Washington and Lee Law Review

Volume 27 | Issue 2 Article 14

Fall 9-1-1970

Strict Liability Unmasked: The Applicable Statute Of Limitations

STRICT LIABILITY UNMASKED: THE APPLICABLE STATUTE OF LIMITATIONS

Rapid developments that have taken place in the products liability field during the past few years emphasize the importance of distinguishing between the concepts of strict liability and implied warranty.[1] Although both of these concepts were developed to give the consumer a remedy against manufacturers of defective products, their differences have produced confusion in some courts.[2] For example, when a specific question arises as to which statute of limitations should be applied in a strict liability action for personal injuries, conflicting opinions have resulted. Some courts have held that strict liability is a tort remedy, and that the tort statute of limitations, which begins to run at the time of injury, should apply.[3] Other courts reason that strict liability is merely an extension of implied warranty and that the contract statute of limitations, which runs from the time of sale, applies.[4]

In *Mendel v. Pittsburgh Plate Glass Co.*,[5] the plaintiff brought suit in 1965 for injuries received earlier that year from what was alleged to be a faulty glass door manufactured and installed in 1958 by the defendant, Pittsburgh Plate Glass Company. The issue presented was whether an action for personal injuries which were caused by an unreasonably dangerous condition in a defective product is based upon strict liability or implied warranty. In a four-to-three decision, the Court of Appeals of New York stated that "strict liability in tort and implied warranty in the absence of privity are merely different ways of

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[1]*See* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); Olney v. Beaman Bottling Co., 220 Tenn. 459, 418 S.W.2d 430 (1967).

[2]*Compare* Sides v. Richard Mach. Works, Inc., 406 F.2d 445 (4th Cir. 1969) (applying the tort statute of limitations which begins to run at the time of injury and not at the time of sale) *with* Richmond Redev. & Housing Authority v. Labarnum Constr. Crop., 195 Va. 827, 80 S.E.2d 574 (1954) (applying the contract statute of limitations which begins to run at the time of sale rather than at the time of injury).

[3]Creviston v. General Motors Corp., 225 So. 2d 331 (Fla. 1969); Williams v. Brown Mfg. Co., 93 Ill. App. 2d 334, 236 N.E.2d 125 (1968); Mickle v. Blackmon, — S.C. —, 166 S.E.2d 173 (1969); Holifield v. Steco Indus., Inc., 42 Wis. 2d 750, 168 N.W.2d 177 (1969).

[4]Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969); Jackson v. General Motors Corp., 441 S.W.2d 482 (Tenn.), *cert. denied*, 90 S. Ct. 376 (1969).

[5]25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

describing the very same cause of action."[6] In other words, the court reasoned that strict liability is merely an extension to third party users or consumers of the contract theory of implied warranty.[7] Therefore, the plaintiff was barred from bringing a personal injury suit against the manufacturer because the action sounded in contract, not tort, and thus should be governed by the contract statute of limitations.[8] According to the court, this statute of limitations began to run at the time of sale in 1958 and had expired before the plaintiff was injured in 1965.

The dissenting judges rejected the idea that strict liability and implied warranty are essentially the same cause of action sounding in contract. Rather, they reasoned that tort law should govern because this was a personal injury action and there is no cause of action until an injury occurs.[9] This would avoid placing the plaintiff in the anoma-

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[6]*Id.* at 210, 305 N.Y.S.2d at 494.

[7]*Mendel* cited the leading case of Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963), as support for this extension of implied warranty. Goldberg involved an action for the wrongful death of an airplane passenger brought against the air carrier, the manufacturer of the airplane, and the manufacturer of the faulty altimeter which allegedly caused the crash. The Court of Appeals of New York held that the airplane manufacturer's implied warranty of fitness ran in favor of passengers despite their lack of privity. However, it should be pointed out that the court also felt that strict tort liability was a more accurate description for the liability being imposed. In addition, the court stated:

> A breach of warranty, it is now clear, is not only a violation of the sale 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 vendor or manufacturer.

Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 532, 191 N.E.2d 81, 82, 240 N.Y.S.2d 592, 594 (1963).

[8]*Compare* N.Y. CIV. PRAC. LAW § 213 (McKinney Supp. 1969) *with* N.Y. CIV. PRAC. LAW § 214 (McKinney 1963). The two New York statutory provisions differ in that the contract statute of limitations begins to run at the time of sale and is six years long, whereas the tort statute of limitations begins to run at the time of injury and is three years long. The court's refusal to apply the tort statute of limitations was based on its fear of unfounded lawsuits being brought against manufacturers many years after the product had been sold. The majority felt that applying the contract statute of limitations would prevent these unfounded suits in the products liability field. 253 N.E.2d at 210, 305 N.Y.S.2d at 495.

[9]The dissent's justification for applying the tort statute of limitations to a strict liability action was that the plaintiff still has the burden of proving that his injury was the result of a defectively manufactured product. This burden would become more difficult to sustain with the passage of time because of the intervening factors of maintenance and depreciation. 253 N.E.2d at 213-14, 305 N.Y.S.2d at 499.

lous situation of being expected to bring a cause of action before she even had one. The dissent also argued that although the plaintiff had asserted a contractual theory of implied warranty in her pleadings, she had stated facts sufficient to allege a cause of action in tort under strict liability. Therefore, the plaintiff should have been able either to recover on this latter basis or to amend her complaint,[10] instead of being left entirely without a remedy for her injury.

Because of a lack of precedent during the early stages of products liability development, many legal devices were utilized to hold manufacturers liable when their defective products caused personal harm.[11] However, the concepts of implied warranty and strict liability gradually emerged as the best routes of recovery for the injured consumer,[12] and results in cases such as *Mendel* can be traced to a similarity in development between the two.

In warranty, traditional economic policies of laissez-faire, as well as a fear that manufacturers would be subjected to unfounded and harassing law suits, enabled contract principles of privity to insulate manufacturers from liability for their defective products.[13] The trend today is away from theories of laissez-faire and towards consumer protection.[14] Consequently, the privity requirement set forth in cases such as *Winterbottom v. Wright*[15] and *Huset v. J.I. Case Threshing Machine Co.*[16] has been gradually discarded. The result is that the manufacturer's liability for defective products has been extended to

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[10]The dissent stated:

> There is a pleading problem in this case. Plaintiffs in their "breach of warranty" causes of action have conservatively followed the "contractural" format.... However, the pleading issue is hardly the nub of this case, and the unesthetic pleading may be easily corrected by allowing a repleading to restate those causes of action for the pure tort in strict liability that they are....

253 N.E.2d at 214, 305 N.Y.S.2d at 500-01.

[11]*See* Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1958). The author lists twenty-nine different devices used by courts to award damages to an injured customer who was not in privity with his seller.

[12]Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[13]Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903); W. PROSSER, LAW OF TORTS § 96 (3d ed. 1964); Green, *The Thrust of Tort Law, Part II, Judicial Law Making*, 64 W. VA. L. REV. 115, 131-32 (1962).

[14]W. PROSSER, LAW OF TORTS § 96 (3d ed. 1964); Green, *The Thrust of Tort Law, Part II, Judicial Law Making*, 64 W. VA. L. REV. 115, 131-32 (1962).

[15]152 Eng. Rep. 402 (Ex. 1842).

[16]120 F. 865 (8th Cir. 1903).

remote buyers and consumers,[17] and the doctrine of implied warranty without privity has gained increasing support in the law of sales[18] and under the Uniform Commercial Code.[19]

Strict liability developed along similar lines, and application of liability without fault quickly progressed from manufacturers of bad foodstuffs[20] to manufacturers of products for intimate bodily use.[21] In recent years, this concept has been extended to any manufacturer whose defective product causes physical harm to the consumer or user.[22]

With the corresponding elimination of privity in contract actions and negligence in tort actions, various courts began to confuse the concepts of implied warranty and strict liability.[23] The result was a haphazard manipulation of warranty concepts in order to allow an injured

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[17]MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) is the leading decision in this area. The court held that privity of contract was unnecessary for a tort action in a products liability case. *Accord,* Stewart v. Cox, 55 Cal. 2d 857, 362 P.2d 345, 13 Cal. Rptr. 521 (1961); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[18]Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd,* 304 F.2d 149 (9th Cir. 1962); Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 MINN. L. REV. 791 (1966).

[19]UNIFORM COMMERCIAL CODE §§ 2-314,-315. But, it is important to note that, in order to prevent further confusion in the products liability field, the Uniform Commercial Code has adopted a neutral position as to strict liability. Comment 3 of § 2-318 states:

> Liability: This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

[20]Stanfield v. F.W. Woolworth Co., 143 Kan. 117, 53 P.2d 878 (1936); Meshbesher v. Channellene Oil & Mfg. Co., 107 Minn. 104, 119 N.W. 428 (1909); Great Atl. & Pac. Tea Co. v. Hughes, 131 Ohio St. 501, 3 N.E.2d 415 (1936); Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

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

[22]Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); *cf.* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

[23]Cases cited note 2 *supra.*

plaintiff to recover from a manufacturer of defective products.[24]

Fortunately, some courts have recognized the need for separating the concepts of strict liability and implied warranty in order to avoid more confusion in products liabiltiy law. *Greenman v. Yuba Power Products, Inc.*[25] was one of the first cases to offer a solution to this problem in that it held that strict liability in tort should preempt implied warranty in the personal injury field.[26] The court further noted that the law of contracts and sales (now the Uniform Commercial Code[27] in most states) would still play an important role in defining a manufacturer's liability for a purely economic loss as distinguished from physical injury losses. In 1965, the American Law Institute followed suit[28] by setting forth strict liabiltiy as a separate tort remedy.[29] However, strict liability was limited to physical harm

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[24]*See* Heinemann v. Barfield, 136 Ark. 500, 207 S.W. 62 (1918); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); DiVello v. Gardner Mach. Co., 65 Ohio L. Abs. 515, 102 N.E.2d 289 (C.P. 1951).

[25]59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[26]The Supreme Court of California has stated that:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law... and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products... make clear that the liability is not one governed by the law of contact warranties but by the law of strict liability in tort. Accordingly, rules defining the governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.

Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); *accord,* Price v. Gatlin, 241 Ore. 315, 405 P.2d 502 (1965) (dissenting opinion).

[27]E. FARNSWORTH & J. HONNOLD, SUPPLEMENT FOR USE WITH CASES AND MATERIALS ON COMMERCIAL LAW, Table 1 (1968).

[28]RESTATEMENT (SECOND) OF TORTS § 402 A (1965)

[29]Comment *M* of § 402 A states:

> The basis of liability is purely one in tort. A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to convenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability... it has become so identified in practice with a contract of sale between the plaintiff and defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract....
> The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to

to the consumer or user.[30] Implicit in this limitation is the suggestion that strict liability is designed to cover physical injury resulting from a defective product and is therefore governed by tort law, whereas implied warranty is better equipped to deal with economic loss and is governed by sales law and the Uniform Commercial Code.[31]

Seely v. White Motor Co.,[32] seems to support this distinction by holding that recovery for commercial loss must be on a warranty theory because strict liability in tort will not extend to the recovery of lost economic expectations in the absence of an express agreement by the manufacturer to cover that risk.[33] The court further states:

> The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries.[34]

However, a court's classification of strict liability as a tort or contract remedy should not be made solely on the basis of historical development or current trend. Rather, consideration must first be given to how such a classification will effect the specific problem involved, for once the decision is made as to which rules govern the action, the question of the applicable statute of limitations becomes moot.

On one side of the argument there are cases such as *Mendel* which hold that strict liability is merely an extension to consumers and users of the contract concept of implied warranty, and consequently, that the contract statute of limitations should be applied.[35] Courts favor-

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> warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" or "seller" in those statutes... In short, ("warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402 A comment *m* at 355-56 (1965).

[30]RESTATEMENT (SECOND) OF TORTS § 402 A (1965).

[31]Note 29 *supra*.

[32]63 Cal. 2d 30, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

[33]*Id.; acord,* Price v. Gatlin, 241 Ore. 315, 405 P.2d 502 (1965); *cf.* Rhodes Pharmacal Co. v. Continental Can Co., 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966); *contra,* Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966).

[34]403 P.2d at 149, 45 Cal. Rptr. at 21.

[35]Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953); Thurston Motor Lines, Inc. v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962).

Under the Uniform Commercial Code § 2-725(2), "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."

ing this argument reason that the injury-producing defect may have resulted from such intervening factors as depreciation, misuse, or faulty maintenance rather than from the manufacturing process. Running the statute of limitations from the time of sale will reduce the possibility of a manufacturer being held liable for defects caused by one of these intervening factors.[36] As the court in *Mendel* stated,

> We are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum.[37]

In addition, there is the public policy consideration of placing too much of a burden on manufacturers by requiring them to market items which must remain completely free from deterioration over a long period of time after production.[38] Running the statute of limitations for a definite period of time after sale in a products liability suit, rather than suspending the statute indefinitely until time of injury, will prevent manufacturers from being subjected to such rigorous standards.

In contrast, other courts have found that public policy in their jurisdictions favors holding manufacturers liable in tort for any original defect which causes physical injury, regardless of a long lapse of time.[39] These courts feel that a mere passage of time between production and injury should not defeat application of the tort statute of limitations.[40] The imposition of strict tort liability in this situation is justified on the ground that an ever-increasing group of consumers is forced to rely on the skill and care of manufacturers in turning out non-defective products.[41]

Furthermore, a court's application of the tort statute of limitations in a strict liability action is supported by the current trend toward

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[36]*See* Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969); *cf.* Creviston v. General Motors Corp., 225 So. 2d 331 (Fla. 1969).

[37]253 N.E.2d at 210, 305 N.Y.S.2d at 495; *accord,* Jackson v. General Motors Corp., 441 S.W.2d 482 (Tenn.), *cert. denied,* 90 S. Ct. 376 (1969).

[38]*See* Creviston v. General Motors Corp., 225 So. 2d 331 (Fla. 1969) (dicta); Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

[39]Mickle v. Blackmon, — S.C. —, 166 S.E.2d 173 (1969); Holifield v. Setco Indus., Inc., 42 Wis. 2d 750, 168 N.W.2d 177 (1969).

[40]Cases cited note 39 *supra.*

[41]W. PROSSER, LAW OF TORTS § 97 (3d ed. 1964); Freedman, *"Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty,* 33 TENN. L. REV. 323 (1966); Lascher, *Strict Liability in Tort for Defective Products: The Road To and Past Vandermark;* 38 S. CAL. L. REV. 30 (1965); Percy, *Products Liability—Tort or Contract or What?;* 40 TUL. L. REV. 715 (1966).

classification of strict liability as a separate remedy in tort for personal injury, independent of the contract remedy of implied warranty.[42] This separate classification has resulted from the realization that bringing a personal injury suit on a contractual theory may result in an injured plaintiff's being deprived of his cause of action because of such technicalities as disclaimer[43] and requirement of notice.[44] With the current emphasis on consumer protection, this treatment of strict liability would prevent manufacturers from escaping the imposition of liability through the mechanisms of sales law if their defective products cause physical injury to consumers or users.[45]

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[42]As of March, 1970, at least twenty-six state courts or federal courts applying state law, plus the District of Columbia, have apparently adopted strict liability as a tort remedy. Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) (applying Montana law); Klimas v. International Tel & Tel. Corp., 297 F. Supp. 937 (D.R.I. 1969); Newton v. Admiralty Corp., 280 F. Supp. 202 (D. Colo. 1967); Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159 (S.D.S.D. 1967); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244 (Alas. 1969); O.S Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Mun. Ct. App. 1962); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Dealers Transp. Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965); Arnold v. United States Rubber Co., 203 So. 2d 764 (La. Ct. App. 1967); McCormack v. Hankcraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss.), *cert. denied*, 386 U.S. 912 (1966); Kenner v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Shoshone Coca-Cola Bottling Co. v. Dolinski, 83 Nev. 439, 420 P.2d 855 (1966); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965); Heaton v. Ford Motor Co., 248 Ore. 267, 435 P.2d 806 (1967); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Olney v. Beaman Bottling Co., 220 Tenn. 459, 418 S.W.2d 430 (1967); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 Tex. (1967); O'Brien v. Comstock Foods, Inc., 123 Vt. 461, 212 A.2d 69 (1965); Ulmer v. Ford Motor Co., 452 P.2d 729 (Wash. 1969); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

[43]Sharples Separator Co. v. Domestic Elec. Refrig. Corp., 61 F.2d 499 (3d Cir. 1932); Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968); Traylor Eng'r & Mfg. Co. v. National Container Corp, 45 Del. 143, 70 A.2d 9 (Super. Ct. 1949); Kolodzcak v. Peerless Motor Co., 225 Mich. 47, 237 N.W. 41 (1931); Gibson v. California Spray-Chem. Corp., 29 Wash. 2d 611, 188 P.2d 316 (1948).

[44]American Mfg. Co. v. United States Shipping Bd. Emergency Fleet Corp., 7 F.2d 565 (2d Cir. 1925); Smith v. Pizitz of Bessemer, Inc., 271 Ala. 101, 122 So. 591 (1960); American Furniture Co. v. Veazie, 131 Colo. 340, 281 P.2d 803 (1955); De Lucia v. Coca-Cola Bottling Co., 139 Conn. 65, 89 A.2d 749 (1952); Bruns v. Jordan Marsh Co., 305 Mass. 437. 26 N.E. 2d 368 (1940).

[45]Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

It seems ironic, in light of the *Mendel* ruling, that a federal court in New York would say sixty years ago that "[t]he remedies of injured consumers ought

A more obvious reason for utilizing the tort statute of limitations in a products liability action is that it insures that plaintiff's cause of action for personal injuries will not be barred before it has accrued, as was the case in *Mendel.* Such an illogical result would seem to be directly contrary to the accepted purposes of the statutes of limitations.[46] For, while statutes of limitations are statutes of repose, intended to encourage promptness in the bringing of actions to insure that none of the pertinent evidence will be lost or destroyed,[47] they are certainly not intended to deprive a party of his rights before they accrue.[48]

The Supreme Court of South Carolina recently avoided this problem in *Mickle v. Blackmon.*[49] The court imposed strict liability on the manufacturer even though the product, a gearshift knob, was thirteen years old when it shattered in an auto accident causing serious and permanent injuries as a result of the plaintiff's being impaled on it. The court held that neither a long passage of time nor ownership changes should be sufficient to defeat recovery if the plaintiff can prove an original defect in the article was the proximate cause of injury.

A final factor to be considered is that an injured plaintiff may rely solely on the contract remedy of implied warranty as his basis for recovery. This could dircetly influence a court in its treatment of the action and in its application of the statute of limitations, especially where, as in *Mendel,* the case has gone all the way to the highest court

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not to be made to depend upon the intricacies of the law of sales." Ketterer v. Armour & Co., 200 F. 322, 323 (S.D.N.Y. 1912).

[46]The United States Supreme Court, in a slightly different situation, realized the potential harshness of this approach as applied to personal injury cases in Urie v. Thompson, 337 U.S. 163 (1949):

> We do not think that the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights.

Id. at 170.

[47]Missouri, K. & T. Ry. v. Harriman, 227 U.S. 657, 672 (1913); Knoxville v. Gervin, 169 Tenn. 537, 89 S.W.2d 348 (1936).

Of course, statutes of limitations also have other purposes, such as to prevent undue delay in bringing suit or claims [(Federal Reserve Bank v. Atlanta Trust Co., 91 F.2d 283 (5th Cir.), *cert. denied,* 302 U.S. 738 (1937)] or to suppress fraudulent and stale claims from being asserted. Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); Pine v. State Indus. Comm'n., 148 Okla. 200, 298 P. 276 (1931).

[48]*Cf.* Urie v. Thompson, 337 U.S. 163 (1949).

[49]— S.C. —, 166 S.E.2d 173 (1969).

of a state without amendment of the pleadings. The refusal of a court to allow a repleading or an amendment of the pleadings at such a late date has been held to be within the discretion of the court.[50] Although this point was not discussed in *Mendel,* the court there may have felt that allowing the plaintiff to replead in tort, after originally bringing her case on a contract theory, would be highly prejudicial to the defendant at that stage of the proceedings.

The ultimate effect of classifying strict liability as a tort remedy will be to run the statute of limitations indefinitely until a defect in the product causes injury to the consumer or user.[51] Holding a manufacturer or seller liable for an indefinite period of time after sale would appear to be unjust,[52] but it would be even more undesirable to bar a plaintiff's cause of action for personal injuries before it even existed, as the New York court did in *Mendel.* What the court there may have failed to realize is that while implied warranty is pertinent to cases of economic loss in the products liability area, it is not equipped to deal with cases involving personal injury.[53] On the other hand, tort law, especially that area of it known as strict liability, can deal effectively with personal injuries. As Prosser states, "If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask."[54] If the Court of Appeals of New York had followed the modern trend in products liability law by removing this mask and applying the tort statute of limitations, Mrs. Mendel would not have been denied her cause of action.[55]

THOMAS F. BAKER, IV

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[50]Shira v. Wood, — Colo. —, 432 P.2d 243 (1967); Whitehall Realty Corp. v. Manufacturers Trust Co., 100 So. 2d 617 (Fla. 1958); Smith v. Owens, 397 P.2d 673 (Okla. 1963); Shurpit v. Brah, 30 Wis. 2d 388, 141 N.W.2d 266 (1966).

[51]Sides v. Richard Mach. Works, Inc., 406 F.2d 445 (4th Cir. 1969); Caudill v. Wise Rambler, Inc., 210 Va. 11, 168 S.E.2d 257 (1969).

[52]Cases cited note 37 *supra.*

[53]Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Price v. Gatlin, 241 Ore. 315, 405 P.2d 502 (1965).

[54]Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099, 1134 (1960).

[55]The Pennsylvania supreme court was presented with this problem in 1966. In Miller v. Preitz, 442 Pa. 383, 221 A.2d 320 (1966), the court sustained a manufacturer's demurrer although recognizing the policy considerations behind imposing strict liability in tort upon those who put defective goods on the market. The court refused to impose strict liability because the plaintiff had not sought recovery on such a basis. However, in Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966), decided later that same year, the Pennsylvania supreme court distinguished *Miller* and adopted § 402 A of the RESTATEMENT (SECOND) OF TORTS. Reasoning that since the plaintiff had broadly pleaded facts necessary to establish a cause of action based on strict liability, the court held that he should be permitted to amend his complaint for retrial.