Torts - The Emergence of Strict Liability in Products Cases

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rule, protecting the owner if the parties could actually be placed in their original positions, or the creditor, if, through no fault of his own, he could not be restored to his original position. This approach would also give effect to the additional requirement of the bona fide purchaser rule stated by the Supreme Court which, it is submitted, should be limited to cases involving a giving in payment.

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TORTS — THE EMERGENCE OF STRICT LIABILITY IN PRODUCTS CASES

Today a consumer is apt to select an item because of the glowing descriptions of a television commercial, or because of enticing packages and displays. Courts are aware that, with the advent of mass advertising through radio, television, magazines, and billboards, consumers purchase specialized products manufactured miles away from the retail outlet by processes only experts understand and that, consequently, only manufacturers, and not the ultimate consumers, are able to evaluate the worth, quality, and fitness of the products. As a result, manufacturers are being held to a greater degree of care to the end that their products fulfill their representations and are free from harmful defects.

Traditionally, the two theories, warranty-contract and negligence-tort, that were available to a person injured by a defective product, equally required the person to be in privity with the manufacturer. The origin of the privity requirement is uncertain; it is clear, however, that growth in the area of products liability has been marked by the gradual elimination of the

32. See note 19 supra.
33. The following example will illustrate the need for this limitation. If a third party in good faith and without notice of any infirmity in the title of goods pays cash for them, he is undoubtedly a bona fide purchaser for value. If the rule required that this party be placed in a worse position before being protected as a bona fide purchaser for value, this would clearly be contra the established rule. See note 1 supra.
5. See Comment, 27 Mo. L. Rev. 198 (1962).
privity requirement in both warranty\textsuperscript{6} and negligence\textsuperscript{7} actions. \textit{Winterbottom v. Wright}\textsuperscript{8} represents the traditional position of nineteenth century courts, perhaps as a measure to protect growing industries, to refuse relief to an ultimate user in a negligence-tort action\textsuperscript{9} against the manufacturer on the basis that no privity existed.\textsuperscript{10} For seventy-four years afterwards it was virtually impossible for one not in privity to recover in a tort action from a manufacturer. An exception\textsuperscript{11} to the general rule of nonliability held the manufacturer liable in the absence of privity if he negligently manufactured an imminently dangerous product.\textsuperscript{12} The increased number of cases fitting into this exception signaled the gradual abrogation of the privity requirement in negligence-tort actions, especially in the area of deleterious food and drugs.\textsuperscript{13}

In 1916, \textit{MacPherson v. Buick Motor Co.},\textsuperscript{14} a negligence action by one not in privity against the manufacturer of a defective automobile, expressly eliminated the privity requirement in negligence cases. \textit{MacPherson} held that liability would be

\begin{itemize}
  \item \textsuperscript{6} Id. at 195.
  \item \textsuperscript{7} See Wade, \textit{Strict Tort Liability of Manufacturers}, 19 Sw. L.J. 5 (1965).
  \item \textsuperscript{8} 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).
  \item \textsuperscript{9} Page Keeton points out that negligence and warranty were the only two alternatives on which products cases could be based in the nineteenth century. Keeton, \textit{Products Liability—Current Developments}, 40 \textit{Texas L. Rev.} 193 (1961).
  \item \textsuperscript{10} Lord Abinger stated: "[U]nless we confine the operation . . . to the parties who entered into them [contracts], the most absurd and outrageous consequences, to which I can see no limit, would ensue." \textit{Winterbottom v. Wright}, 152 Eng. Rep. 402, 405 (Ex. 1842). While \textit{Winterbottom} is often cited as the fountainhead of products liability, it is significant to note that liability of the manufacturer was not at issue. Defendant's sole obligation was to keep a mail coach in good working order.
  \item \textsuperscript{11} Huest v. J. I. Case Threshing Machine Co., 120 Fed. 865 (8th Cir. 1903); 1 \textit{Blumer & Friedman, Products Liability § 5.02} (1964).
  \item \textsuperscript{12} See Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852). There were two other types of cases in which recovery was allowed in the absence of privity: first, when the manufacturer knew that the product was imminently dangerous and failed to disclose that fact; and second, when the defendant manufacturer furnished a defective product for use on his own premises. See Lewis v. Terry, 111 Cal. 39, 43 Pac. 398 (1896) (bed represented as safe); Schubert v. J. R. Clark Co., 49 Minn. 350, 51 N.W. 1102 (1892) (ladder with defects painted over); Coughtry v. Globe Woolen Co., 56 N.Y. 124 (1874) (defective scaffold). These cases seem to involve a breach of an affirmative duty and the question of privity was not the major issue.
  \item \textsuperscript{13} See Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852), involving the manufacturer of drugs who labeled a poison harmless. The court held that a duty arose, not from privity, which was lacking, but rather from the nature of the business in relation to the public trust which was placed in druggists.
  \item \textsuperscript{14} 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916): "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation . . . in the law.".
\end{itemize}
imposed if the manufacturer should have foreseen that in the absence of care in manufacturing the product would cause injury to life and limb, and thereby discarded the previous requirement that the product would have to be considered inherently dangerous. The foreseeability doctrine of MacPherson was soon expanded to allow recovery for property damage. Since MacPherson the bulk of litigation in this area has been based in tort: courts have recognized that the law imposes a duty on the manufacturer or supplier of exercising reasonable care to furnish objects that can be safely used for the designated purpose by the expected user, or in the alternative, to supply instructions or adequate warning of dangers attending their use. The applications of the principle of MacPherson include cases in which the manufacturer should have exercised reasonable care to prevent: (1) a defect which would have

15. Id. at 389, 111 N.E. at 1053.
17. See E. I. Du Pont de Nemours & Co. v. Baridon, 73 F.2d 28 (8th Cir. 1934) (a spray containing a chemical substance that killed flowers as well as the insects it was designed to kill).
18. See 1 FUMER & FRIEDMAN, PRODUCTS LIABILITY (1964); Noel, Recent Trends in Manufacturer's Negligence as to Design, Instructions and Warnings, 19 Sw. L.J. 43 (1965).
19. RESTATEMENT (SECOND), TORTS § 390 (1965), has adopted the position that the supplier should be held liable as well as the seller. See Golembe v. Blumberg, 262 App. Div. 760, 27 N.Y.S.2d 692 (1941).
21. The rubber exerciser in Jamison v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir. 1957) is an excellent example of a product not safe for its designated purpose, because the foot support was loose and the rubber caused the foot support to hit the user in the face.
22. RESTATEMENT (SECOND), TORTS § 390 (1965) : "One who supplies directly or through a third person for the use of another whom the supplier knows or from the facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself and others whom the supplier should expect to share in, or be endangered by its physical use, is subject to liability for harm resulting to them." See Anderson v. Settergren, 100 Minn. 294, 111 N.W. 279 (1907); Pitts v. Basile, 55 Ill. App. 2d 37, 204 N.E.2d 43 (1965); Semeniuk v. Chentis, 1 Ill. App. 2d 508, 117 N.E.2d 883 (1954).
23. For a comprehensive discussion as to when warnings or instruction have been found to be necessary, see Comment, 18 LA. L. Rev. 588 (1958).
24. If a foreseeable injury due to a breach of the duty to use reasonable care occurred without intervening negligence, the breach was considered to be the proximate cause of the injury. In Stewart v. DuPlessis, 42 Ill. App. 2d 192, 198, 191 N.E.2d 622, 626 (1963) the court said: "However, the intervention of independent concurrent or intervening forces will not break the causal connection (between the original wrong and the injury) if the intervention of such forces was, itself, probable or foreseeable. . . . [T]he test to be applied is whether
been discovered by a reasonable inspection of the product,25 (2) continued use of a known unsafe design,26 (3) negligent misrepresentations of safety,27 (4) harm caused by the nature of the product28 or by the immaturity of the expected user;29 when the harm could have been avoided by adequate warnings or instructions. Since liability in cases relying on MacPherson rests on negligence, the plaintiff must show fault, but he has been assisted through the application of res ipsa loquitur.30 However, in many cases the manufacturer is able to present enough evidence to rebut the inference created by res ipsa loquitur, thereby

the first wrongdoer might reasonably anticipate the intervening cause as a natural and probable consequence of his own negligence." For a discussion of proximate cause and its determination, see Comment, 9 WAYNE L. REV. 397 n.18 (1963).

25. See Goullon v. Ford Motor Co., 44 F.2d 310 (6th Cir. 1930) (tractor steering wheel broke when pressure was applied owing to defective composition); Biller v. Allis Chalmers, 34 Ill. App. 2d 47, 180 N.E.2d 46 (1962) (defective valve caused propane to spill on plaintiff's hands); Brown v. Sterling Abrasives, 5 Ill. App. 2d 1, 124 N.E.2d 607 (1955) (grinding wheel shattered owing to a defect).


28. The obviousness of the danger has played a large part in the past in determining the duty that was to be imposed. Noel, Manufacturer's Negligence of Design or Directions for Use of a Product, 71 YALE L.J. 816, 836 (1962): "It is frequently asserted that a design is not unreasonably dangerous because the risk is one which anyone immediately would recognize and avoid. For example, it is clear that there is no duty to provide a protective covering or a warning with a sharp knife . . . , and it is evident that the sharpness of such an instrument is not a defect." It seems, therefore, that the courts must make an initial determination as to how the nature of the product will be classified — dangerous or not dangerous.

29. The immaturity of the user is also determinative of what reasonable precautions must be taken. It is logical that if children are intended users of the product more precautions must be taken than if the product is intended for adult use. See Pitts v. Basile, 55 Ill. App. 2d 37, 204 N.E.2d 43 (1965) (liability for darts labeled KIDDY PACKAGE — no warning — manufacturer should have known that children would buy); Semeniuk v. Chentis, 1 Ill. App. 2d 508, 117 N.E.2d 883 (1954) (foreseeable that selling a BB gun to an eight-year-old without instruction would result in injury to passerby).

30. The effect of the doctrine is stated in Mabee v. Sutliff & Case Co., 404 Ill. 27, 31, 88 N.E.2d 12, 14 (1949): "[I]n a case within the maxim . . . , proof of the circumstances of such case and of the injury constitutes a prima facie case of negligence, and will justify a verdict unless such prima facie case is overcome by proof showing that the party charged is not at fault." The so-called "prima facie" case is overcome when "it is true that the defendants presented evidence tending to show it exercised considerable precaution . . . . It is well settled, however, that when a defendant produces evidence to rebut the inference of negligence which arises upon the application of the doctrine . . . it is ordinarily a question of fact for the jury." Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 433, 461 (1949); 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 12.03 (1946); Comment, 25 LA. L. REV. 748 (1965).
weakening plaintiff's position when the issue of negligence is submitted to the jury.\textsuperscript{31}

In addition to negligence-tort, plaintiffs may bring action on a warranty-contract basis, thereby eliminating the necessity of showing fault on the part of the manufacturer.\textsuperscript{32} The earliest cases brought in warranty emphasized the importance of privity and cited tort cases\textsuperscript{33} beginning with Winterbottom v. Wright.\textsuperscript{34} In warranty-contract actions\textsuperscript{35} the courts adopted the position that one not "in privity" of contract could not maintain an action for breach of contract; therefore one not a party to a sale could not maintain an action in warranty.\textsuperscript{36} This reasoning denied to a third party the application of the two warranties available in a contract action — the warranty of merchantability and the warranty of fitness for a particular purpose.\textsuperscript{37}

Soon the courts found privity in food cases\textsuperscript{38} through concepts of agency,\textsuperscript{39} assignment,\textsuperscript{40} and third-party beneficiary,\textsuperscript{41}


\textsuperscript{32}See George v. Willman, 379 P.2d 103 (Alaska 1963); 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.01 (1964).

\textsuperscript{33}See Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5 (1965). Even when the action was brought in warranty the courts have used a mixture of tort and contract language. See Beck v. Spindler, 265 Minn. 543, 99 N.W.2d 670 (1959). Several writers and cases agree that the reason the courts spoke in warranty terms was that the action for breach of warranty was originally tortious in nature; however, with the growth of the action of assumpsit, providing a remedy in pure contract, the warranty, which was designed to impose liability where a product failed to measure up to representations of the manufacturer caused injury, came to be considered rather a part of the contract of sale than a basis of recovery in tort. See Hamon v. Digiuliani, 148 Conn. 710, 174 A.2d 294 (1961); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03 (1) (1964); PROSSER, TORTS § 84 (2d ed. 1955); PROSSER, Assault upon the Citadel, 69 YALE L.J. 1099, 1126 (1960).

\textsuperscript{34}10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

\textsuperscript{35}See American Tank Co. v. Revert Oil Co., 108 Kan. 690, 196 Pac. 1111 (1921).

\textsuperscript{36}1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03(2) (1964), recognizes that this reasoning has been applied by the courts but attacks it as being incorrect.

\textsuperscript{37}See UNIFORM COMMERCIAL CODE §§ 2-314, 315; Corman, Implied Sales Warranty of Fitness for Particular Purpose, 1958 Wis. L. Rev. 219; Prosser, The Implied Warranty of Merchantable Quality, 27 MINN. L. REV. 117 (1943).

\textsuperscript{38}Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 23.01(1) (1964).


\textsuperscript{40}See Madoure v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936). See 1 WILLISTON, SALES § 243(a) (3d ed. 1948).

even though no direct contractual relationship existed. Later the courts expressly dispensed with the privity requirement in food cases. Cases involving products intended for intimate bodily use were treated as analogous to the food cases and the privity requirement was likewise discarded.

A more circuitous route was taken in eliminating the privity requirement in cases concerned with mechanical products. Courts have applied Uniform Commercial Code section 2-318, which provides that a warranty extends to members of the family of the purchaser or to guests in his home. In addition, another line of cases indicates that if the manufacturer makes an express representation in the form of an advertisement, he warrants his product to the public at large and recovery is allowed without a direct contractual relationship. Henningse n v. Bloomfield Motors, a warranty action by a third party against the manufacturer and seller of a defective automobile, explicitly abrogated the privity requirement in cases involving mechanical products brought on warranty-contract basis. After Henningse n the only remaining question is whether the product is defective and not fit for the purpose sold or not adequate to sup-

42. For an extensive discussion of judicial avoidance of the privity rule, see Gillam, Products Liability in a Nutshell, 37 Ore. L. Rev. 119, 153-55 (1957).
43. See Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913). Prosser lists 16 jurisdictions which have dispensed with the privity requirement in food cases. Prosser, Assault upon the Citadel, 69 Yale L.J. 1099, 1107 (1960).
44. See, e.g., Graham v. Bottonfield's, 176 Kan. 68, 269 P.2d 413 (1957) (hair dye).
45. "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by the breach of the warranty..."
46. Peterson v. Lamb Rubber Co., 54 Cal.2d 339, 353 P.2d 575 (1960) illustrates the liberal manner in which the courts have interpreted section 2-318. Plaintiff was an employee of the purchaser; however, the court considered him a member of the industrial family and thus covered by the warranty.
50. While Henningse n contained the first express declaration that privity was not necessary in a warranty suit, Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (defective cinder blocks caused property damage), indicated that the manufacturer would be held liable, in the absence of privity, to the ultimate consumer; however, it was not clearly stated that privity could be eliminated in a warranty action.
51. This is a utilization of the warranty of fitness for purpose. See Hamon v. Digianni, 148 Conn. 710, 174 A.2d 294 (1961); Morrow v. Caloric Appliance Co., 372 S.W.2d 41 (Mo. 1963). See also note 37 supra.
port the uses to which such products are ordinarily put. The elimination of the privity requirement in warranty actions is advantageous for the plaintiff who might be unable to show fault in a negligence action if the manufacturer overcomes the prima facie presumption created by res ipsa loquitur; consequently, increasing numbers of products cases have been brought on the warranty theory.

In the past warranty has presented several obstacles to recovery not present in a negligence-tort action: (1) warranty has traditionally been associated with sale; however, very recently a New Jersey court has adopted the position that a sale is not necessary for recovery in products cases; (2) for a warranty of particular purpose to be applicable there must have been reliance on the express representations of the seller; however, courts have avoided this requirement by making use of the warranty of general merchantability which does not require reliance; (3) in the past the buyer had to give prompt notice of a breach of warranty; however, recent cases have dispensed with the notice requirement; and (4) traditionally, a manufacturer has been allowed to disclaim liability or limit it; however, Henningsen v. Bloomfield Motors rejected the manufacturer's

52. This is a unitization of the warranty of general merchandise. See Hardman v. Helene Curtis Industries, 48 Ill. App. 42, 198 N.E.2d 681 (1964). See also Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5, 23 (1965); note 38 supra.

53. For cases following Henningsen, see, e.g., Picker X-Ray Corp. v. General Motors, 185 A.2d 919 (D.C. App. 1962).

54. Courts using the warranty theory have been careful to point out that the nature of the breach of warranty in product cases is also a tortious wrong. In Goldberg v. Kollsman Instrument Co., 12 N.Y.2d 432, 436, 191 N.E.2d 81, 82 (1963), the court stated: "[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 . . . article is within the reasonable contemplation of the vendor or manufacturer."


57. See note 2 supra.

58. This requirement was based on the Uniform Sales Act § 49 and the Uniform Commercial Code § 2-607. See Baum v. Murray, 23 Wash. 2d 890, 162 P.2d 801 (1946); Johnson v. Kanavos, 296 Mass. 373, 6 N.E.2d 434 (1937).

59. When warranty was extended to include those not in privity the notice requirement was assumed not to apply. See Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961). Recent decisions which rest on strict liability say the notice requirement is not present. See Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P.2d 168 (1964).


plea of disclaimer as against public policy, and this rejection has been followed in personal injury actions. The result has been that warranty no longer protects only bargaining power but extends to protect human life as well. The courts now view the breach of "warranty" in products cases as a tortious wrong. In a recent case "warranty" was held to protect against inadequacy of value. Thus it appears that a manufacturer will be held liable without regard to privity whenever a defect in his product causes injury. This is a species of absolute liability.

Even though he is liable without fault, the manufacturer is not considered an insurer. The injured party must still show that the product in question has been transferred from the manufacturer in a "defective" condition and that the "defect" caused injury. The problem for the court is to determine what is a defective product. Two general categories have been established: (1) when the product is not made in the way intended and (2) when the product was made as intended and still causes injury. In the former, the courts have adopted a position similar to that of the Second Restatement of Torts section 402-A and have

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63. See Greeman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1962), where Justice Traynor stated that "rules defining and 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 their defective products unless those rules also serve the purposes for which such liability is imposed."

64. See note 54 supra.


67. See 1 Frumer & Friedman, Products Liability § 16.03(4) (1964).

68. See Picker X-Ray Corp. v. General Motors, 185 A.2d 919 (1962); 1 Frumer & Friedman, Products Liability § 16.01(1) (1964); Comment, 27 Mo. L. Rev. 194, 203 (1962).

69. "(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 . . . 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.

"(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.

"Caveat: The Institute expresses no opinion as to whether the rules stated
imposed liability despite the degree of care exercised by the manufacturer.\textsuperscript{70} When the product is made as intended but still causes injury, a more difficult question is presented; namely, whether the product can be considered subject to an inherent defect because of unsuitability for the purpose intended by the manufacturer.\textsuperscript{71} In Magee v. Wyeth Laboratories,\textsuperscript{72} a case of death from allergic reaction to drugs, the court recognized that there could be liability on a warranty basis if a substantial proportion of users suffered similar reactions. Such a determination is apparently based on balancing the utility of the product against the magnitude of the risk. Factors involved in such a determination are: (1) The value society places on the product, (2) an examination of whether the product could be made safer and still accomplish its intended purpose, (3) the presence of adequate warnings and instructions, (4) whether there are safer substitutes, (5) the necessity of the risk in relation to the usefulness of the product, and (6) whether the cost of eliminating the risk would be prohibitive.\textsuperscript{73}

Louisiana courts have, in the great majority of cases, made use of a negligence-tort theory to determine the liability of a manufacturer for the harm caused by his defective product.\textsuperscript{74} The courts have eliminated the privity requirement in negligence actions and have also allowed use of \textit{res ipsa loquitur} to facilitate proof.\textsuperscript{75} LeBlanc v. Louisiana Coca-Cola Bottling Co.\textsuperscript{76} 

\begin{notes}
72. 29 Cal. Rptr. 322 (1963).
73. Wade, \textit{Strict Tort Liability of Manufacturers}, 19 Sw. L.J. 5, 17 (1965), suggests that the factors to be considered are: "(1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger . . . , (6) the avoidability of injury by care in the use of the product . . . , and (7) the ability to eliminate the danger . . . ."
74. There is limited use of the warranty-contract theory in Louisiana because of the code warranty against redhibitory vices contemplates a direct, buyer-seller relationship. See La. Civil Code arts. 2476, 2520, 2522, 2531, 2547 (1870). These articles appear to preclude an ultimate consumer from recovering directly from a manufacturer; consequently, the negligence theory is preferable because the privity requirement has been eliminated and \textit{res ipsa loquitur} is available to the plaintiff. See Comment, 13 La. L. Rev. 624 (1953).
75. See Auzenne v. Gulf Public Serv., 181 So. 54 (La. App. 1st Cir. 1938); Lee v. Smith, 168 So. 727 (La. App. 1st Cir. 1936). See also Comment, 22 La. L. Rev. 435 (1962); Note, 13 La. L. Rev. 624 (1953).
76. 221 La. 919, 60 So. 2d 873 (1952).
\end{notes}
tablished that in cases involving deleterious food recovery will lie on the basis of an implied warranty of wholesomeness even though the action was brought in tort, and the injured party need not be in privity with the manufacturer. This position is similar to that of the absolute liability imposed on food and drug manufacturers at common law. A recent federal decision, *Lartigue v. R. J. Reynolds Tobacco Co.*, indicates that absolute liability will also be imposed in actions dealing with products intended for intimate bodily use. Lousianian courts have not had an opportunity to rule on a products case since the Second Restatement of Torts section 402-A was expanded to include products other than food.

It is submitted that in the future the manufacturer of a product which causes injury, either because of a defect not intended to be present, or a defect due to the nature of the product, will be liable for the harm caused. It appears that this liability will be imposed according to the principles established in the Second Restatement's section 402-A. A similar position should be adopted in Louisiana, since the jurisprudence indicates that absolute liability is not inconsistent with the civil law requirement of fault. As a practical matter, this extension is justified because of mass advertising and sales techniques aimed at the

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77. The court, as Justice Hawthorn pointed out in his dissent, ignored the code articles against redhibitory vices and imposed liability because of the nature of the business and the manufacturer’s advertisements extolling the quality of the product. Liability was imposed through a warranty-contract theory, the result being that absolute liability was imposed on the manufacturer. Absolute liability, however, is not inconsistent with the civilian theory of fault. See *La. Civil Code* arts. 2315, 2316 (1870). The question remains whether the courts will extend this liability to include products other than food, or whether the court will interpret article 2315 strictly and require a showing of fault. A strict interpretation is unlikely because delictual responsibility without dolus (willful harming) or culpa (negligent harming) is explainable in terms of fault. See Stone, *Tort Doctrine in Louisiana: The Concept of Fault*, 27 Tul. L. Rev. 1, 14, 19 (1952). Delicts do not have to depend on negligence; rather, they can rest on absolute liability. See *La. Civil Code* arts. 177 (master liable for damage caused by whatever is thrown out of his house into street), 2321 (owner who has turned loose dangerous animal liable) (1870). See also Note, 13 *La. L. Rev.* 624 (1953); Harris, *Liability Without Fault*, 6 Tul. L. Rev. 1 (1932).

78. 317 F.2d 19 (5th Cir. 1963), cert. denied, 375 U.S. 865 (1963).

79. See note 69 supra.

80. See note 77 supra. Another possible argument is that the vendor of a product is subrogated to his seller’s rights and actions in warranty against all others. *La. Civil Code* art. 2503 (1870). Although this article appears in the section of the code entitled “Warranty in Case of Eviction,” it does not appear to be inconsistent with the theory of redhibitory vices. If this article were used, a consumer would have a cause of action against the manufacturer through subrogation to the rights of his vendor (the retailer) and thus would eliminate the question of privity.
ultimate consumer who is often unable to show fault. It places the liability where it should be — on the one who creates the risk and is best able to bear the consequences.

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