Washington and Lee Law Review

Volume 26 | Issue 1 Article 15

Spring 3-1-1969

Tort Action For Strict Liability In Products Liability Cases

compensation was granted in *Thomas*, it is doubtful whether the result will be the same in a situation where the public need is great and the cost of compensation will make the project too expensive.

Criticism of a flexible rule based on fairness and policy often centers on the fact that it lacks certainty and predictability.[29] While the *Thomas* approach may be subject to this criticism, it allows a landowner to invest in his land with the certainty that compensation will not be denied upon doctrinal grounds alone. This same approach will now compel the government to consider the effect that a proposed project will have upon individual landowners. The fact that a proper governmental function is being performed will no longer by itself be a basis for denying compensation.

It is too early to tell what the full impact of *Thomas* will be, but it is of significance that a court has finally departed from doctrinaire concepts (which look only to see if a proper governmental function is being performed or if the condemnee is claiming what may be called a public right) and has applied a test of fairness. This does not mean that *Thomas* necessarily disagrees with the results reached in other cases, but that the Court of Appeals of Kentucky reached its decision outside a rigid doctrinal mold.

LEIGHTON S. HOUCK

TORT ACTION FOR STRICT LIABILITY IN PRODUCTS LIABILITY CASES

Suits by consumers against manufacturers for injuries caused by their defective products have had a turbulent history. These suits were brought in either tort[1] or contract,[2] and privity of contract was a

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[29]38 S. CAL. L. REV. 689 (1965).

[1]*E.g.*, Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).

Products liability cases were historically founded in tort, allowing a negligence action against a seller of goods only where there existed privity of contract between the parties. Several exceptions were created to rectify the obvious inequities of the privity requirement. *See* Huset v. J. I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903); Jaeger, *How Strict Is the Manufacturer's Liability? Recent Development*, 48 MARQ. L. REV. 293, 296 (1964-65). However, the privity requirement in negligence actions was subsequently abolished in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[2]*E.g.*, Conner v. Great Atl. & Pac. Tea Co., 25 F. Supp. 855 (W.D. Mo. 1939); Chanin v. Chevrolet Motor Co., 15 F. Supp. 57 (N.D. Ill. 1935).

A warranty cause of action originated as a pure action of tort closely allied

prerequisite to recovery in either action.[3] Since negligent manufacturers were using lack of privity to insulate themselves from liability, the requirement was initially abolished in tort actions.[4] Subsequently courts began to utilize legal fictions in an attempt to abolish the privity doctrine in warranty actions based upon a contract.[5] The use of these fictions and the facts that the decline of the privity doctrine has not been uniform in application or theory, has added to the already existing confusion in products liability cases.[6]

The Supreme Court of Wisconsin recently attempted to rectify this confusion in *Dippel v. Sciano*[7] by maintaining privity as a prerequisite to recovery in a warranty action, but adopting strict liability in tort for actions where privity was not present.

In *Dippel,* the plaintiff was a guest in a commercial tavern. While he was assisting in the moving of a pool table, the front leg assembly collapsed, severing several of his toes. An action was commenced against the tavern owner, the manufacturer of the table and the sales distributor who had purchased the table and leased it to the tavern owner. Plaintiff brought two actions in negligence and one for breach of implied warranty by the manufacturer and sales distributor. The trial court sustained the sales distributor's demurrer to the warranty action and the Supreme Court of Wisconsin affirmed upon the ground that there was no privity between the seller and the plaintiff.

The court first noted that under the Uniform Sales Act, privity was required in actions for breach of implied warranty,[8] and that Wis-

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to deceit. *See* Ames, *The History of Assumpsit,* 2 HARV. L. REV. 1, 8 (1888); 1 S. WILLISTON, SALES § 197 (rev. ed. 1948). However, the warranty action only arose from the warrantor's consent to be bound. Since 1778, an express or implied warranty has been regarded as being based on a contract of sale. Stuart v. Wilkins, 99 Eng. Rep. 15 (K.B. 1778). Upon this theory ,the courts have required privity of contract between the contracting parties. *See* W. PROSSER, TORTS § 96 (3d ed. 1964).

[3]See notes 1 and 2 *supra.*

[4]The leading decision in this area in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), where the court stated that privity of contract was not a prerequisite for a tort action in products liability cases. *See* W. PROSSER, TORTS § 96 (3d ed. 1964).

[5]*See* 8 S. WILLISTON, CONTRACTS §§ 998, 998A (3d ed. Jaeger 1964).

[6]The area of products liability has been ill-defined since its inception. In relation to the law of warranty, Prosser states that the "seller's warranty is a curious hybrid, born of the illicit intercourse of tort and contract, unique in the law." W. PROSSER, TORTS § 95, at 651 (3d ed. 1964).

[7]37 Wis. 2d 443, 155 N.W.2d 55 (1967).

[8]The accident in *Dippel* occurred before the Uniform Commercial Code was enacted in Wisconsin, and therefore the Wisconsin version of the Uniform Sales Act was controlling. 155 N.W.2d at 60. The court noted, however, that this was unimportant since it was only concerned with whether products liability cases should be treated as matters of warranty or strict liability in tort. *Id.* at 61.

consin's adoption of the Uniform Commercial Code did not change this basic requirement.[9] The court stated that it was reluctant to deal with legal fictions which had long been utilized to avoid the privity requirement in breach of warranty actions.[10] It noted further that in addition to the privity requirement, warranty actions are attended by the Code's restrictive requirements of notice to the seller of a breach of warranty[11] as well as the provision allowing a disclaimer of warranty by the manufacturer or seller.[12]

To avoid the Uniform Commercial Code's restrictive requirements, particularly privity, and the necessity of dealing in fictions to circumvent those requirements, the court held that in the absence of privity, products liability cases are properly a matter of strict liability in tort under § 402A of the Restatement (Second) of Torts.[13] Under this rule, the consumer would not be encumbered by the requirements of privity, notice, and a valid disclaimer, all of which inhere in warranty actions. Although the consumer would not be forced to prove

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[9]§ 2-318 of the Uniform Commercial Code states that any person who is in the family, household or a guest of the buyer, may sue the immediate seller, in his own right on a warranty action. But Comment 3 of § 2-318 indicates that the Code does not purport to enlarge or restrict the privity requirement in an action between a consumer and manufacturer or distributor. The failure of the Code to follow the moden trend to circumvent privity in warranty actions appears relevant. The most logical explanation seems to be that the drafters of the Code appreciated the effects such a drastic action would have, and decided to avoid any further confusion of the law of warranties.

Several states did not expressly adopt § 2-318. California and Utah have not adopted § 2-318, and put no similar provision in its place. Other states have made limited changes, such as Connecticut which merely codified Comment 3 of § 2-318. Finally, some jurisdictions have replaced § 2-318 with specific "anti-privity" statutes. *E.g.*, VA. CODE ANN. § 8.2-318 (1965); *see* COLO. REV. STAT. ANN. § 155-2-318 (1963).

[10]155 N.W.2d at 60.

[11]UNIFORM COMMERCIAL CODE § 2-607(3)(a).

[11]UNIFORM COMMERCIAL CODE § 2-607(3)(a).

[12]RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:

(1) 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 and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) 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.

specific acts of negligence,[14] he would need to sustain several burdens of proof as prerequisites to recovery.[15] Moreover, to prevent the manufacturer from becoming an insurer of the public, the court added an element which does not appear in § 402A of the Restatement and said the defense of contributory negligence would be available.

Fictions were first used to erode the privity requirement of warranty actions in cases involving food, beverages or drugs for human consumption.[16] The erosion soon spread to markets other than food and drugs. Three principal fictions were developed to circumvent the privity requirement. First, extensive advertising by the manufacturer, coupled with consumer reliance, served as a substitute for privity.[17] Second, a dealer or distributor was considered a mere conduit through which the contract was made, with the actual contract being between the consumer and the manufacturer.[18] Third, an implied warranty merely stated the legal consequences of a transaction and was not based on contract with its consequent privity.[19] It should be noted,

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[14]RESTATEMENT (SECOND) OF TORTS § 402A, comment *a* (1965).

[15]For an enumeration of these burdens of proof, see text at n. 36 *infra.*

[16]*See* 8 S. WILLISTON, CONTRACTS §§ 994, 994A (3d ed. Jaeger 1964). This exception to the privity rule was later extended to products which were dangerous for external use by humans. *E.g.,* Patterson v. George H. Weyer, Inc., 189 Kan. 501, 370 P.2d 116 (1962); *see* 8 S. WILLISTON, CONTRACTS § 994A (3d ed. Jaeger 1964).

Some courts have held that a warranty of fitness and wholesomeness of food products attaches to and runs with the goods. Therefore, a warranty action could be had by anyone along the distributive chain despite the lack of privity. *E.g.,* Vassallo v. Sabatte Land Co., 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (Dist. Ct. App. 1963).

Other courts in cases dealing with food and drugs have rejected the privity principle on the basis of a public policy to protect human health and life. *E.g.,* Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P.2d 1094 (1957); Heimsoth v. Falstaff Brewing Corp., 1 Ill. App. 2d 28, 116 N.E.2d 193 (1953); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); *see* Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App. 1960).

[17]*E.g.,* Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399 (1962); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958). This theory has been extended to cases involving the consumer's reliance upon the labels, tags and brochures of the manufacturers. If the consumer is thereafter injured, courts have held that he can maintain a warranty action, despite the lack of privity. *E.g.,* Randy Knitwear, Inc. v. American Cyanamid Co., *supra;* Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932).

[18]*E.g.,* General Motors Corp. v. Dodson, 47 Tenn. 438, 338 S.W.2d 655 (1960).

[19]*E.g.,* Bookholt v. General Motors Corp., 215 Ga. 391, 110 S.E.2d 642 (1959).

These three fictions permitted a consumer to maintain a breach of warranty action against a remote manufacturer, but they greatly added to the confusion in products liability cases because, with no privity requirement, it was difficult to distinguish a warranty action from a tort action.

One jurisdiction has held that a warranty action is a new form of action, distinct from both tort and contract. Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964) (applying admiralty law).

however, that courts, in many instances, continue to require privity in a warranty action.[20]

Another burdensome requirement to plaintiffs in warranty actions and one which the Uniform Commercial Code perpetuates, is notice to the seller of a breach of warranty.[21] Those courts which have attempted to circumvent the privity requirement and to allow recovery against a remote manufacturer have also attempted to avoid the notice requirement under § 2-607(3)(a) of the Uniform Commercial Code. They rationalize that the Code's requirement that "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy...."[22] merely contemplates those direct sales between parties in privity with each other. Therefore, they hold the notice requirement inapplicable in a warranty action by a consumer against the remote manufacturer.[23]

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[20]*E.g.*, Blitzstein v. Ford Motor Co., 288 F.2d 738 (5th Cir. 1961); Alexander v. Inland Steel Co., 263 F.2d 314 (8th Cir. 1968); Blum v. Richardson-Merrell, Inc., 268 F. Supp. 906 (D. Md. 1965); Harnischfeger Corp. v. Harris, 280 Ala. 93, 190 So. 2d 286 (1966); Burr v. Sherwin-Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954); Gordon v. Clairol, Inc., 22 Conn. Supp. 209, 166 A.2d 209 (C.P. Fairfield County 1960); Behringer v. William Gretz Brewing Co., 53 Del. 365, 169 A.2d 249 (1961); Albin v. Illinois Crop Improvement Ass'n, 30 Ill. App. 2d 283, 174 N.E.2d 697 (1961); Gordon v. Bates-Crumley Chevrolet Co., 158 So. 223 (La. App. 1935); Kennedy v. Brockelman Bros., 334 Mass. 225, 134 N.E.2d 747 (1956); Pelletier v. Dupont, 124 Me. 269, 128 A. 186 (1925); Canter v. American Cyanamid Co., 12 App. Div. 2d 691, 207 N.Y.S.2d 745 (1960); Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956); Dimoff v. Ernie Majer, Inc., 55 Wash. 2d 385, 347 P.2d 1056 (1960).

[21]See note 11 *supra*. The primary purpose of the notice requirement is to inform the seller that production and distribution of the defective product should be halted, thereby protecting the public from future harm. *See* Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Products Cases*, 18 STANFORD L. REV. 974, 997 (1966). It would also give the seller an early opportunity to recall those defective products already sold and to correct such defects.

Another purpose of the notice requirement is to advise the seller that he must meet a claim for damages, in which the law requires an early warning. *E.g.*, Columbia Axle Co. v. American Auto. Ins. Co., 63 F.2d 206 (6th Cir. 1933); American Mfg. Co. v. United States Shipping Bd., 7 F.2d 565 (2d Cir. 1925); Reininger v. Eldon Mfg. Co., 114 Cal. App. 2d 240, 250 P.2d 4 (Dist. Ct. App. 1952).

[22]UNIFORM COMMERCIAL CODE § 2-607(3)(a).

[23]This interpretation defeats the primary purpose of the notice requirement because knowledge of the defective nature of the product is essential to the nonprivity seller so that he can remove the product from the market and correct the defect. See note 21 *supra*. Furthermore, Comment 5 of § 2-607, in its rationale as to third party beneficiaries (contemplated in § 2-318), states:

> [T]he reason of this section does extend to requiring the beneficiaries to notify the seller that an injury has occurred.... [E]ven a beneficiary can

A few courts have attempted to ease the notice requirement, rather than abolish it, by holding that the statute of limitations on the action does not begin to run until the consumer discovers the defect.[24] While the courts have perhaps reached the right conclusion, they have done so for the wrong reason. A contract statute of limitations commences to run upon the sale of the product,[25] while a tort statute of limitations commences to run at the time of the injury.[26] Since a warranty action is based upon contract, the statute of limitations should begin to run at the time the product was sold to the customer.

It is evident that the requirements of privity and notice as well as the availability of a disclaimer by the defendant have tended to make difficult a consumer's recovery for a breach of warranty against a remote manufacturer.[27] Furthermore, attempts to bypass the requirements have led to the use of legal fictions, some of which strain recognized legal principles.[28]

There were early attempts to alleviate these obstacles to consumer recovery by imposing strict liability upon the remote manufacturer when sued in a contractual warranty action.[29] However, this was unsuccessful since the privity and notice requirements were carried over and applied to warranty actions notwithstanding the imposition of

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be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

A third party beneficiary being required to give notice, even though he is technically not in privity with the seller, is analogous to a consumer who is not in privity with the remote manufcturer. Therefore, the argument that the notice requirement of § 2-607(3)(a) is inapplicable because of the lack of privity, is not valid.

[24]*E.g.*, Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961); Davidson v. Wee. 93 Ariz. 191, 379 P.2d 744 (1963); Southern Cal. Enterprises, Inc. v. D.N. & E. Walter & Co., 78 Cal. App. 2d 750, 178 P.2d 785 (Dist. Ct. App. 1947); Puretex Lemon Juice, Inc. v. S. Riekes & Sons, 351 S.W.2d 119 (Tex. Civ. App. 1961).

[25]1 S. WILLISTON, SALES § 212(a) (rev. ed. 1948).

[26]*E.g.*, Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836 (7th Cir. 1957); Rodibaugh v. Caterpillar Tractor Co., 225 Cal. App. 2d 570, 37 Cal. Rptr. 646 (Dist. Ct. App. 1964); *see* Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953).

[27]See UNIFORM COMMERCIAL CODE § 2-316 which allows a seller to exclude any implied warranties, if the language of the disclaimer mentions merchantability and, in the case of a writing is conspicuous.

[28]*See* cases cited in notes 17-19 *supra*.

[29]*See* Noel, *Manufacturers of Products—The Drift Towards Strict Liability*, 24 TENN. L. REV. 963, 985-999 (1957); Prosser, *The Assault Upon The Citadel*, 69 YALE L.J. 1099, 1102-1114 (1960); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 802 (1966); Comment, *Implied Warranties—The Privity Rule and Strict Liability—The Non-Food Cases*, 27 MO. L. REV. 194, 221-23 (1962). *See also* W. PROSSER, TORTS § 97 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 402A, comments *b*, *m* (1965).

strict liability.[30] Thus, courts still had to resort to fictions to allow recovery.

Some states have abolished the privity requirement by statute,[31] while in other states statutes have been enacted in an attempt to ease the notice requirement.[32] Most states, however, have failed to do either of these, and the only way to circumvent the privity and notice requirements is still by the use of legal fictions.

Taking cognizance of the fact that where no privity existed, liability could not be predicated upon contract without the use of legal fictions, the American Law Institute adopted § 402A of the Restatement (Second) of Torts.[33] This section provides that a manufacturer selling a defective product is strictly liable in tort to the ultimate consumer even where privity is not present. Because this is a tort action, the notice requirement of the warranty action is not present either.

When *Dippel* was decided, Wisconsin became one of an increasing number of states adopting § 402A or a similar rule.[34] Under § 402A the injured consumer must bear several burdens of proof before succeeding in his claim.[35] *Dippel* adopted similar burdens and required the plaintiff to show:

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[30]*See* Comment, *Implied Warranties—The Privity Rule and Strict Liability—The Non-Food Cases*, 27 MO. L. REV. 194, 221-23 (1962).

[31]*E.g.*, VA. CODE ANN. § 8.2-318 (1965); *see* COLO. REV. STAT. ANN. § 155-2-318 (1963). The disadvantage of abolishing privity in the Code would be to treat a warranty action as a tort action, with contract limitations of notice and disclaimer. Thus, a warranty action would become a hybrid form of action without a firm basis in either contract or tort law. This would prevent the uniformity of application which the Uniform Code tries to achieve. *See generally* Prosser, *The Assault Upon The Citadel*, 69 YALE L.J. 1099 (1960).

[32]*E.g.*, CAL. CIV. CODE § 1769 (West 1957); ILL. ANN. STAT., ch. 121½, § 49 (Smith-Hurd 1960).

[33]AMERICAN LAW INSTITUTE PROCEEDINGS, 1964, at 349-56 (1965); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 802 (1966). It should be noted that § 402A was directed only at creating a strict liability action in tort and not a strict liability action in warranty.

[34]Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964); Lee v. Sears Roebuck & Co., 262 F. Supp. 232 (E.D. Tenn. 1966); Hacker v. Rector, 250 F. Supp. 300 (W.D. Mo. 1966); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Nalbandian v. Byron Jackson Pumps, Inc., 97 Ariz. 280, 399 P.2d 681 (1965); O. S. Stapley Co. v. Miller, 6 Ariz. App. 122, 430 P.2d 701 (1967); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Dealers Transport Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. 1965); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965); Cochran v. Brooke, 243 Ore. 89, 409 P.2d 904 (1966); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

[35]*See* RESTATEMENT (SECOND) OF TORTS § 402A, comments *f,g,i,p,q* (1965).

> (1) that the product was in defective condition when it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause ... of the plaintiff's injuries or damages, (4) that the seller engaged in the business of selling such product ... and (5) that the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it.[36]

The first of these requirements appears to be the most burdensome and such proof is difficult[37] without the aid of judicial presumptions or inferences.

In addition to the harsh burdens of proof imposed upon the plaintiff, *Dippel's* interpretation of § 402A protects the interests of defendant manufacturers in products liability cases by expressly providing them with a defense of contributory negligence. This is contrary to the express language of § 402A which provides that contributory negligence is not a defense in a strict liability action "when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence."[38] Generally, contributory negligence is not available in a strict liability action because there is no negligence in the action with which the defense can be compared; and contributory negligence can only be used as a defense in those actions in which negligence is an elment.[39] *Dippel* recognized this fact but carved out an exception in products liability cases by reasoning that strict liability was similar to, or interchangeable with, "negligence per se."[40] The court noted that violation of a statutory duty to prevent injury-producing, defective products from entering the consumer market would be considered negligence per se. A court could impose the same duty without the existence of

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[36]155 N.W.2d at 63.

[37]RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* (1965) states that the "burden of proof that the product was in a defective condition at the time it left the hands of the particular seller is upon the injured plaintiff; and *unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.*" (Emphasis added).

If the consumer does not meet this burden, it will be assumed that the defect was caused by a third party. *E.g.*, Jakubowski v. Minnesota Mining & Mfg. Co., 42 N.J. 177, 199 A.2d 826 (1964).

Once the plaintiff has borne this heavy burden of proof, it is quite likely that some negligence was involved, even though this need not be proved. *See* Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966).

[38]RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965).

[39]W. PROSSER, TORTS § 78, at 538 (3d ed. 1964).

[40]155 N.W.2d at 63-64.

such statute, and violation of the court-made duty would likewise constitute negligence per se.[41] Characterizing the defendant's conduct as negligence per se in a § 402A type of strict liability action, therefore, enables him to utilize the defense of contributory negligence since negligence would be an element of the consumer's cause of action. The court adopted this defense in order to prevent a manufacturer from becoming an "insurer" of the public as to all injuries resulting from his products on the market.

Both § 402A and *Dippel* allow the remote manufacturer to use the defense of assumption of risk. *Dippel's* characterization of strict liability as negligence per se is not a prerequisite to the availability of this defense since negligence is not an element of the defense.[42]

One major effect of the adoption of § 402A strict liability in *Dippel* is the elimination of much of the existing confusion in products liability cases in a jurisdiction which had not by statute abolished privity or eased the notice requirement. This is accomplished by channeling those actions where the consumer and seller are in privity to warranty actions, and those where no privity is found into strict liability actions in tort.[43] This approach eliminates the need of utilizing legal fictions to circumvent privity in warranty actions since a consumer not in privity can sue only in the strict liability tort actions.

Where legal fictions are utilized to circumvent the privity requirement, a warranty action is practically indistinguishable from a strict liability action in tort. In those states which adhere to theory pleading, the plaintiff-consumer must make a critical choice as to which theory to plead. By channeling the actions into privity and nonprivity categories, the critical choice is obviated.[44]

However, § 402A as adopted in *Dippel* affords much greater pro-

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[41]Other jurisdictions have recognized the use of contributory negligence in a § 402A strict liability case. *E.g.*, Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); *see* O. S. Stapley Co. v. Miller, 6 Ariz. App. 122, 430 P.2d 701 (1967); Maiorino v. Weco Prods. Co., 45 N.J. 570, 214 A.2d 18 (1965).

[42]W. PROSSOR, TORTS § 67 (3d ed. 1964). Under this theory, if the consumer voluntarily and unreasonably encounters a known danger, he will be precluded from complaining of a risk which he brought upon himself with full appreciation of the danger. *See* W. PROSSER, TORTS § 78 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 402A, comment *n* (1965); Prosser, *The Assault Upon The Citadel*, 69 YALE L.J. 1099, 1147-48 (1960).

[43]Comment *f* of § 402A indicates that the section is concerned with actions by a consumer against a remote manufacturer, wholesaler, retailer or distributor.

[44]This approach will not affect consumers in "fact pleading" states, where a legal theory does not have to be pleaded. *See* F. JAMES, CIVIL PROCEDURE §§ 2.5-2.9 (1965).

tection to remote manufacturers than they have in warranty actions. This is a result of the fact that the consumer's burden of proof in a strict liability action requires him to show that the product was defective when it left the manufacturer's hands. A consumer in a warranty action need only prove the contractual warranty, breach of warranty and resultant injury.[45]

Accordingly, it would appear that continuing the fictions in a warranty action would perhaps be more equitable to the injured consumer than limiting his action to § 402A strict liability with its difficult burdens of proof. Making it difficult for the plaintiff to recover seems incongruous since the purpose in creating a strict liability action in tort was to afford injured consumers an adequate remedy against even remote manufacturers and sellers.[46]

One possible method of easing the plaintiff's burden of proving that the product was defective would be to invoke the aid of prima facie presumptions that the product was defective when it left the manufacturer's hands if it is defective when it reaches the consumer.

Another method would be to follow the lead of several states which have adopted § 402A or a similar rule, but which liberalized the plaintiff's burden of proof.[47] These states have required proof only that the consumer was injured as a result of an undiscovered defect in the design or manufacturer of the product. The consumer need not prove that the product was in a defective condition when it left the manufacturer's hands.

While either of these methods would ease plaintiff's burdens of proof and thereby make the result consistent with the purpose of § 402A, the defendant would not, as *Dippel* feared, become an "insurer" since he would still have available the defenses of contributory negligence and assumption of risk.

ROY G. HARRELL, JR.

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[45]UNIFORM COMMERCIAL CODE § 2-314, comment 13.

[46]RESTATEMENT (SECOND) OF TORTS § 402A, comment *c* (1965).

[47]Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965).