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Odom v. Ford and the Privity Requirement in South Carolina

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ODOM v. FORD AND THE PRIVITY REQUIREMENT IN SOUTH CAROLINA

Privity of Contract: an Essential Element of an Implied Warranty Action

About ten years ago, Harley Odom, a Darlington farmer, won a case in the county court against the Ford Motor Company, and Ford appealed. The question presented by that appeal was whether Odom, who had purchased an allegedly defective tractor[1] from a local retailer, should be allowed to maintain an implied warranty action[2] against the Ford Motor Company with whom he had no contractual relation.

The court reversed and held that lack of privity of contract was a bar to an action based upon an implied warranty.[3] Recovery was thus denied Odom because he had no contractual relation with the Ford Motor Company[4]; his contract had been with the retailer only.

The *Odom* decision aligns South Carolina with the majority of jurisdictions.[5] The definite trend, however, is in the other

1. Odom alleged that the tractor had failed to perform properly, causing him additional expense in his farming operation.

2. Plaintiff's complaint was based on both an oral express warranty which plaintiff claimed the retailer as agent of Ford had made and on an implied warranty that the tractor was suitable for agricultural purposes. Following defendant's motion to require him to elect plaintiff chose to proceed on the implied warranty.

3. Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956).

4. Plaintiff contended that Ford's advertising pamphlets established the requisite privity; Judge Oxner dismissed this contention by pointing out,

> There are cases where recovery has been allowed on the theory of *express* warranty without a showing of privity. . . . But the instant action was neither brought nor tried on this theory.

Id. at 328, 95 S.E. 2d at 604.

5. Blitzstein v. Ford Motor Co., 288 F.2d 738 (5th Cir. 1961); Crystal Coca-Cola Bottling Co. v. Cathey, 837 Ariz. 163, 317 P.2d 1094 (1957); Drury v. Armour & Co., 140 Ark. 371, 216 S.W. 40 (1919); Ciociola v. Delaware Coca-Cola Bottling Co., 53 Del. 477, 172 A.2d 252 (1961); Revlon v. Murdock, 103 Ga. App. 842, 120 S.E.2d 912 (1961); Schultz v. Tecumseh Products, 310 F.2d 426 (6th Cir. 1962); Vaccarino v. Cozzubo, 181 Md. 614, 31 A.2d 316 (1943); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946); Grey v. Hayes-Sammons Chemical Co., 310 F.2d 291 (5th Cir. 1962); Larson v. U. S. Rubber Co., 163 F. Supp. 327 (D. Mont. 1958); Long v. Flanigan Warehouse, 79 Nev. 241, 882 P.2d 399 (1963); Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942); Alexander Funeral Home, Inc. v. Pride, 26 N.C. 723, 136 S.E.2d 120 (1964); Wood v. Advance Rumely Thresher Co., 60 N.D. 384, 234 N.W. 517 (1931); Inglis v. American Motors,

direction, and a rapidly increasing number of states have discarded the privity requirement altogether.[6] The question is: Will South Carolina follow this trend or will South Carolina follow *Odom*?

A recent case[7] allowing an action for the wrongful death of an unborn viable fetus indicates the court's inclination to follow a modern trend, but many cases show that stare decisis is still powerful.[8]

The Contract Action and the Tort Action: Burdens of Proof.

Unfortunately the field of warranty liability is not as clear as it might be. Confusion has resulted in some cases from terminology, in others from misunderstanding.

A warranty, of course, may be express[9] or implied[10]; the implied warranty arises by operation of law at the sale of goods and usually means that the goods will be generally fit for ordinary purposes.[11] If the goods are not fit the warranty is breached, and all damages flowing naturally from the breach,[12] such as damages for personal injury,[13] may be recovered by the purchaser.

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94 Abs. 438, 197 N.E.2d 921 (1964); Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963); Russo v. Merck, 138 F. Supp. 147 (D.R.I. 1956); Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956); Whitehorn v. Nash-Finch Co., 67 S.D. 465, 293 N.W. 859 (1940); Brown v. Howard, 285 S.W.2d 752 (Tex. Civ. App. 1955); Harris v. Hampton Roads Tractor & Equipment Co., 202 Va. 958, 121 S.E.2d 471 (1961); Burgess v. Sanitary Meat Market, 121 W. Va. 605, 5 S.E.2d 785 (1939), and Barlow v. DeVilbiss, 214 F. Supp. 540 (E. D. Wis. 1963). Research has failed to discover cases in Alaska, Idaho, New Mexico, Oklahoma, Wyoming and Utah.

6. California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, New Jersey, New York, Oregon, Tennessee, Texas, and Vermont have dispensed with privity in warranty actions.

7. Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964), 16 S.C.L. REV. 439 (1964).

8. Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234 (1818); Alexander v. Hunnicut, 196 S.C. 364, 13 S.E.2d 630 (1941);Patrick v. Maybank, 198 S.C. 262, 17 S.E.2d 530 (1939); State v. Williams, 13 S.C. 546 (1880).

9. Herndon v. Southern Pest Control Co., 307 F.2d 753 (4th Cir. 1962); Iler v. Jennings, 87 S.C. 87, 68 S.E. 1041 (1909); Robson v. Miller, 12 S.C. 586 (1879); UNIFORM COMMERCIAL CODE § 2-315; UNIFORM SALES ACT § 12; WILLISTON, SALES §§ 195, 196 (2d ed. 1924).

10. Bond Bros. Cash & Delivery Grocery v. Claussen's Bakeries, Inc., 184 S.C. 95, 191 S.E. 717 (1937); Annot., 113 A.L.R. 675 (1938).

11. Liquid Carbonic Co. v. Coclin, 161 S.C. 40, 159 S.E. 461 (1931); Walker, Evans & Cogswell Co. v. Ayer, 80 S.C. 292, 61 S.E. 557 (1908); UNIFORM COMMERCIAL CODE § 2-314; Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

12. National Tire & Rubber Co. v. Hoover, 128 S.C. 344, 122 S.E. 858 (1924).

13. Ellis v. Montgomery & Crawford, Inc., 189 S.C. 72, 200 S.E. 82 (1938).

The problem comes up, as in *Odom*, when a purchaser from the retailer attempts to sue the manufacturer in implied warranty. Most courts view the implied warranty as a promise or contract made by the seller to the buyer,[14] and therefore, allow only the immediate buyer to sue upon the warranty. To allow someone not the recipient of the warranty to sue would, in Lord Abinger's words, cause "the most absurd consequences to which I can see no limit."[15] The privity gap between manufacturer and purchaser from retailer is thus fatal to a cause of action in implied warranty in most states today.[16] These states see a tort action as the proper remedy for the out-of-privity plaintiff[17]; they see fault as the basis of liability and refuse to extend warranty liability to one who was not a party to the contract of sale.

A comparison of the burdens of proof in tort and contract actions points up an interesting aspect of the privity problem. In a tort products liability action the plaintiff must show (1) his injury, (2) that the defendant's product was the proximate cause of his injury, and (3) that the defendant was negligent in the manufacture of the injury-causing product.[18] In a warranty action plaintiff need only prove injury, causation, and the existence of the injury-causing defect in the product when it left the defendant's control.[19] In a tort action the plaintiff may have difficulty in establishing the defendant's negligence, particularly in view of the complexity of manufacturing processes. In most states the plaintiff has the tool of res ipsa loquitor at his disposal,[20] but the defendant can show the use of all reasonable care in his manufacturing and testing procedures and thus rebut

14. VOLD, SALES § 84 (2d ed. 1959); 3 WILLISTON, CONTRACTS § 673 (rev. ed. 1936); 77 C.J.S. *Sales* § 302(c) (1952).

15. Winterbottom v. Wright, 10 M.&W. 109, 114, 152 Eng. Rep. 402, 405 (1842).

16. This gap exists in the case of the retailer between the retailer and any person who is not a purchaser from him. The gap, wherever it exists, is the privity problem and statements made about privity are generally applicable to retailer and manufacturer alike.

17. Odom v. Ford Motor Co., 230 S.C. 320, 326, 95 S.E.2d 601, 604 (1956).

18. RESTATEMENT, TORTS § 28 (1938); Prosser, *Assault upon the Citadel of Privity*, 69 YALE L.J. 1099, 1114 (1960).

19. Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Mun. App. 1962); Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W.2d 918 (1961); Keeton, *Products Liability—Liability without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963).

20. South Carolina does not subscribe to the doctrine of res ipsa loquitor by name, but in bailment cases the plaintiff may establish a prima facie case if he shows delivery in good condition and return in damaged condition. 1 S.C.L.Q. 290 (1948); Shoreland Freezers, Inc. v. Textile Ice and Fuel Co., 241 S.C. 537, 129 S.E.2d 424 (1963); Gilland v. Peter's Dry Cleaning Co., 195 S.C. 417, 11 S.E.2d 857 (1940); 38 AM. JUR. *Negligence* § 295-312 (1941).

any inference of negligence on his part. In light of this, the reason for the clamor for the abrogation of the privity requirement becomes apparent: if privity is not required plaintiff can sue in warranty and not be required to prove negligence. If privity is done away with, manufacturers become liable in warranty to remote vendees even though they used all possible care in the production of their goods.

Warranty liability is thus strict liability because once privity has been eliminated as a defense, manufacturers become strictly liable for injury caused by their products regardless of lack of contractual relation with the injured party and regardless of freedom from fault in the manufacture of the product.[21]

Strict liability should not be confused with "absolute liability"[22] which is presently imposed only on those who engage in some ultra-hazardous activity such as blasting. Persons engaged in such activity are absolutely liable for the harm they cause, regardless of the precautions they take. Strict products liability, on the other hand, requires the plaintiff to prove a defect in the injury-causing product when it left defendant's control.

The key to the difference between the contract and tort actions for product-caused injury lies in the difference in the burden of proof required for each; in a tort action the plaintiff must go one step further than he must go in a contract action and show that the defendant's negligence caused the defect which caused the injury. The advocates of dispensing with privity are thus advocates of dispensing with the proof of negligence in products liability cases. There is the difference; there is what the fight is about. The lines are drawn; the battle rages. Which side will South Carolina take?

History and Development: the privity requirement

Although all states recognize the right of action in tort against the manufacturer of an injury-causing product,[23] this recogni-

21. A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a non-contracting party whose use of the warranted article is within the reasonable contemplation of the . . . manufacturer.
Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 377 P.2d 879 (Sup. Ct. 1962); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 433, 191 N.E.2d 81, 82 (Ct. App. 1963); Jakubowski v. Minnesota Mining & Manufacturing Co., 80 N.J. Super. 184, 193 A.2d 275 (App. Div. 1963); James, *General Products—Should Manufacturers Be Liable Without Negligence,* 24 TENN. L. REV. 923 (1957).

22. RESTATEMENT, TORTS § 519 (1938).

23. *Id.* § 395; PROSSER, TORTS § 96 (3d ed. 1964).

tion is a fairly recent development. A brief look at history will show how this came about.

Lord Abinger indulged in dicta in *Winterbottom v. Wright*,[24] and was understood to say that lack of privity was a bar to both contract *and* tort actions. In *Winterbottom*, a mailcoach driver who was injured when his coach collapsed sued the man responsible for keeping the coaches in proper condition. The defendant was under contract with the postmaster to maintain the coaches. The English court disallowed the suit because the plaintiff was not in contractual relation with the defendant; they said it would be unjust to allow a third party to come along and rip open the contract with a law suit after the parties to the contract had settled everything to their satisfaction. This result was accepted in England and America, and courts refused the right of action in tort and contract by anyone not in privity with the defendant.[25]

This was quickly seen to be unsatisfactory in tort actions. The rule which disallowed a tort action because of lack of privity of contract became riddled with exceptions,[26] the most important being that if the product was "inherently" dangerous, then plaintiff could sue in tort even though he was not in privity. This exception was first stated in the case of *Thomas v. Winchester*,[27] in which plaintiff was injured because defendant, a druggist, had mislabelled a bottle of poison. However, deciding what products were inherently dangerous gave the courts difficulty, and classifications of various products added to the confusion.[28]

In 1916, Judge Cardozo caused the exception to swallow the general rule of non-liability in the celebrated case of *MacPherson v. Buick Motor Co.*[29] MacPherson, "an improvident Scot who squandered his gold on a Buick automobile,"[30] was hurt when

24. 10 M.&W. 109, 152 Eng. Rep. 402 (1842).

25. PROSSER, TORTS § 96 (3d ed. 1964).

26. Three general exceptions have been noted: (1) If the seller knew the chattel was dangerous for its intended use and failed to tell this to the buyer he became liable on the basis of something like fraud; (2) If the product was furnished for use on the defendant's premises the user was treated as an invitee; (3) If the product was "inherently" dangerous to human safety the manufacturer was held liable. PROSSER, TORTS § 96 (3d ed. 1964).

27. 6 N.Y. 397 (1852).

28. *Compare* Stone v. Van Noy R. News Co., 153 Ky. 240, 154 S.W. 1092 (1913) which says a bottle is not inherently dangerous *with* Coca-Cola Bottling Works v. Shelton, 214 Ky. 118, 282 S.W. 778 (1926) which says a bottle is inherently dangerous.

29. 217 N.Y. 382, 111 N.E. 1050 (Ct. App. 1916).

30. Prosser, *Assault upon the Citadel of Privity*, 69 YALE L.J. 1099, 1100 (1960).

the wheel of his automobile fell off. He brought a tort action against the Buick Co. and the maker of the wheel. The suit was allowed, and privity as a bar to a tort action was laid to rest in New York. Cardozo said any product which if negligently made could injure was dangerous; a known danger, he said, attendant upon a known use made vigilance a duty. The case was quickly and widely followed; today every jurisdiction allows a tort action against the manufacturer regardless of lack of privity.[31] The *MacPherson* doctrine has been extended to afford recovery to any foreseeable user of any product which injures because of the maker's negligence.[32]

Privity lingered, however, to prevent an action in warranty. Here it made more sense; here it was more at home. After all, a

31. Annot., 74 A.L.R. 2d 1111 (1960); Ford Motor Co. v. McDavid, 259 F.2d 261 (4th Cir. 1958). There seem to be two views on the meaning and result of the *MacPherson* case: first, that the case (and the many that followed it) enunciated another exception to the privity requirement in tort actions, i.e., if the product, if negligently made, could injure, then it was "imminently" dangerous and recovery would be allowed; second, that *MacPherson* dispensed with the privity requirement in tort actions. The second view seems more reasonable. Generally, the same result follows regardless of the view taken: under the first view the plaintiff must show that the product was imminently dangerous in order to recover; under the second view the plaintiff must show that the defendant was negligent in the manufacture of the product. That the product was "imminently" dangerous thus becomes another way of saying that the defendant was negligent.

Justice Cardozo probably did not intend to state an "imminently" dangerous exception in *MacPherson*:

> Subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous, but the case does not turn upon these *verbal niceties*. If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent. [Emphasis added].

MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (Ct. App. 1916). Weight is given to the position that *MacPherson* abolished lack of privity as a defense in tort actions by Justice Cardozo's statements:

> The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser. . . . 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. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, *irrespective of contract*, the manufacturer of this thing of danger is under a duty to make it carefully. [Emphasis added].

Id. at 384, 111 N.E. at 1053.

32. [W]here a product, negligently made, is placed on the market, under circumstances where danger is to be foreseen, lack of privity is no defense.

17 Wyo. L.J. 111, 114 (1963);

> The current trend is to enlarge the liability of the manufacturer to the remote vendee to include any article which if negligently made . . . may reasonably be anticipated to cause injury.

Odom v. Ford Motor Co., 230 S.C. 320, 327, 95 S.E.2d 601, 604 (1956).

warranty is a contract, and a plaintiff must be a party to a contract in order to sue on it. This reasoning coupled with the courts' benign attitude toward budding industry enforced the privity requirement.

However, the law has become more sophisticated since the early 1900's and industry has become self-sufficient and less in need of coddling by the courts.

Writers complained of the unfairness of disallowing an injured plaintiff a cause of action against the manufacturer simply because the plaintiff had not purchased the product directly from the manufacturer. Public sentiment was outraged in the area of injury caused by food and related products. Gross adulteration and mislabelling of food led the courts to declare food-caused injury an exception to the privity requirement in the warranty area.[33] A person injured by unwholesome food could sue under the new "exception" and recover against the manufacturer for breach of the implied warranty of fitness even though he purchased from a retailer.[34]

Another noteworthy exception, mentioned in *Odom*, was first stated in *Baxter v. Ford*.[35] This case involved express representations contained in Ford's advertising pamphlets that the windshield of the Ford automobile "would not fly or shatter under the hardest impact." Relying on these representations plaintiff bought a Ford; later a small rock shattered the windshield and caused plaintiff to lose his eye. The court upheld the plaintiff's right of action in *express* warranty, based on the pamphlets, stating that the express representations were a promise to the consuming public and that Ford should be responsible for failure to comply with the representations. The advertising pamphlets, they said, had as their purpose the inducement of the public to purchase, and it would be manifestly unfair to allow Ford to make statements which plaintiff relied on to his harm and then refuse plaintiff redress in warranty against Ford.

The privity requirement in warranty actions was thus being whittled away by exceptions much as the defunct privity requirement in the tort area had been before.

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33. 142 A.L.R. 1479 (1943); Dickerson, *Recent Developments in Food Products Liability: Privity*, 80 DEFENSE L.J. 105 (1960).

34. See generally Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773 (1961) in which a warranty action was held maintainable by an infant who was hurt while biting into pieces of salmon containing metal fish tag; the infant's father had bought the salmon.

35. 168 Wash. 465, 12 P.2d 409 (1932).

The express warranty exception[36] and the food exception[37] have been generally accepted by the courts of this country. South Carolina recognizes the food exception in its Pure Food and Drug statute which makes the sale of adulterated food negligence per se.[38]

Much of the confusion in this area of the law comes from the failure to differentiate between contract and tort actions: some courts cite negligence cases as support for the proposition that privity should not be essential in warranty actions. The old "inherently dangerous" exception which existed in the tort area has been confused with the privity requirement in the contract area, and it has been stated that such articles form an exception to the privity requirement in implied warranty actions.[39] This statement has not been borne out by the cases. In fact, the nature of the injury-causing product should have no relevance to the problem of whether privity should be a requisite in a warranty action. If a product can and does injure, its nature should have no bearing on whether the injured party has a right to pursue a warranty action. The difficulties in determining what products were inherently dangerous were so great in the tort area that it is fortunate the concept has not been imported into the contract area.

The use of the word "warranty" has been an important factor in the development of the law. Historically, a warranty action first sounded in tort and was akin to the action in deceit, but by custom and convenience it became associated with contract.[40] Warranty actions were thus a curious hybrid of tort and contract

36. Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399 (Ct. App. 1962); Rogers v. Toni Home Permanent, 167 Ohio St. 244, 147 N.E.2d 612 (1958).

37. See generally 1 PRODUCTS LIABILITY § 23.01[1][A] (1961); Annot., 142 A.L.R. 1479 (1943); RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft no. 6, 1961) states that 19 jurisdictions have accepted strict liability as to food; 5 (including South Carolina) have reached the same result under statutes; 13 states hold there is no liability in consumers in absence of negligence or privity of contract; and 14 states have no definite law as to food.

38. S.C. CODE ANN. § 32-1520 (1962), makes it unlawful to sell any article of food which is adulterated or misbranded and imposes a fine or imprisonment as punishment for violation of the section. However, there is some conflict in the cases on whether violation of the statute is negligence per se, Gantt v. Columbia Coca-Cola Bottling Co., 193 S.C. 51, 7 S.E.2d 641 (1940), or merely prima facie evidence of negligence, Peters v. Double Cola Bottling Co., 224 S.C. 437, 79 S.E.2d 77 (1954); Note, *Negligence Per Se in South Carolina: The Effect Given in Civil Actions to the Violation of Criminal Statutes*, 11 S.C.L.Q. 207 (1959).

39. 77 C.J.S. *Sales* § 305(b) n. 49 (1952).

40. 1 WILLISTON, SALES § 195-197 (2d ed. 1924); Ames, *History of Assumpsit*, 2 HARV. L. REV. 1 (1888).

partaking of some aspects of both.[41] Warranty gradually became connected with contract in the minds of the bench and bar, and this fact has hindered the acceptance of warranty liability as strict tort liability.

The View of the New RESTATEMENT OF TORTS: *Strict Tort Liability*

The proposed RESTATEMENT OF TORTS[42] imposes strict tort liability on manufacturers of unreasonably dangerous products which injure an ultimate consumer; it proposes a redefinition of "warranty" as an obligation, *not based in contract*, the breach of which renders the manufacturer strictly liable without the need of proof of fault. In view of the importance of the section and its wording it is included here:

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

In the note accompanying the section, the reporter says that strict liability is quite evidently the law of the future, and that with the exception of the change in the law with respect to prenatal injuries strict liability is the most radical and spectacular development in tort law during this century. The reporter's comments serve to explain the section so a summary of salient portions follows.

The rule of strict liability stated in the section makes the seller subject to liability to the user or consumer even though he has used all care in the preparation of his product. The rule applies to products which, if they are defective, may cause only physical harm to the user's land or chattels. The rule does not apply to

41. For example, tort damages may be recovered but the contract statute of limitations is applicable. The statute is generally considered to run from the breach and not from the injury.

42. RESTATEMENT, (SECOND), TORTS § 402A (Tent. Draft no. 10, 1964).

the occasional seller who is not engaged in that activity as part of his business, and does not apply to sales of stock of merchants out of the usual course of business.

The rule applies only when the product is, at the time it leaves the seller's hands, in a defective condition unreasonably dangerous to the ultimate consumer. The burden of proof that the product was defective is on the injured plaintiff. A product is not defective when it is safe for normal handling and consumption. "Unreasonably dangerous" means that the article must be dangerous beyond the extent contemplated by the ordinary consumer.

The ultimate consumer or user may acquire the product through one or more intermediate dealers. He need not have purchased the product at all as he may be an employee, guest or donee of the purchaser. "User" includes one who is presently enjoying the benefits of the product as well as one who is doing some work on it. The liability stated in section 402A does not rest on negligence but is strict liability similar to absolute liability and has its basis purely in tort. To accord with section 402A, "warranty" must be given a new meaning very different from the warranty found in the sale of goods and not subject to the rules which govern such sales: (1) no reliance by the consumer upon the seller's skill or judgement is required; (2) the consumer is not required to give notice to the seller of his injury; (3) the consumer's cause of action is not affected by any disclaimer and (4) the UNIFORM SALES ACT and the UNIFORM COMMERCIAL CODE are not at all applicable.[43]

Section 402A had a rapid and dramatic development: in its 1960 form the section concerned liability of sellers of food;[44] then in 1961 it was widened to concern sellers of products for intimate bodily use;[45] and in 1964 it reached its present form. This sequence reflects the extraordinary rapidity of change in products liability law. For example, 75 A.L.R.2d contains an annotation on this subject;[46] since publication of that volume in 1961 eleven of the states it names as requiring privity have abandoned the requirement.[47]

43. *Id.* comments A-N.

44. RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft no. 6, 1961).

45. RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft no. 7, 1962).

46. Annot., 75 A.L.R.2d 1 (1961).

47. Those states are California, Colorado, Connecticut, District of Columbia, Illinois, Kansas, Louisiana, Minnesota, Missouri, New York, New Jersey, and Texas.

Dispensing with Privity: New York and New Jersey

In 1958, two years after *Odom*, the first major case declared privity not essential in an implied warranty action. This bursting of the dam occurred in Michigan in the case of *Spence v. Three Rivers Builders & Masonry Supply, Inc.*[48] which was an action against the manufacturer for commercial loss caused by defective cinder blocks. The action was allowed, and after this the cases came pell-mell: since *Spence*, eighteen jurisdictions have dispensed with the privity requirement.[49]

New York was a relative late comer, doing away with privity in 1963 in *Goldberg v. Kollsman Instrument Corp.*[50] Prior to *Goldberg* there had been two important cases: *Greenberg v. Lorenz*[51] and *Randy Knitwear v. American Cyanamid.*[52] The first of these allowed the warranty action absent privity because the injury had been caused by a food product; the second allowed the action because of the manufacturer's express representations on the labels in his products. The time was ripe for a final blow to privity, and it came in *Goldberg*. Plaintiff's deceased had been a passenger on an American Airline's flight which crashed near La Guardia airport. Suit was brought in tort against American Airlines, and in warranty and tort against Lockheed (the manufacturer of the aircraft) and Kollsman Instrument Corporation (the maker of the allegedly defective altimeter). The New York court allowed the warranty action against Lockheed but not against Kollsman, stating that Lockheed had the final duty to test all component parts and that casting Lockheed in liability was sufficient protection for passengers "for the present at least."[53] It may be recalled that Cardozo reached a similar result in *MacPherson* relative to the liability of the component part maker when he refused to hold the maker of the wheel liable. *Goldberg*, which completed the evolution in New York and did away finally with privity, is clouded by the fact that it is a four to three decision and contains a stormy and powerful dissent by Judge Burke, who was reluctant to displace the law of negligence from its ancestral environment without legislative action. He saw fault as the basis of liability,

48. 353 Mich. 120, 90 N.W.2d 873 (1958).
49. See note 6, *supra*.
50. 12 N.Y.2d 432, 191 N.E.2d 81 (Ct. App. 1963).
51. 9 N.Y.2d 195, 173 N.E.2d 773 (Ct. App. 1961).
52. 11 N.Y.2d 5, 181 N.E.2d 399 (Ct. App. 1962).
53. Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 434, 191 N.E.2d 81, 83 (Ct. App. 1963).

and criticized the majority's choice of Lockheed as responsible defendant:

> Inherent in the question of strict products or enterprise liability is the question of the proper enterprise on which to fasten it. Here the majority have imposed this burden on the assembler of the finished product, Lockheed. The principle of selection stated is that the injured passenger needs no more protection. We suggest that this approach to the identification of an appropriate defendant does not answer the question: Which enterprise should be selected if the selection is to be in accord with the rationale upon which the doctrine of strict products liability rests?
>
> The purpose of such liability is not to regulate conduct with a view to eliminating accidents,[2] but rather to remove the economic consequences from the victim who is unprepared to bear them and place the risk on the enterprise in the course of whose business they arise. The risk, it is said, becomes part of the cost of doing business and can be effectively distributed among the public through insurance or by a direct reflection in the price of the goods or service. As applied to this case we think that the enterprise to which accidents such as the present are incident is the carriage of passengers by air—American Airlines.

And in footnote two, Burke goes to the heart of the problem:

> 2. In view of the ease with which lack of care can be brought to light through devices such as *res ipsa loquitur*, any marginal increase in the stimulus to care would be clearly outweighed by the harshness of the means used to achieve it—the removal of due care as a defense.[54]

This dissent and the division of the court leave the state of the law in New York in some doubt.

In *Henningsen v. Bloomfield Motors*,[55] New Jersey was faced with the privity problem. The plaintiff was the wife of the purchaser of an automobile; while she was driving, the steering mechanism ceased to function properly, and she ran into a brick wall. She brought an action against the retailer based on the breach of an implied warranty to recover for the injuries she sustained in the accident. The court, in a well-reasoned decision,

54. *Id.* at 435, 191 N.E.2d at 85.
55. 32 N.J. 358, 161 A.2d 69 (1960).

abandoned the privity requirement and affixed strict liability on the defendant.[56] The court could see no rational basis for differentiating between a fly in a bottle of soda pop (for which an action was allowed by way of the food exception) and a defective steering mechanism. The *Henningsen* case is perhaps destined to become the *MacPherson* of the warranty area and is as valuable for its discussion of the disclaimer clause in the contract of sale of a new automobile[57] as it is for its discussion of privity.

The New York and New Jersey approach, *i.e.* stripping warranty of its illusory contract mask and declaring it strict tort liability, seems direct and reasonable. Other courts, however, have used various theories to allow recovery without going to this extent, such as the idea that the warranty "runs with the goods,"[58] or that the contract of sale inures to the benefit of the injured party,[59] or that the warranty is assigned to the purchaser from the retailer.[60] One writer has collected twenty-nine theories from the cases.[61]

The reasons for dispensing with privity are persuasive: the manufacturer should stand behind his product; the man who puts a defective product on the market should be held liable for the consequences of that defect; society holds human life in high

56. Where commodities sold are such that if defectively manufactured they will be dangerous . . . then society's interest can only be protected by eliminating the privity requirement. . . .
Henningsen v. Bloomfield Motors, 32 N.J. 358, 370, 161 A.2d 69, 81 (1960).

57. The disclaimer of warranty was on a standard printed purchase order of the sort widely used by the Automobile Manufacturer's Association which is composed of General Motors, Ford, Chrysler and others. On the back of the order was the following:

> It is expressly agreed that there are no warranties, express or implied, made by either the dealer or manufacturer . . . except as follows: the manufacturer warrants each vehicle to be free from defects in material and workmanship under normal use. . . . Its obligation under this warranty being limited to making good at its factory any part . . . which shall within 90 days . . . be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective.

Id. at 363, 161 A.2d at 74. The New Jersey court held the disclaimer ineffective:

> An instinctively felt sense of injustice cries out at such a bargain.

Id. at 373, 161 A.2d at 84. A similar warranty was involved in *Odom* but Mr. Justice Oxner did not discuss it as the jury had found that it had not been brought to the plaintiff's attention.

58. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

59. Klein v. Duchess Sandwich Co., 14 Cal.2d 277, 93 P.2d 799 (1939).

60. Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936).

61. Gilliam, *Products Liability in a Nutshell,* 37 ORE. L. REV. 119, 153-155 (1957).

regard and that interest demands that manufacturers indemnify the victims of their defective products; manufacturers are best able, by virtue of their position, to bear the cost of strict liability by raising the unit price of their consumer goods or purchasing products liability insurance, thus preventing the burden of injury from falling on the injured party alone. Justice demands that the manufacturer be liable regardless of his freedom from fault. Furthermore, since the manufacturer's liability can be enforced by a series of suits (purchaser against retailer, then retailer against manufacturer) it is expedient to avoid such a circuity of actions which cause needless cost to needless parties by allowing a direct action by the injured purchaser against the manufacturer. Against these compelling reasons stands the naked, legal argument that a warranty is contractual and cannot be sued on by a non-contracting party. This dry logic is not well-received by a man crippled by a defective product which he bought from a retailer who is not able to pay damages.

The conjecture, what will South Carolina do in the future, is heightened by the fact that *Odom* was not a case of personal injury but of commercial loss only. If faced with the *Goldberg* or the *Henningsen* situation, will the South Carolina Supreme Court consider itself bound by *Odom* or will it confine *Odom* to its facts? The answer is not apparent. The language in *Odom* is clear to the effect that privity is essential in an implied warranty action,[62] but *Odom* could easily be considered to stand for the proposition that privity is necessary for warranty actions involving purely commercial loss. The court would then be free to announce a new policy on the question of privity in actions involving personal injury when such a case arises in this state. It is desirable that South Carolina adopt the reasoning of the New York and New Jersey courts on the privity matter. Strict liability will very soon be the law in a majority of states and may, in the future, be law in all the states. The inevitability of strict liability is clear, and the only real question is when it will be adopted.

62. We think it is clear . . . that any liability on the theory of implied warranty is confined to [the retailer] and that an action on such a warranty cannot be maintained against Ford with whom there was no privity of contract.

Odom v. Ford Motor Co., 230 S.C. 320, 328, 95 S.E.2d 601, 605 (1955). It is interesting to note that two of the cases cited in support of this proposition have been subsequently overruled.

Related Problems: Insurance, legislation, Uniform Acts and Contributory Negligence.

Since the central problem in products liability cases is who is to pay, and since it is arguable that the manufacturer should have to pay, the question becomes one of where the money is to come from. Insurance is the reasonable answer. Products liability insurance is still in relative infancy, but generally it provides coverage for injury caused by the insured's product during the policy period. Policies are usually written for one year and contain limits for each person injured, each accident caused by the product, and for the total amount that will be paid during the policy period. In such aspects as the duty of the insurer to defend actions involving the insured's product and the duty of the insured to co-operate, products liability is similar to other liability insurance.[63] The critics of this scheme decry the advent of "Products Compensation" patterned after workman's compensation insurance.[64]

Some states have attempted to solve the privity problem by legislation.[65] Georgia, for example, enacted a statute[66] holding the manufacturer liable to the ultimate consumer which appeared to dispense with privity. The Georgia court,[67] however, interpreted "ultimate consumer" to mean purchaser and thus retained the privity requirement to the extent that anyone not a purchaser could not sue under the statute.

The UNIFORM SALES ACT defines "buyer"[68] and "seller" as immediate buyer and seller and has been held to preclude a war-

63. See generally 2 PRODUCTS LIABILITY §§ 50-52 (1961).

64. Freedman, *Products Compensation: Who's Pushing Whom?,* 20 BUS. LAW 167, 168 (1964).

65. California enacted a statute apparently designed to eliminate the right of recovery in implied warranty as to blood plasma. CALIFORNIA HEALTH AND SAFETY CODE § 1623 (1955).

66. The manufacturer of any personal property sold as new property . . . shall warrant the following to the ultimate consumer, who, however, must exercise caution when purchasing to detect defects, and provided there is no express covenant of warranty . . . to the contrary: (1) the article is merchantable and reasonably suited to the intended use . . . ."

GA. CODE ANN. § 96-307.

67. Revlon v. Murdock, 103 Ga. 842, 120 S.E.2d 912 (1961). The plaintiff, a beautician, was hurt when a bottle of nail polish exploded. The court said that in view of the language of the statute, "consumer" meant purchaser.

68. "Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

UNIFORM SALES ACT § 76(1).

ranty action by one who does not buy from the defendant.[69] The UNIFORM COMMERCIAL CODE extends the retailer's warranty to any natural person who is in the family or household of the buyer or who is a guest in the buyer's home if it is reasonable to expect that the person may use the goods.[70] The Code does not go further than this, and the question of the manufacturer's liability to the remote vendee is expressly left to the developing case law.[71]

It might be supposed that once the privity requirement is abolished the defense of a products liability case becomes almost impossible, but this is not true.[72] The plaintiff must still show causation and he must show that the defect existed in the product when it left the defendant's hands. This is not an easy burden of proof. Also, the defendant will presumably have some form of the defense of assumption of risk available to him. Contributory negligence is not generally a defense to a warranty action[73] but assumption of risk, consisting of voluntarily and unreasonably proceeding to encounter a known danger, should be a defense. In any case, a plaintiff who becomes aware of the dangerous nature of the product he is using and continues to use the product in defiance of the obvious danger to him should clearly be barred of recovery.[74]

Conclusion

As Judge Cardozo said in *Ultramares v. Touche*, "The assault upon the citadel of privity is proceeding in these days apace."[75] However, since Dean Prosser has used that sentence in his ex-

69. In Hanback v. Dutch Baker Boy, 107 F.2d 203 (D.C. Cir. 1939), an infant who was made ill by an unwholesome chocolate eclair purchased by the infant's mother was denied an action for breach of implied warranty since the infant was not a "buyer" or "successor in interest" of a buyer.

70. UNIFORM COMMERCIAL CODE § 2-318.

71. *Id.* comment (3) A recent Pennsylvania case allowed an employee of a hotel who was injured by a champagne cap (it blew out of the bottle and hit him in the eye) to avail himself of the remedy afforded by § 2-318. Yentzer v. Taylor Wine Co., 414 Pa. 272, 199 A.2d 463 (1964), 17 VAND. L. REV. 1537 (1964).

72. See generally Bushnell, *Practical Aspects of Defending Products Liability Cases*, 11 DEFENSE L. J. 99 (1962).

73. See generally Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939).

74. Unreasonable exposure to a known and appreciated risk should bar recovery . . . .

1 PRODUCTS LIABILITY § 16.01 [3] (1961).

75. 255 N.Y. 170, 180, 174 N.E. 441, 445 (Ct. App. 1931).

cellent article in the *Yale Law Journal*,[76] this writer is precluded from doing so, and is left to a more mundane termination.

The history of the privity requirement shows that it was accidentally introduced into the law to apply to both contract and tort actions; that *MacPherson* dispensed with it in the tort action; that many states including New York and New Jersey have done away with privity in warranty actions; and that the inevitable trend is towards a strict products liability sounding in tort. "Warranty" is considered by the proposed RESTATEMENT OF TORTS as a duty, devoid of contract implications, the breach of which is afforded a remedy regardless of the lack of contractual relation between the plaintiff and the defendant.

Odom v. Ford Motor Co. held that privity was requisite for an implied warranty action, but *Odom* was not a personal injury case. Due to the harshness of the privity requirement in warranty actions and in light of the humanitarian reasons behind dispensing with privity, it is very possible that the South Carolina Supreme Court will confine *Odom v. Ford* to its facts, or even overrule it, if faced with a case involving personal injury.

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76. 69 YALE L. J. 1099 (1960).