the understanding of

<sup>86</sup> See *id.* at 505-06.

<sup>87</sup> See *id.* at 506.

<sup>88</sup> *Id.* at 518.

<sup>89</sup> *Trust v. Arden Farms Co.*, 50 Cal. 2d 217, 236, 324 P.2d 583, 594-95 (1958) (separate opinion).

<sup>90</sup> *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (concurring opinion).

the draftsmen,<sup>91</sup> and of the language employed. As Dean Prosser has indicated, there are substantial difficulties to be overcome if any personal injury actions are to be brought within the Sales Act,<sup>92</sup> and it has been proposed that an independent tort basis for such actions without fault be recognized.<sup>93</sup> By the time of *Greenberg*, however, the New York courts had long since accepted the implied warranty procedure and had gone rather far in overcoming the difficulties.<sup>94</sup>

Is there a more basic reason for refraining from stating these principles? Recall Professor Keeton's statement that "expression of a narrower ground of decision may appropriately be chosen where the court's attraction to the broader principle falls short of conviction."<sup>95</sup> Professor Keeton cites in support of this conclusion an analysis by Professor Llewellyn.<sup>96</sup> In this analysis Professor Llewellyn is concerned with the problem of ascertaining the scope of the "problem situation" with which an appellate court in a given case should deal. For example, in *Greenberg*, the Court of Appeals might have purported to decide (1) a case in which a minor daughter is injured by unwholesome food that was purchased by her father at her request, or (2) a case in which a member of the buyer's household is injured by unwholesome food, or (3) a case in which a member of the buyer's household is injured by defective household goods generally, or (4) a

<sup>91</sup> See Professor Ehrenzweig's study for the New York State Law Revision Commission, N.Y. State Law Rev. Comm'n Rep., N.Y. Legis. Doc. No. 65 (J) 17 n.61 (1943).

<sup>92</sup> Prosser, *supra* note 41, at 1124-34.

<sup>93</sup> *Id.* at 1134; Restatement (Second), Torts § 402A (Tent. Draft No. 7, 1962). The Court of Appeals in *Greenberg* seemed to show little interest in abandoning the Sales Act implied warranty provisions as the basis of the retailer's obligation. While the opinion refers to the tort origins of the warranty cause of action, the reference appears to be solely for the purpose of demonstrating that the Sales Act provisions are not burdened by history with a privity requirement.

<sup>94</sup> See *Ryan v. Progressive Grocery Stores*, *supra* note 83 (Damages for personal injuries held recoverable under implied warranty of merchantable quality); *Bernstein v. Queens County Jockey Club*, 222 App. Div. 191, 225 N.Y. Supp. 449 (1927) (Action for personal injuries for breach of implied warranty held abated by death of defendant under statute preserving contract actions but not personal injury actions); *Greco v. S. S. Kresge Co.*, 277 N.Y. 26, 12 N.E.2d 557 (1938) (Breach of implied warranty causing death held a "default" or "wrongful act" within the meaning of the wrongful death statute); *Kennedy v. F. W. Woolworth Co.*, 205 App. Div. 648, 200 N.Y. Supp. 121 (1923) (Notice of breach of warranty required under Uniform Sales Act § 49 held unnecessary where personal injury caused by goods sold for immediate human consumption); *Linn v. Radio City Delicatessen*, 169 Misc. 879, 9 N.Y.S.2d 110 (N.Y. City Munic. Ct. 1939) (Disclaimer by food manufacturer of implied warranties held invalid as against public policy in action over by retailer for damages paid to injured customer). See also N.Y. Pers. Prop. Law § 150(1)(d) (Uniform Sales Act § 69(1)(d)), as amended, L. 1948 ch. 276 (Amendment allows recovery of uncompensated damages even after rescission, return of goods and recovery of price). But see *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953) (Implied warranty action for personal injuries held subject to statute of limitations on implied contracts, rather than to shorter statute on negligence actions).

<sup>95</sup> *Supra* note 93.

<sup>96</sup> Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960).

case involving a certain kind of relationship between the buyer and the injured party with respect to the particular defective goods, or (5) some other narrow or broad sort of case. As has been indicated,<sup>97</sup> certain rather clear limitations may be imposed by the guidance function of courts of last resort on the choice of the appropriate problem situation. But apart from these, the choice is a subtle one. Professor Llewellyn says the following:

No rule or principle can ever, in such a choice, tell any court, in concretely definitive terms, what scope "the" problem-situation before it has, or, more accurately, is best made to have. There is a line of guidance, but it speaks only to conscience plus judgment. That line is: "the" problem-situation extends as far as you are *perfectly* clear, in your own mind, that you have grasped the picture fully and completely *in life-essence and in its detailed variants*, and therefore *know* it to present a *significantly* single whole, *and one over which your knowledge and judgment have command*. That far, it is wise to deal with it, and right to deal with it, because small things take on fuller meaning in the context of greater ones. And also because the law does well to trend into ever larger unities, *so long as they remain meaningful as they grow*. But those unities must be and remain meaningful, over their whole scope, in terms of life and sense, not merely in terms of formula and "sound," else they do harm. That is why a court is doing its duty when, contrary to the sense *you* see and desire, but with clear consciousness that it understands what it is doing and why, *and with clear statement* of both, it goes to bat on the whole of a broad situation.

But that is also why any doubt about whether the court has the whole situation in sure grasp is to be resolved *by the court always in favor of a narrower* rather than a wider scope.<sup>98</sup>

Does this argument indicate that a court should refrain from setting forth the broad economic principles of resource allocation and spreading losses if it is not certain that they would properly control the decision in every case in which one or both<sup>99</sup> were applicable? Or

<sup>97</sup> See part II *supra*.

<sup>98</sup> Llewellyn, *op. cit.* *supra* note 96, at 427.

<sup>99</sup> Even within the area of implied warranty liability the principles of resource allocation and spreading losses may, in some instances, point to opposite results. If, for example, the product involved would not foreseeably cause personal injuries even if defective, it would be unlikely that a seller would insure against such injuries. Thus, while the resource allocation theory would call for the imposition of warranty liability, the theory of spreading losses would not. See Calabresi, *supra* note 84, at 528-29. *Quaere* whether this analysis might not justify a decision such as that reached by the trial court in *Amie v. Laure*, *supra* note 61 & text. (The analysis, of course, would bar

can a distinction be drawn between the statement of the "problem situation" over which a court purports to rule and the statement of broader principles for decision that plainly do not constitute present rulings on other fact situations? The latter would amount to frankly open-ended reasoning, demanding subsequent consideration of the stated principles when they are applicable, but also inviting consideration by lawyers and trial judges of other authorities and principles that may be shown to carry greater weight.<sup>100</sup> In this view, lawyers and trial judges could be given the means to play more creative roles in the evolution of legal doctrine, and the potentialities for doing the job right in the trial courts would seem to be enhanced.

[E]ven where rules are quite fully particularized and well accepted, they are subject to being tested against concepts of more generalized character, described in a variety of ways as principles, policy considerations, economic and social implications, factors of practical import and so on. . . . [O]ccasionally, especially in developing and disputed areas of the law, the more generalized considerations are brought to the foreground and are explicitly relied upon in testing and reaffirming, modifying or abandoning the more particular, categorical formulations. The interplay of the general and the particular, of the rules and the reasons, is essential to the preservation of an ideal accommodation of creativity and continuity, and it is desirable that it occur openly in judicial opinions.<sup>101</sup>

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recovery by the buyer as well as by others.) Compare, however, situations in which some personal injuries are foreseeable from use of the product—albeit only to a relatively small group of "allergic" users. See Horowitz, *Allergy of the Plaintiff as a Defense in Actions Based Upon Breach of Implied Warranty of Quality*, 24 So. Cal. L. Rev. 221 (1951). Similarly, cases denying recovery when there has been improper or unusual use of the product, see Prosser, *supra* note 41 at 1144, may be viewed as refusals to apply the loss spreading theory because, under the resource allocation theory, the injury should properly be charged as a cost of the particular use rather than as a cost of the product itself.

<sup>100</sup> In the present context, one such principle may be that the cost to the general public of certain essential products or services should not be raised by the imposition of absolute enterprise liability. See *Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 (1954); *Krom v. Sharp & Dohme*, 7 App. Div. 2d 761, 180 N.Y.S.2d 99 (1958). Another may be that absolute enterprise liability should not be imposed where it would have the practical effect of deterring entirely or delaying the marketing of valuable new products. See 13 *Stan. L. Rev.* 645, 649-50 (1961). But see *Gottsdanker v. Cutter Labs.*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960). A third may be that absolute enterprise liability should not be imposed on the manufacturer of a product defective only in the sense that all products of its type may cause harm, if the potential harm is widely known and no representation is made as to the product's safety. See Judge Goodrich's concurring opinion in *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 301 (3d Cir. 1961). Such a determination would rest, at least in part, on the traditional notion that a person must bear those risks that he has knowingly assumed.

<sup>101</sup> Keeton, *Creative Continuity in the Law of Torts*, 75 *Harv. L. Rev.* 463, 496-97 (1962).