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Sales--Actions for Breach of Implied Warranty--Privity Not Required [,i>Lonzrtck v. Republic Steel Corp., 6 Ohio St. 2d 277, 217 N.E.2d 185 (1966)]

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Recent Decisions

SALES — ACTIONS FOR BREACH OF IMPLIED WARRANTY — PRIVITY NOT REQUIRED


Winterbottom v. Wright, an 1842 English landmark decision in products liability law, held that absent a contractual relationship between the parties there could be no action by an injured passenger against the seller of a coach who had contracted to keep the coach in repair. "Thus, the notorious creature, 'privity of contract,' was born." And ever since its birth, the courts have been slowly but steadily burying it.

The privity barrier first fell away in actions which alleged negligence in the manufacture of an article which caused injury to the consumer. Here, the leading case was MacPherson v. Buick Motor Co., which in effect abolished the rule requiring privity of contract in negligence actions. In MacPherson, the court held a manufacturer liable for injuries to a remote vendee caused by a product which, because negligently made, had become dangerous.

The demise of the privity requirement in actions based on warranty has not progressed as rapidly as in negligence actions, and it is in this area that the doctrine of strict liability has begun to blossom. As with negligence cases, the first products covered by the strict liability doctrine were food and drink; then products intended for intimate bodily use were encompassed. A brief breakthrough in the privity requirement was made in 1951 in DiVello v. Gardner Mach. Co., where the Court of Common Pleas of Cuyahoga County became

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3 217 N.Y. 382, 111 N.E. 1050 (1916). Although MacPherson is the leading case, it was not the first. In 1852 Thomas v. Winchester, 6 N.Y. 397 held that a dealer in drugs who negligently labeled a deadly poison as a harmless medicine was liable to a person not in privity with the dealer who, without fault on his part, was injured by the use of the product. Following this case, the courts began to abandon the requirement of privity in cases involving products for human consumption and then in products which were inherently dangerous to the consuming public. For a history of the demise of privity in negligence actions, see PROSSER, TORTS § 96, at 659-63 (3d ed. 1964); Note, 19 RUTGERS L. REV. 715 (1965); Note, supra note 2.
4 PROSSER, op. cit. supra note 3, § 96, at 661.
5 Id. § 97, at 676.
the first to permit recovery without a showing of negligence in a case involving something other than products for intimate bodily use. In *DiVello*, the court allowed recovery against the manufacturer of a defective grinding wheel which had burst, injuring an employee; however, the case was later overruled. Then in 1958 the Michigan Supreme Court, in a case where defective building blocks caused a house to collapse, held that the manufacturer was liable to the ultimate purchaser of the house even though no negligence or privity of contract was shown. A majority of the courts which have since considered the question have followed the lead of the Michigan court.

In Ohio, the law of products liability has had a slow but orderly development. Until 1958, the courts denied recovery in warranty actions in the absence of privity. In *Rogers v. Toni Home Permanent Co.*, however, the supreme court held that where a consumer relies on the advertising of a product and that product causes injury to the consumer, privity is not required in an action against the manufacturer on an express warranty. In 1960, the court, in *Kennedy v. General Beauty Prods., Inc.* held that for a damage action based on breach of an implied warranty to lie, there must be privity of contract.

In 1962, the Uniform Commercial Code was enacted in Ohio.

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7 Prosser, op. cit. supra note 3, § 97, at 677.
8 102 N.E.2d at 289.
9 Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953), wherein recovery was not allowed when the defect caused a fire. The court pointed out that for an action in implied warranty to lie, there must be privity of contract between the plaintiff and the defendant.
14 167 Ohio St. 244, 147 N.E.2d 612 (1958).
17 Ohio Rev. Code §§ 1301.01-1309.50.
Section 1302.31 of the Ohio Revised Code extends the seller's warranties — express and implied — to members of the buyer's household and to his guests. The supreme court, in Inglis v. American Motors Corp.,\(^{18}\) recognized an action in tort based on breach of express warranty and permitted recovery for property damage caused by a defective product. The Ohio Supreme Court has recently taken another forward step by eliminating the requirement of privity in actions alleging a breach of an implied warranty.\(^{19}\)

In Lonzrick v. Republic Steel Corp.,\(^{20}\) the defendant manufactured and sold steel roof joists. The plaintiff was doing structural iron work under an area where the joists had been installed when the joists collapsed and fell on the plaintiff, causing him to suffer injuries. In his petition, the plaintiff alleged that the defendant had impliedly warranted the roof joists to be of good and merchantable quality and that because of the breach of said warranty, the joists came apart and injured him. The defendant demurred to the petition and, for purposes of the demurrer, the allegations were taken to be true. The issue raised by these facts and considered by the court was:

Where . . . a manufacturer produced and sold steel joists, implicitly representing that they were of good and merchantable quality, fit and safe for the ordinary purposes . . . but without advertising the product, is [a] . . . user, whose presence the defendant could . . . anticipate and who is injured because a defect in the joists caused them to fall upon him, restricted to an action based on negligence alone, or can he recover in an action in tort based upon breach of this implied warranty where he was not in . . . (privity) with the manufacturer-defendant?\(^{21}\)

The court held that, in a products liability case, the plaintiff is not restricted to an action based on negligence; he may proceed upon the theory of implied warranty, notwithstanding the fact that there is no contractual relationship between himself and the defendant and even though the defendant does not advertise the product on the market.\(^{22}\)

\(^{18}\) 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

\(^{19}\) Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

\(^{20}\) 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

\(^{21}\) Id. at 236, 218 N.E.2d at 192. (Emphasis added.)

\(^{22}\) Id. at 227, 218 N.E.2d at 185. This was a four-to-three decision. The arguments of the dissent, which were not heeded by the majority of the court, were: (1) The plaintiff failed to allege that the joists were defective — an element required by earlier Ohio decisions. (2) Allegations that the joists were defective when sold and that the defective condition was the proximate cause of the plaintiff's injury would have been sufficient, with help of res ipsa loquitur, to state a cause of action in negligence. There-
Thus, Lonzrick has changed the law in Ohio. For the first time the supreme court discarded the requirement of privity in a case where there is no food, inherently dangerous articles, or advertising involved and allowed recovery to a mere passive user of the product. The court found certain representations implicit in the mere presence of a product on the market. If these representations are breached and an injury occurs, the injured party will have a cause of action even though he is a stranger to any transaction involving the product.

The Lonzrick decision raises several interesting points for discussion. First, in the earlier cases which allowed recovery on express warranty — aside from those involving food or products for intimate bodily use — the courts considered reliance by the plaintiff on the representations made in the defendant's advertising to be a necessary element. In Lonzrick, the defendant manufacturer made no representations through advertising either to the plaintiff or to the public in general. Therefore, although the plaintiff relied on no express representations, he was still permitted to recover because he was a "user" of a product which the manufacturer had impliedly warranted. The court reached this conclusion even though it was a passive use, his mere presence in the building making him a "user" of the joists. No Ohio court and few courts of other jurisdictions have gone this far in finding a user of a product.

Although few courts have allowed recovery to an innocent bystander on the basis of strict tort liability, there seems to be no valid reason to allow recovery to a passive user and yet deny it to a pedestrian injured by a defective automobile or to a bystander injured by an exploding beer bottle. In neither case has the plaintiff relied on any representations of the defendant, nor did the defendant make any representations to the plaintiff. The legislature and not the courts should decide whether privity should be abolished.

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23 Id. at 240, 218 N.E.2d at 194 (dissenting opinion).
24 Id. at 227, 218 N.E.2d at 185.
25 E.g., Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).
26 6 Ohio St. 2d at 236, 218 N.E.2d at 192.
tiff relied on any express representations of the defendant. Just as the plaintiff in Lonzrick used the roof joists — to prevent the roof from falling on him — so the pedestrian on the street uses the brakes on a car — to prevent the car from running into him. The same implicit representations were made to both, and there seems to be no reason, now that the requirement of privity in an action on implied warranty has been laid to rest, for denying recovery to an innocent bystander.\footnote{Dean Prosser feels that there is no essential reason why an innocent bystander should not be allowed to recover in strict liability. However, he believes the courts will draw the line at allowing recovery to the user or consumer. The sentiment has been for the consumer and not the innocent bystander. Prosser, supra note 28.}

As a matter of public policy, such a person has as much right to expect a non-defective automobile on the streets,\footnote{Recovery has been allowed to a passenger in an automobile or in an airplane. See, e.g., Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). Leading Comment, supra note 28.} or a non-defective bottle in the supermarket, as did a person injured by a steel roof joist to have expected it to have been non-defective.\footnote{Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 574, 205 N.E.2d 92 (1965).} The next step the Ohio Supreme Court may well take, as a logical extension of the Lonzrick holding, is to allow an innocent bystander recovery in strict tort liability.

A second point for discussion is the apparently intentional avoidance by the Lonzrick court of the phrase “strict liability in tort.” This phrase was conspicuous by its absence because the court of appeals\footnote{Id. at 384, 205 N.E.2d at 99.} used the term almost exclusively. It explained:

The use of the word “warranty” is probably improper; however, the courts, in describing causes of action for strict liability . . . seem to have continued to use it for want of a better word, not intending to mean anything more than the manufacturer putting his goods into the stream of commerce, thereby representing that they are of merchantable quality . . . .\footnote{RESTATEMENT (SECOND), TORTS § 402A (1965).}

The Restatement of Torts\footnote{Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) is one of the forerunners of the cases abolishing privity in actions for breach of an implied warranty.} says nothing about warranty. Instead, it justifies recovery on the basis of strict liability in tort in accord with Greenman v. Yuba Power Prods., Inc.,\footnote{Prosser, supra note 28.} a leading California case. But the comments explain that this should not prevent the courts from calling strict liability in tort a breach of warranty if they choose to do so.\footnote{However, in order to avoid confusion, it is important to note that the Restatement of Torts does not consider warranty claims in tort. Instead, it focuses on the concept of strict liability in tort.}
would seem wise to discard the term “warranty” and instead to use the term “strict liability in tort.” Although breach of warranty was originally a tort action,\(^{30}\) it now has a connotation of contract which is misleading, since there is no contract between the plaintiff and the manufacturer. Furthermore, the liability imposed on the manufacturer for the harm resulting from the defective goods may rest on principles of tort law.\(^{40}\) That is, by selling a defective product, the seller has breached a duty and for this breach he is held liable in tort. The Ohio Supreme Court should follow the court of appeals by designating such an action as one based on strict tort liability rather than on the breach of an implied warranty.

The *Lonzrick* court stated that the confusion which arises from the use of the word “warranty” is attributable to a failure to distinguish between the “two different kinds of warranties,”\(^{44}\) one based on the contractual relation and the other upon the representations implicit in putting the product on the market. These representations are made not only to persons who are in privity but also to those who use or consume the product.\(^{42}\) The former type is the warranty covered by the Uniform Commercial Code, and the latter is covered by tort principles. Aside from the misnomer involved in the latter type of warranty,\(^{43}\) problems also arise when it is construed in the light of the Code. Allowing recovery to one not in privity with the manufacturer is not entirely inconsistent with the Code. The comments to section 2-318\(^{44}\) provide that the Code is neutral as to allowing recovery to others, except for the purchaser and his family, who are in the distributive chain. Moreover, as to a person in a position similar to that of the plaintiff in *Lonzrick*, the Code still would not permit recovery because he was never a purchaser of the defective product.\(^{45}\) However, even if the Code

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\(^{30}\) Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919, 920 (D.C. App. 1962); PROSSER, op. cit. supra note 3, § 95, at 651.


\(^{41}\) 6 Ohio St. 2d at 234, 218 N.E.2d at 190.


\(^{43}\) The type of warranty will hereinafter be referred to as strict liability in tort.

\(^{44}\) UNIFORM COMMERCIAL CODE § 2-318 comment 3 [hereinafter cited as UCC].

\(^{45}\) Contra, Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipse, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5, 24-27 (1965). Professor Shanker suggests that interpreting comment 3 as that limiting the development of case law to only those who have purchased goods somewhere in the distributive chain “is far too strict and deprives the comment of its intended meaning.” *Id.* at 26.
were held to apply to persons not in the chain of distribution, the courts have already held that various provisions are not applicable in actions based on strict liability in tort.\(^{46}\)

For example, the Code permits the seller of a product to modify or exclude both express and implied warranties\(^{47}\) and also to modify or limit the remedies available to the damaged party.\(^{48}\) Under the theory of strict liability in tort, an attempted disclaimer by the seller has been held to be ineffective.\(^{49}\) The cause of action is not based on the validity of a contract or any representation contained therein. Instead, it is based on the breach of a duty owed to the consumer or user — it is a tort action, and therefore any restrictions on contractual liability are immaterial.\(^{50}\)

Another Code provision which is inapplicable in strict liability cases is the one dealing with notice to the seller.\(^{51}\) Section 2-607(3) provides that the buyer must give the seller notice within a reasonable time after he discovers or should have discovered a breach. Several courts, in cases based on strict tort, have asserted that the notice requirement is not applicable.\(^{52}\) At least one writer has declared that any distinction between the notice requirements under the Code and the lack of them under strict liability is merely illusory.\(^{53}\) He relies on comment 5 to section 2-607 which states that a remote party is not held to the notice requirements of 2-607 but is only "held to the use of good faith in notifying, once he has had

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\(^{47}\) UCC § 2-316.

\(^{48}\) UCC § 2-719. However, it must be pointed out that in the case of consumer goods, limitation of consequential damages for injury to the person is prima facie unconscionable. UCC § 2-719(3).


\(^{50}\) Note, supra note 49, at 685.

\(^{51}\) UCC § 2-607(3).


\(^{53}\) Shanker, supra note 45, at 27.
time to become aware of the legal situation. However, it would seem that under strict tort liability the injured party is not even required to notify the seller within a reasonable time. As has been said, an action in strict tort does not sound in contract but in tort for the breach of a duty owed. It is the statute of limitations for actions on bodily injury or injury to personal property which should control the giving of notice rather than the "reasonable" or "good faith" time allowed by the Code. This argument can be supported by comparing a strict liability action to one sounding in negligence. The only difference between the two is that in a strict liability action negligence does not have to be proven. In a negligence action, the question of notice is governed by the statute of limitations on the bringing of such an action. Since the two actions are so similar, there appears to be no reason why the same statute should not control the giving of notice in strict tort liability cases.

The third area in which a difference exists between the Code and strict liability is related to the preceding discussion of notice, namely, the statute of limitations on the bringing of an action. Under the Code, the statute of limitations as applied in an action for breach of warranty is four years after the action accrues, and the action accrues when tender or delivery is made. Under strict liability in tort, however, the cause of action accrues when the injury occurs; thus the statute of limitations should be the same as that which applies to personal property and bodily injuries. In Ohio this is a two-year statute. Therefore, if the Code were held to be applicable and a party were injured by a defective product four years and a day after the sale, this party would be barred from recovery, even though he may never have had an opportunity to inspect the product, unless he were able to carry the burden of proving negligence. Many times a defect in a long-lived product will not arise until several years after its initial sale. It would be unfair to place an injured party who was unable to inspect on the same footing with someone who could have inspected and discovered the defect. This is another reason why the statute of limitations for negligence should also apply to strict liability in tort actions.

The critics of strict liability in tort argue not only that it is contrary to the Code but also that it imposes an absolute liability

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54 UCC § 2-607, comment 5.
56 UCC §§ 2-725 (1), (2).
58 Ohio Rev. Code § 2305.10.
on the defendant manufacturer. In answer to this argument, the Lonzrick court explained that the plaintiff still must carry the burden of proof. The plaintiff must prove that the joists were defective at the time the manufacturer sold them, that the defect caused the joists to collapse while they were being used for their ordinary purpose, that the defect was the direct and proximate cause of the injury, and that the manufacturer could reasonably anticipate the plaintiff’s presence in the building at the time of the accident. In addition, the court stated that the “defendant has available the opportunity to offer evidence in defense on each of these necessary elements of the plaintiff’s case, and also . . . the defense of assumption of risk and intervening cause.” The defense of contributory negligence was not raised. This is in accord with the Restatement of Torts, which does not recognize contributory negligence as a defense when it consists of failing to discover a defect or to guard against the possibility of its existence but does recognize assumption of the risk as a defense. A variation of the defense of contributory negligence has been recognized in at least one case, in which the court called it “misuse,” that is, a “use different from or more strenuous than that contemplated to be safe by ordinary users/consumers.”

In addition to the defenses of assumption of the risk and intervening cause, the Ohio courts might recognize “misuse” if faced with the proper factual situation. But it does appear that they will not accept the defense of contributory negligence in an action based on strict liability in tort.

If the defect is laid at the manufacturer’s doorstep and if he is unable to raise any of the above defenses, he, in effect, becomes an insurer without limit of any damage proximately caused by a defect existing in his product at the time of its sale, even though no amount of care could have eliminated that defect, even though

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60 Id. at 237, 218 N.E.2d at 192-93.
61 Ibid.
62 Ibid.
63 This is contrary to DiVello v. Gardner Mach. Co., 102 N.E.2d 289 (Ohio C.P. 1951), which recognized contributory negligence as a defense. However, DiVello was impliedly overruled by Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953).
64 RESTATEMENT (SECOND), TORTS § 402A, comment n (1965).
65 Ibid.
67 Ibid. at 429.
such manufacturer made no representations about his product to anyone, and even though no one knew that it was his product.60

Various reasons have been given for placing the manufacturer in such an unfavored position, one reason being that public interest demands that the cost of injuries or damage resulting from defective products be borne by the makers who put them into the channels of commerce rather than by the injured consumer or user who is powerless to protect himself.70 A second reason is that "the maker, by placing the goods upon the market, represents to the public that they are suitable and safe for use . . . and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he has made no contract with the consumer."71 Another reason is that strict tort liability would otherwise be enforced by a series of suits. The retailer is first held liable to the consumer or user. He then sues the middleman who in turn seeks recovery from the manufacturer. Rather than require this multiplicity of suits, it is much less burdensome for all concerned to permit the injured party to seek relief directly from the manufacturer.72 One other reason for allowing direct recovery by the consumer in strict liability is that, although the cost of an injury may be an overwhelming one for the injured party, the manufacturer can insure himself against the risk by distributing among the public the cost of such insurance.73 The manufacturer even has his choice of methods of insuring; he can either raise the cost of his product or buy insurance coverage at a relatively nominal cost.74 Despite these arguments for strict tort liability, however, there are those who oppose it.75

One argument against the imposition of strict tort liability is that by imposing such high standards on marketed products, the

71 PROSSER, op. cit. supra note 57, § 97, at 674. Leading Comment, supra note 28, at 206.
72 PROSSER, op. cit. supra note 57, § 97, at 674.
development of new products will be hindered. The proponents of this view claim that it is impossible to test a new product fully in the laboratory, the only true test being use by the consuming public. Accordingly, if a manufacturer can be held liable even though he has done everything possible to test the safety of the product, he will be quite hesitant to place it on the market.

Dean Prosser suggests that the manufacturer of a new product should be required to give notice of the potential dangers of the product but should not be held to strict liability. There are several problems inherent in this suggestion. First, it is difficult to define what a new product is and for how long it will remain new. Furthermore, one cogent argument in favor of strict liability is the belief that the manufacturer owes a duty to the consuming public. The question therefore arises as to whether this duty should be subordinated to the public's need for new and better products — a question with which the courts will be faced in coming years.

The critics of strict liability also argue against the so-called "risk spreading" explanation. It is contended that many manufacturers will not be able to raise their prices and still remain competitive. This argument has been countered by the suggestion that the manufacturer purchase insurance at a minimal cost which even the smallest manufacturer can afford. But even if a manufacturer could not raise his prices or buy insurance, his duty to the public to place safe products on the market and to be held liable for any that are defective is unaltered. When a product is placed in the flow of commerce, the user or consumer usually does not examine the financial stability of the manufacturer. Instead, he relies on the representations implicit in the product having been placed on the market. If the manufacturer cannot afford to meet this duty, he should nevertheless be held strictly liable and thereby possibly be forced out of business. This threat, however, should induce manufacturers to exercise great care in placing safe products on the

76 Id. at 950.
77 Prosser, supra note 28, at 172.
79 See text accompanying note 74 supra for a brief discussion of the risk-spreading explanation.
80 Plant, supra note 75, at 947.
81 Leading Comment, 27 Mo. L. Rev. 194, 207 (1962).