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Products Liability and the Privity Requirement

Philip J. Teigen

PRODUCTS LIABILITY AND THE PRIVITY REQUIREMENT

I. INTRODUCTION

"Products Liability," is now an identifiable class of litigation. It involves the liability of a manufacturer, processor, or seller to a buyer or third party for personal or property damage caused by their products. There are three issues present in every products liability case which must be proven: (1) that the product is of such a nature that it was capable of causing the injury; (2) that this product was actually the proximate cause of the injury; and (3) that the defendant was legally responsible for the product causing the injury.[1] Another important issue, although not found in every products liability case, is the requirement of privity of contract.[2] When required, it operates to bar recovery for product-caused harm where there is no pre-existing contractual relationship between the injured party and the party sought to be held liable. Thus A, who purchased hair dye manufactured by B from retailer C, can, if she loses her hair, seek recovery from C, but not from B because there is no privity of contract with B. If one of A's family, or a friend, uses the hair dye and his hair falls out, they cannot seek recovery from either B or C because of the lack of privity. This, of course, insulates the manufacturer and sometimes the retailer, from any liability they may have to a consumer for injuries caused by their products.

The dictum regarding privity of contract, as found in *Winterbottom v. Wright*,[3] an 1842 English case, was adopted by the majority of American courts to make our infant in-

1. 1 HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 1:2 (1961).

2. See generally **Id.** Ch. 6.

3. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). It is interesting to note that the action in this case was against a contractor and not a manufacturer. But **cf.** Donoghue (or M'Alister) v. Stevenson; (1932) A. C. 562 (Eng.); Grant v. Australian Knitting Mills. L., (1936) A. C. 85 (Eng.). These cases represent England's subsequent recognition of exceptions to the privity rule.

dustry immune to any liability caused by their products.[4] But this case, and the majority rule it established, created much dissatisfaction, and exceptions to the rule soon followed.[5] In his article, *The Assault Upon the Citadel*,[6] Prosser points this out:

> . . . In 1842 Lord Abinger foresaw 'the most absurd and outrageous consequence, to which I can no limit,' if it should ever be held that the defendant who made a contract with A would be liable to B for his failure to perform that contract properly. What happened in the next century was enough to make the learned jurist turn in his grave. The courts began by the usual process of developing exceptions to the 'general rule' of nonliability to persons not in privity. The most important of these was that the seller of a chattel owed to anyone who might be expected to use it a duty of reasonable care to make it safe, provided that the chattel was 'inherently' or 'imminently' dangerous . . .

The primary concern of this note is to show what effect these exceptions and other developments have had on products liability law.

II. LIABILITY IN NEGLIGENCE

The "General rule" requiring privity in negligence actions for product-caused injuries soon became subject to three exceptions. The first, and possibly the most important exception, is where the injury is caused by an "inherently dangerous" product.[8] Under this rule, products must be dangerous by their very nature and not because of some

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4. See Bordwell v. Collie, 45 N.Y. 494 (1871); National Sav. Bank v. Ward, 100 U.S. 195 (1879); **Cf.** Huset v. J. I. Case Threshing Machine Co., 120 F. 865 (8th Cir. 1903), 61 L.R.A. 303 (three exceptions to privity rule). It should be pointed out that privity was required in both negligence and warranty actions. This forced the doctrine of **Caveat Emptor** upon the consumer in order to protect industry during its early stages of development.

5. See Thomas v. Winchester, 6 N.Y. 397 (1852). Liability for negligence in the marketing of products dangerous by their very nature.

6. 69 Yale L. J. 1099 (1960).

7. See generally 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 5.02 (1960).

8. Thomas v. Winchester, 6 N.Y. 397 (1852). A landmark decision which held drug dealer liable for injuries caused by selling poison labeled as a harmless drug even though purchased by plaintiff's husband.

defect.[9] Poisons,[10] firearms,[11] explosives[12] and unwholesome food[13] are just a few of the products considered inherently dangerous. The second exception is where a person furnishes a defective product on his premises for an invitee to use.[14] The third exception is where the product sold or delivered is known to be "imminently dangerous" and the defendant failed to disclose that fact to the buyer.[15] These exceptions, although helpful, were still considered by many as being too limited in scope and having a stifling effect on the further development of products liability law.

In 1916, the privity rule was finally overcome by its exceptions.[16] In the famous case, *McPherson v. Buick Motor Co.*, Judge Cardozo stated: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger." This statement later became the basis of the modern rule or what is sometimes known as the "imminently dangerous" exception.[18] Consequently, the manufacturer is liable for negligence if his product causes injury under the following circumstances: (1) when the product is lawfully used in a manner and for a purpose for which it was made; (2) when a manufacturer fails to exercise reasonable care or to recognize whether or not it had been carefully made; and (3) when it places those lawfully using it, including those in the vicinity of its probable use, in a state of unreasonable risk.[19] A 1946 case summed up the effect of this rule by stating:

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9. It should be distinguished that "inherently dangerous" means dangerous by its very nature whereas "imminently dangerous" indicates a particular defect.

10. National Sav. Bank v. Ward, 100 U.S. 195 (1880); Merrill v. Beaute Vues Corp., 235 F.2d 893 (10th Cir. 1956).

11. Herman v. Markham Air Rifle Co., 258 F. 475 (E.D. Mich., 1919).

12. Cadillac Motor Car Co. v. Johnson, 221 F. 801 (2nd Cir. 1915).

13. Ketterer v. Armour & Co., 247 F. 921 (2nd Cir. 1917); Cook v. People's Milk Co., 90 Misc. 34, 152 N.Y. Supp. 465 (1915).

14. Coughtry v. Globe Woolen Co., 56 N.Y. 124 (1874); Bright v. Barnett & Record Co., 88 Wis. 299, 60 N.W. 418 (1894).

15. Lewis v. Terry, 111 Cal. 39, 43 Pac. 398 (1896); Huset v. J. I. Case Threshing Machine Co., 12 F. 865 (8th Cir. 1903) (also known as the fraud exception).

16. "The MacPherson case caused the exception to swallow the asserted general rule of non-liability leaving nothing upon which that rule could operate." Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693, 700 (1946).

17. 217 N.Y. 382, 111 N.E. 1050, 1053 (1916).

18. See generally, 1 HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 6:24 (1961).

19. RESTATEMENT, TORTS § 395 (1934).

> The time has come for us to recognize that the asserted general (privity) rule no longer exists. In principal it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth.[20]

So it seems that the courts have followed, and will continue to follow, the *MacPherson* view and leave the rule of *Winterbottom v. Wright* back in the Nineteenth Century.[21]

Throwing out the privity requirement in negligence cases was a big step in products liability law. But the proof of negligence on the part of the manufacturer or vendor, even with the help of *res ipsa loquitur*,[22] or by showing the defendant violated a safety or pure food and drug statute[32], may be difficult. In many cases, it can be proven that the product manufactured or sold by the defendant did in fact cause the injury, but without proof of negligence the plaintiff cannot recover.[24] Many turned to express and implied warranties only to find the privity requirement deeply imbedded in warranty law. So again much dissatisfaction was found and again courts started their attack upon the privity requirement.

III. LIABILITY IN IMPLIED WARRANTY

Warranty started out in English Common Law as a tort concept and later indebitatus assumpsit was used as a remedy for its breach which brought it into contract law.[25] As a result thereof, privity of contract soon became a requirement to sue for a breach of warranty.[26] At that time, manufacturers usually sold their goods directly to the consumer without the use of an intermediary. Under those circumstances privity was not a serious burden. But later the middle man

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20. Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693, 700 (1946); Annot. 164 A.L.R. 559.

21. State v. Garzele Plastics Industries, 152 F. Sup. 483 (E.D. Mich. 1957).

22. Kuntz v. McQuade, 95 N.W.2d 430 (N.D. 1959); See generally Crabb, **Res Ipsa Loquitur in North Dakota** 38 N.D. L. Rev. 390 (1962).

23. Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961); Doherty v. S.S. Kresge Co., 227 Wisc. 661, 278 N.W. 437 (1938).

24. Trolli v. Triple X Stores, 19 Conn. Supp. 293, 112 A.2d 507 (1954).

25. See, Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612, 615 (1958); Annot. 75 A.L.R.2d 103.

26. See Longmeid v. Holliday, 6 Ex. D 761, 155 Eng. Rep. 752 (1851); Thomas v. Lucas, 17 W.R. 520 (1868).

became an important element of marketing and the consumer, not being in privity with the manufacturer, began having difficulty recovering damages for breach of warranty.

Here again, to overcome the requirement of privity, courts resorted to exceptions and in some cases, even fictions.[27] The most notable and widespread exception placed strict liability upon the manufacturers and vendors of food and beverage products.[28] This was later broadened to include other products intended for internal human consumption, whether consumed orally or otherwise.[29] Eventually, makers and sellers of products intended for intimate external bodily use became strictly liable for injuries caused.[30] This, of course, created problems in relation to allergies and the hypersensitive consumer.[31] Some have also applied the exception to the container of a product,[32] animal food,[33] and explosives.[34]

In 1958, *Spence v. Three Rivers Builders & Masonry Supply*,[35] held that privity was not needed to sue for breach

27. See Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927) (warranty runs with the goods); Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939) (public policy requires warranty to inure to the consumer's benefit); Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936) (assignment); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928) (third-party beneficiary); Flesher v. Carstens Packing Co., 93 Wash. 48, 160 P. 14, 17 (1916) (action in tort, not contract); Campbell Soup Co. v. Ryan, 328 S.W.2d 821 (Tex. Civ. App., 1959) (action not in tort or contract but on public policy). See Generally Gillam, **Products Liability in a Nutshell**, 37 Ore. L. Rev. 119, 153-154 (1958) for a complete list of exceptions and fictions.

28. Greenburg v. Lorenz, 9 N.Y.2d 195, 213 N.Y.S.2d 39, 173 N.E.2d 773 (1961), Annot. 75 A.L.R.2d 39; Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942), Annot. 142 A.L.R. 1479 (leading packaged food case); Ada Coca-Cola Bottling Co. v. Asbury, 206 Okla. 269, 242 P.2d 417 (1952); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927) (beverage).

29. See Bowles v. Zimmerman Mfg. Co., 277 F.2d 868 (7th Cir. 1960), Annot. 76 A.L.R.2d 120 (pin inserted in plaintiff's femur in course of an operation; Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 694, 6 Cal. Rptr. 320 (1960), Annot. 79 A.L.R.2d 290 (innoculation of polio vaccine).

30. Graham v. Bottenfield's Inc., 176 Kan. 68, 269 P.2d 413 (1954) (hair dye); Markovich v. McKesson & Robbins, 106 Ohio App. 265, 149 N.E.2d 181 (1958) (permanent wave solution).

31. See generally 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, Ch. 8 (1961).

32. See Canada Dry Bottling Co. v. Shaw, 118 So. 2d 840 (Fla. 1960); Nichola v. Nold, 174 Kan. 613, 258 P.2d 317 (1953). **Contra**, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); Soter v. Griesediech West Brewery Co., 200 Okla. 302, 193 P.2d 575 (1948).

33. See, McAfee v. Cargill, 121 F. Supp. 5 (S.D. Cal. 1954); Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo 1959).

34. See United States Cas. Co. v. Hercules Powder Co. 4 N.J. Super 444, 67 A.2d 880 (1949); Hentschel v. Baby Bathinette Corp., 215 F.2d 102 (2nd Cir. 1954).

35. 353 Mich. 120, 90 N.W.2d 873 (1958).

of implied warranty on cinder blocks. The ruling of this case, plus prior exceptions[36] to the privity rule, tends to indicate that Michigan has thrown out the privity requirement altogether. In his opinion Justice Voelker criticized prior Michigan decisions for requiring privity and then making exceptions to the rule which tend to "maim and muddy up the larger field of law in both contracts and torts." But there appeared to be some confusion as to the distinction between negligence and warranty theories which deadened its effect.[37] Also in 1958, an intermediate Florida court held that privity between the manufacturer and purchaser of electric cable was unnecessary,[38] but a later decision by the Florida Supreme Court made this holding questionable.[39] In 1959, another intermediate court, this time in Pennsylvania, held that privity is not needed for breach of implied warranty and this decision still stands.[40] Minnesota has hinted that they will dispense with privity when the occasion arises.[41]

In 1960, New Jersey apparently decided that it was time the requirement of privity, to allow suit for breach of implied warranty, be discarded without the help of exceptions or fictions. In their landmark decision of *Henningson v. Bloomfield Motor Co.*, the court held the manufacturer and seller of a defective automobile liable for resultant injuries to the purchaser's wife even though she was not in privity with either of them. Confronted with the problem of privity, Justice Francis stated:

> With the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media. In such an economy it became obvious that the consumer was the person being cultivated. Mani-

36. See Hertzler v. Manshum, 228 Mich. 416, 200 N.W. 155 (1924) (food exception); Ebers v. General Chemical Co., 310 Mich. 261, 17 N.W.2d 176 (1945) (insecticide).

37. Spence v. Three Rivers Builders & Masonry Supply, **supra** note 36 at 877-881; confusion was cleared up by Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 241, 109 N.W.2d 918, 922 (1961).

38. Continental Copper & Steel Indust. v. "Red" Cornelius, 104 So. 2d 40 (Fla. 1958).

39. McBurnette v. Playground Equip. Corp., 137 So. 2d 563 (Fla. 1962).

40. Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959).

41. Beck v. Spindler, 256 Minn. 543 at 561, 99 N.W.2d 670 at 681-82 (1959) (dictum).

> festly, the connotation of 'consumer' was broader than that of 'buyer'. He signified such a person who, in the reasonable contemplation of the parties to the sale, might be expected to use the product. Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur . . .[43]
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> Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.[44]

It is safe to say the *Henningson* case will have considerable influence on other jurisdictions in the future.

IV. LIABILITY IN EXPRESS WARRANTY

Unlike implied warranties, which are imposed by law, express warranties arise when a manufacturer or seller makes positive affirmations of fact concerning his goods to the buyer.[45] Through radio, television, newspapers, magazines, billboards, brochures and labels the manufacturer or seller constantly makes such representations directly to the consumer. For this reason the "advertised product" exception has arisen providing consumers with a means of circumventing the privity requirement. The first case to use this exception was *Baxter v. Ford Motor Co.*[46] Here,

42. 32 N.J. 358, 161 A.2d 69 (1960), Annot. 75 A.L.R.2d 1. It should be pointed out that this case also held that the manufacturer's express warranty disclaiming or limiting implied warranties is void as against public policy. But a 1962 North Dakota case held that such was not contrary to public policy. Knecht v. Universal Motor Co., 113 N.W.2d 688 (N.D. 1962); 38 N.D. L. Rev. 529.

43. **Id.** at 80-81.

44. **Id.** at 84.

45. See N.D. Cent. Code § 51-01-13.

46. 168 Wash. 456, 12 P.2d 409 (1932), 88 A.L.R. 521 (1934).

the plaintiff lost an eye when a stone shattered the window of a car he had purchased from a dealer. There was printed matter circulated by the defendant-manufacturer which represented the car's windows to be shatter-proof. The court held that privity should not bar the consumer when manufacturers create "a demand for their products by representing that they possess qualities which they, in fact, do not possess."[47] Since the *Baxter* case, this exception has been followed by many cases dealing with expressed warranties.[48]

V. CONCLUSION

It is apparent from the foregoing discussion that the privity requirement is on its way out. Many jurisdictions have reduced its importance, with exceptions, and some have buried it altogether. It seems that the main reason for dispensing with privity is to modernize the law. In *Randy Knitware, Inc. v. American Cyanamid Co.*,[49] Judge Fuld points this out:

> In concluding that the old court-made rule should be modified to dispense with the requirement of privity, we are doing nothing more or less than carrying out an historic and necessary function of the court to bring the law into harmony 'with modern-day needs and with concepts of justice and fair dealing.'[50]

In North Dakota, the status of the privity requirement is questionable. There are no cases in the negligence area and one one case in warranty. This was the 1931 case of *Wood v. Advance Rumely Thresher Co.*,[51] in which the North Dakota Supreme Court held that a right of action for breach of warranty in an order for farm machinery could not be had by a subsequent purchaser, and that the subsequent sale of property by the purchaser does not oper-

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47. **Id.** at 412.

48. See Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939) (car roof advertised as seamless); Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952) (detergent labeled "kind to hands"); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958), Annot. 75 A.L.R.2d 103 (1961) (advertised as safe and harmless); Randy Knitware, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (1962)) (advertised that a "Cyana" treated fabric will not shrink or stretch out); generally, 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.04(4) (1960).

49. 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (1962).

50. **Id** at 404.

51. 60 N.D. 384, 234 N.W. 517 (1931).

ate to vest in the subsequent purchaser any right of action against the original seller for a breach of warranty. Furthermore, there must be privity of contract between the parties in order to maintain an action for a breach thereof.

It should be pointed out that at the time of this decision no other jurisdiction held contrary to this North Dakota decision. The abolition of privity in negligence cases was well under way but little had been done in warranty cases. Not until just recently have there been any decisions casting aside privity in warranty cases. With these developments in the law of products liability, courts are more apt to discard the privity requirement or at least make a reasonable exception to it. Of course, much depends upon the individual case in deciding this question. Until the Supreme Court of North Dakota is confronted with this issue, we can only speculate upon the out come.

PHILIP J. TEIGEN