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PIERCING THE SHIELD OF PRIVACY IN PRODUCTS LIABILITY—A CASE FOR THE BYSTANDER

A gas tank exploded at the duplex home of the Toombs family. Several members of the family were injured and one child was killed. A woman and her child, who lived in the other side of the duplex, were also injured.

The gas tank was owned by the defendant gas company and had been used for the storage of the gas sold to the Toombs family. The individual members of the family and the other injured persons brought suit against the defendant manufacturer and the defendant gas supplier alleging negligence and breach of implied warranty. Evidence was introduced on two alleged causes of the explosion—a defect in the weldings of the tank and the overfilling of the tank by defendant gas supplier. The jury exonerated the manufacturer from liability,¹ but found the gas company liable to all persons who were injured.

The District Court of Appeal, Fourth District, reversed the verdict for the plaintiffs and remanded the case for a new trial.² The court classified the plaintiffs into two categories, (1) members of the Toombs family who were bailees and (2) mere bystanders, and held that neither class of persons could recover on the grounds of breach of implied warranty.³ The Supreme Court of Florida reviewed the case by conflict certiorari and *held*, reversed: The distinction between bailment and sale drawn by the district court of appeal was wholly inapplicable to the facts, involving the sale and handling of a dangerous commodity in a container subject to bailment provisions.⁴ A bystander is entitled to recover for breach of implied warranty even though he is not in privity with the seller or user of the product under the "dangerous instrumentality" exception to the privity requirement when he is necessarily in the vicinity of the hazard of

1. The jury apparently believed that the explosion was not due to a defect in the manufactured tank but rather to the fact that it was overfilled with gas.

2. *Fort Pierce Gas Co. v. Toombs*, 193 So.2d 669 (Fla. 4th Dist. 1966). New trial was to be held on the issue of negligence.

3. The Toombs family could not recover because there was no absolute liability in bailment cases as in cases involving a sale, *id.* at 672, citing *Brookshire v. Florida Bendix Co.*, 153 So.2d 55 (Fla. 3d Dist. 1963). The court made an error here because, on the basis of the jury verdict exonerating the manufacturer, the explosion was caused by the gas which was sold and not by the tank which was bailed. See note 4 *infra*.

4. *Toombs v. Fort Pierce Gas Co.*, 208 So.2d 615 (Fla. 1968). It is conceptually difficult to fit the theories of implied warranty in sales to a situation involving the handling of gas. The product sold is not defective, nor is it dangerous in design. In reality, the liability here is a strict liability for mishandling of a dangerous commodity like dynamite and not a breach of implied warranty in the sale. The closest analogy in implied warranty is presented in situations where the bottler is held liable for exploding bottles, although he did not manufacture the bottle and presumably overfilled it. See *Canada Dry Bottling Co. v. Shaw*, 118 So.2d 840 (Fla. 2d Dist. 1960). A legal purist could engage in interesting discussions as to whether returnable bottles are sold or bailed like the gas tank in the instant case. For practical purposes, sale of bottled soft drinks are treated as sales transactions and are not split into bailment and sale as in the instant case.

such a commodity. *Toombs v. Fort Pierce Gas Co.*, 208 So.2d 615 (Fla. 1968).⁵

By extending liability for breach of implied warranty to include the bystander, the Florida Supreme Court has done away with even more of the few remaining traces of the requirement of privity of contract to maintain such an action.⁶ The innocent bystander, neither a consumer nor a user of the product, has been the center of conflict in the battle over the scope of responsibility for breach of implied warranty⁷ envisioned by *Henningsen v. Bloomfield Motors*.⁸ Only two other courts have granted the bystander a right of recovery. In *Piercefield v. Remington Arms*, the Supreme Court of Michigan permitted a bystander to recover when a gun exploded because of a defective shell and injured him.⁹ A lower court in Connecticut permitted a golfer's widow to recover against the manufacturer of a car with defective brakes which rolled down a golf course hill and killed her husband.¹⁰ Other cases which have considered the problem have denied recovery.¹¹

The history of the development of warranty, the bastard offspring of tort and contract, has been traced in detail by many legal scholars and need not be repeated here.¹² It should be noted, however, that at the same period of time that warranty was developed as a contract action,¹³ the English courts in *Winterbottom v. Wright*¹⁴ extended the privity requirement of contract law to an action for negligence in supplying a chattel. In *Winterbottom*, the court was concerned that if the operation of contracts to supply chattels were not confined to the parties who made them, the most outrageous results would ensue: "[I]f the plaintiff can sue, every passenger, or even *any person passing along the road*, who was injured by

5. *Toombs v. Ft. Pierce Gas Co.*, 208 So.2d 615 at 617 (Fla. 1968).

6. The clarity of the holding in this case is somewhat marred by the retention of the "dangerous instrumentality" device which can be made to fit the situation in subsequent cases, as has been done before. See for example notes 64-66 *infra* and accompanying text.

7. *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841 (5th Cir. 1967). The case is very clear in defining the scope of implied warranty. See also Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). Prosser discusses the recovery of bystanders and other non-users as a question of public policy which has until now centered on the consumer. *Id.* at 819. The RESTATEMENT (SECOND) OF TORTS § 402A, comment *o*, caveats the question of the bystander's recovery.

8. 32 N.J. 358, 161 A.2d 69 (1960).

9. 375 Mich. 85, 133 N.W.2d 129 (1965).

10. *Mitchell v. Miller*, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965).

11. *Mull v. Ford Motor Co.*, 368 F.2d 713 (2d Cir. 1966), *aff'g* *Mull v. Colt Co.*, 31 F.R.D. 154 (S.D.N.Y. 1962); *Kuschy v. Norris*, 25 Conn. Supp. 383, 206 A.2d 275 (Super. Ct. 1964), *overruled by* *Mitchell v. Miller*, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965); *Rodriguez v. Shell's City, Inc.*, 141 So.2d 590 (Fla. 3d Dist. 1962); *Berzon v. Don Allen Motors, Inc.*, 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (4th Dept. 1965).

12. See *e.g.*, Gilliam, PRODUCTS LIABILITY IN A NUTSHELL, 37 ORE. L. REV. 119 (1958); Llewellyn, ON WARRANTY OF QUALITY, AND SOCIETY, 36 COLUM. L. REV. 699 (1936).

13. The warranty action originally sounded in tort, Prosser, *supra* note 8 at 802. In 1778 Lord Mansfield's court held that the form of action for warranty was *assumpsit*, *Stuart v. Wilkins*, 1 Doug. 18, 99 Eng. Rep. 15 (1778).

14. 10 M & W 109, 152 Eng. Rep. 402 (Ex. 1842).

the upsetting of the coach might bring a similar action."¹⁵ The problem of the bystander's recovering absent a privity requirement was seen immediately by the courts.

The principle of *Winterbottom v. Wright* was adopted¹⁶ and simultaneously distinguished¹⁷ by the courts of the United States. Numerous exceptions riddled the rule¹⁸ until its demise in *MacPherson v. Buick Motors Co.*, where Cardozo made privity obsolete as a requirement in a negligence action against the manufacturer and other suppliers of chattels.¹⁹

Finding negligence hard to prove, the courts turned to an action based on breach of warranty in order to protect the consumer.²⁰ However, an ironical and paradoxical problem then presented itself. Warranty was an action in contract, and privity is a legitimate requirement in contract actions, circumvented only by the third party beneficiary theory.²¹ By giving warranty the attributes of tort liability, the courts were able to abrogate the privity requirement in a development similar to the abrogation of the privity requirement in negligence.²² Yet negligence was a tort action and the privity requirement was essentially artificial.

The first exceptions to privity in warranty cases were those involving food, a judicial trend consistent with the public furor over food manufacture in the period of the muckrakers.²³ The exception was then extended to products for intimate bodily use²⁴ and products which were inherently dangerous.²⁵ Beginning in 1958 with *Spence v. Three Rivers*

15. *Id.* at 114, 152 Eng. Rep. at 405 (emphasis supplied).

16. [Nat'l] Savings Bank v. Ward, 100 U.S. 195 (1879), in which the United States Supreme Court used the principle to limit an attorney's liability for examining an abstract.

17. The New York court accepted it quickly in dicta in *Thomas v. Winchester*, 6 N.Y. 397, 57 Am. Dec. 455 (1852), but just as quickly distinguished it in the same case because it involved an inherently dangerous product.

18. The inherently dangerous rule was used to create so many exceptions that it was carried to absurdities. Boehlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L.Q. REV. 343 (1929).

19. 217 N.Y. 382, 111 N.E. 1050 (1916). The history of the abolition of privity in the field of negligence of manufacturers is another one which has been well covered by judges and scholars. See Boehlen, *supra* note 18.

20. *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. App. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion by Justice Traynor).

21. The development of third party beneficiary theories in order to get around privity in certain contract cases has likewise been difficult for the courts since the days of the landmark case of *Lawrence v. Fox*, 20 N.Y. 268 (1859).

22. Kessler, *Products Liability*, 76 YALE L. J. 887 (1967).

23. *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913) was the first case to abolish privity in breach of implied warranty of food. It was followed by *Parks v. G. C. Yost Pie Co.*, 93 Kan. 334, 144 P. 202 (1914) and *Jackson Coca Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 791 (1914). See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1106-10 for other cases supporting this position.

24. *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954); *Kruper v. Procter & Gamble Co.*, 113 N.E.2d 605 (Ohio Ct. App. 1953), *rev'd on other grounds*, 160 Ohio St. 489, 117 N.E.2d 7 (1954).

25. *Chapman Chemical Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949). See also *Di Vello v. Gardner Machine Co.*, 46 Ohio Op. 161, 102 N.E.2d 289 (C.P. Cuyahoga Cty., 1951), *overruled by Wood v. General Electric Co.*, 159 Ohio St. 273, 112 N.E.2d 8 (1953), *overruled by Lonrick v. Republic Steel Corp.*, 6 Ohio St. 2d 277, 218 N.E.2d 185 (1966).

*Building Supply*²⁶ where liability was imposed for economic and property loss from defects in building blocks, there was a gradual extension of liability²⁷ culminating in the decision in *Henningsen v. Bloomfield Motors, Inc.*²⁸

The *Henningsen* case, like the Uniform Commercial Code, established an action for breach of warranty which is a hybrid between tort and contract.²⁹ Then, Justice Traynor and the Supreme Court of California put warranty back into the law of torts in *Greenman v. Yuba Power Products* by removing the requirements of privity and notice.³⁰ Warranty was made a form of strict liability, a position adopted by the *Restatement*.³¹ The courts of most other jurisdictions, however, are still in the process of deciding what to do about privity, warranty, and strict liability.

If the requirement of privity is removed in warranty actions, the courts are faced with the problem of how to limit liability. On the other hand, if it remains as a bar to personal injury actions, the result can be harsh and unjust. There are two possible approaches to the problem. One is to maintain privity, but to develop certain exceptions to the rule or alternative theories of recovery. This is the approach adopted by section 2-318 of the Uniform Commercial Code. It offers the third party beneficiary theory as a way to circumvent the privity requirement by extending the warranty to persons in the family or household of the buyer or to those who are guests in his home.³² Although comment 2 to this section states that the enumerated parties are not intended to enlarge or restrict the developing case law, the effect of this section on some courts has been to create a few narrow exceptions to the rule rather than an alternative theory of recovery.³³

26. 353 Mich. 120, 90 N.W.2d 873 (1958).

27. See Annot., 75 A.L.R.2d 39 and supplements thereto for an exhaustive discussion of the cases.

28. 32 N.J. 358, 161 A.2d 69 (1960). Liability was imposed on the retailer and the manufacturer when the purchaser's spouse was injured in a defective automobile.

29. Comment, *Implied Warranty, Strict Liability for Personal Injuries, and the Uniform Commercial Code, Section 2-318*, 13 KAN. L. REV. 411 (1965).

30. 59 Cal. 2d 57, 377 P.2d 897 (1962).

31. RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

32. UNIFORM COMMERCIAL CODE § 2-318 provides:

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 breach of the warranty. A seller may not exclude or limit the operation of this section.

The Code has been harshly criticized for its inadequacies in solving the problem of privity. See, e.g., Weaver, *Allocation of Risk in Products Liability Cases: The Need for a Revised Third-Party Beneficiary Theory in UCC Warranty Actions*, 52 VA. L. REV. 1028 (1966) and Comment, 13 KAN. L. REV., note 29 *supra*. The drafters of the Code, however, deserve credit for the flexibility which they did give the Code in the area of implied warranty. The Code was drafted in the late forties and first adopted in the early fifties. The more progressive RESTATEMENT was drafted in the early sixties, after the cases were giving a right of recovery.

33. The reason for this is that the Code is adopted as the legislatures' own words, and courts favoring strict statutory construction are reluctant to go beyond the words, despite

Other divergent theories have been employed by the courts. In fact, one author lists no less than twenty-nine.³⁴ The following are examples: the buyer is an agent of the injured party;³⁵ the warranty runs with the chattel;³⁶ the warranty rights are assigned to the user of the product;³⁷ public policy should protect the person in possession;³⁸ and an interesting case where the court defined privity as nothing more than the successive right to possession.³⁹ In those cases involving food,⁴⁰ products for intimate bodily use,⁴¹ and inherently dangerous products⁴² flat exceptions are generally made.

The other alternative is to abolish privity and to find some other means of limiting liability. Thus, a few courts have replaced privity with some other artificial requirement, *e.g.*, the person injured by the product must be a remote vendee,⁴³ or he must be a consumer or user of the product.⁴⁴ The bystander, however, could not recover under either of these two theories.

The *Restatement* took this alternative, abolished privity and limited liability by a foreseeability test.⁴⁵ It did not, however, answer the question of whether or not a bystander can recover and expressly *caveated* that point.⁴⁶

urgings by draftsmen. A good example of this is *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963). Pennsylvania was the first state to adopt the Code and it refused to go beyond the words of the statute and permit recovery by an employee. Yet, the theory of third-party beneficiary certainly applies in a situation where an employer purchases equipment to be used by his employee. A New Jersey court felt that it had to stretch the word "family" so as to include employees. *Jakubowski v. Minnesota Mining and Manufacturing*, 80 N.J. Super. 184, 198, 193 A.2d 275, 280 (1963), *rev'd on other grounds*, 42 N.J. 177, 199 A.2d 826 (1964).

34. Gilliam, note 12 *supra*.

35. *Freeman v. Navarre*, 47 Wash. 2d 760, 289 P.2d 1015 (1955); Gilliam, *Judicial Legislation, Legal Fictions, and Products Liability: The Agency Theory*, 37 ORE. L. REV. 217 (1958).

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

37. *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920).

38. *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959); *Escola v. Coca Cola Bottling Co.*, 24 Cal. App. 2d 453, 461, 150 P.2d 436, 440 (1944) (concurring opinion of Justice Traynor).

39. *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 353 P.2d 575 (1960).

40. See note 23 *supra*.

41. See note 24 *supra*.

42. See note 25 *supra*.

43. *Loch v. Confair*, 361 Pa. 158, 63 A.2d 24 (1949); Professor Kessler, note 22 *supra* at 892 says that the various ways which the courts have used advertising by the manufacturer to create express warranties has really modified privity of contract to a kind of privity of sale. Most courts allow recovery today by the purchaser against the manufacturer.

44. The injured party could not recover unless he was a user of the product in *Mull v. Ford Motor Co.*, 368 F.2d 713 (2d Cir. 1966); *Rodriguez v. Shell's City, Inc.*, 141 So.2d 590 (Fla. 3d Dist. 1962), followed by *Engel v. Lawyer's Cooperative Publishing Co.*, 198 So.2d 93 (Fla. 3d Dist. 1967); The RESTATEMENT (SECOND) OF TORTS § 402A (1965) defines those who can recover as "users and consumers."

45. The RESTATEMENT makes warranty strict liability and therefore the proximate cause or within the risk tests of liability would apply. See Prosser, 50 MINN. L. REV., at 817-19 (1966); Freedman, *Help for the Third Party Casual Bystander? Extension of Warranty Beyond Foreseeability?* PLI HANDBOOK ON PRODUCTS LIABILITY at 4-6 (1966).

46. RESTATEMENT (SECOND) OF TORTS § 402A, comment *o* (1965).

The result of all this intricate and varied logic to expand warranty protection is that, one by one, different classes of people have been given a cause of action. Included among these have been spouses,⁴⁷ other family members,⁴⁸ guests,⁴⁹ friends,⁵⁰ employees,⁵¹ passengers,⁵² and in a few cases, the innocent bystander.⁵³

Florida, a progressive state in developing the law of implied warranty,⁵⁴ first permitted recovery in the absence of privity in a food case. In *Blanton v. The Cudahy Packing Co.* the court held that the implied warranty of wholesomeness of food extended to the ultimate consumer.⁵⁵

In 1956 an intriguing decision was handed down by Justice Terrell of the Supreme Court of Florida in *Matthews v. Lawnlite*.⁵⁶ A prospective customer sat in a lawn chair on display in a retail store. His finger was amputated by the moving parts of the chair. The court discussed the lack of a privity requirement in negligence under *Restatement* section 398,⁵⁷ and then discussed implied warranty. It held that a lawnchair was not a dangerous instrumentality like a gun, an automobile, or an airplane, but that an innocent looking lawnchair which concealed a dangerous device was thereby a dangerous instrumentality.⁵⁸ Finally, the court held

47. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

48. *McBurnette v. Playground Equip. Co.*, 137 So.2d 563 (Fla. 1962); *Shamrock Fuel & Oil Sales Co. v. Tunks*, 406 S.W.2d 483 (Tex. Civ. App. 1966).

49. *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124 (2d Cir. 1963).

50. *Chapman v. Brown*, 198 F. Supp. 78 (D.C. Hawaii 1961).

51. *Vandercook & Son, Inc. v. Thorpe*, 344 F.2d 930 (5th Cir. 1965); *Barfield v. Atlantic Coast Line*, 197 So.2d 545 (Fla. 2d Dist. 1967); *Williams v. Union Carbide Corp.*, 17 App. Div. 2d 661, 230 N.Y.S.2d 476 (2d Dept. 1962); *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); *Brewer v. Oriard Powder Co.*, 66 Wash. 2d 187, 401 P.2d 844 (1965).

52. *Middleton v. United Aircraft Corp.*, 204 F. Supp. 856 (S.D.N.Y. 1960); *King v. Douglas Aircraft Co.*, 159 So.2d 108 (Fla. 3d Dist. 1964); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963).

53. *Mitchell v. Miller*, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965); *Piercefield v. Remington Arms*, 375 Mich. 85, 133 N.W.2d 129 (1965). For an excellent discussion of the bystander before *Piercefield* see Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916 (1964).

54. In 1919, the court in *American Mfg. Co. v. A. H. McLeod & Co.*, 78 Fla. 162, 82 So. 802 (1919) held that when the buyer purchased an article relying on the seller's skill and judgment, and the seller knew the buyer's purpose, an implied warranty of fitness arose. In *Smith v. Burdines*, 144 Fla. 500, 198 So. 223 (1940), the court found an implied warranty for fitness of particular purpose in the purchase of a lipstick.

55. 154 Fla. 872, 19 So.2d 313 (1944). The case was followed by *Food Fair Stores v. Macurda*, 93 So.2d 860 (1957); *Florida Coca-Cola Bottling Co. v. Jordan*, 62 So.2d 910 (Fla. 1953); *Cliett v. Lauderdale-Biltmore Corp.*, 39 So.2d 476 (Fla. 1949). The case of *Spencer v. Carl's Markets*, 45 So.2d 671 (Fla. 1950) went even further in holding the retailer of canned sardines liable although he could not, of course, have caused the defect. In the early fifties a strange case, *Hoskins v. Jackson Grain Co.*, 63 So.2d 514 (Fla. 1953), *rev'd on other grounds on rehearing*, 75 So.2d 306 (1954), extended implied warranty in the absence of privity to seed. The effect of this case is weakened by the fact that mislabeling of seed was a violation of statutes, FLA. STAT. 578.09 and 578.13.

56. 88 So.2d 299 (Fla. 1956).

57. RESTATEMENT OF TORTS § 398 (1934), which provides for manufacturers to be liable for negligence.

58. 88 So.2d 299, 300 (Fla. 1956). The use of the term "dangerous instrumentality" or "imminently" or "inherently dangerous" is really an attempt by courts to extend liability

that the manufacturer of this particular lawnchair was liable under *Restatement* section 398.⁵⁹ The case is frequently cited⁶⁰ to show that privity is not required for implied warranty for a dangerous instrumentality. However, the language of the courts makes it difficult to tell whether they are discussing negligence or breach of implied warranty.⁶¹ Nonetheless, privity of contract in an action for breach of implied warranty by a sub-purchaser to recover *economic* loss was considered unnecessary in *Cornelius v. Continental Copper Co.*⁶²

The Florida trend of extending implied warranty regardless of privity was arrested by the case of *Carter v. Hector Supply Co.*⁶³ The "way out" provided by the case of *Matthews v. Lawnlite*⁶⁴ was utilized by the court, *i.e.*, classifying the chattel as *not* being a dangerous instrumentality.⁶⁵ *Carter* was at once narrowly construed and confined to its facts in a subsequent supreme court case, *McBurnette v. Playground Equipment Corp.*⁶⁶ In that case a child who was injured on a swing set was permitted to recover because the purchase by his father was for his benefit and use.⁶⁷ Although the *McBurnette* court tried to restrict *Carter v. Hector Supply Co.*,⁶⁸ frequent citation to *Carter* by the courts show that it still has strong force.⁶⁹

In *Rodriguez v. Shell's City, Inc.*, the district court developed the requirement that the injured party be a user in order to recover, refusing

while pretending, perhaps only to themselves, that the privity requirement still exists. At other times, when recovery is denied, it provides for the courts a convenient "way out" of finding liability. See notes 65 and 66 *infra* and accompanying text. The use of the term results in a tautology, a thing is usually a "dangerous instrumentality" if it causes the plaintiff bodily harm of such nature that he would sustain damages for a suit. There are a few products like dynamite, poison, and gas which are truly "inherently dangerous" but most of the cases do not deal with such items and these terms have caused great confusion. It was Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) who first pointed out how the term "inherently dangerous" was extended to absurdities. He said that products which because of their nature would be dangerous if negligently made, and the seller can foresee this danger, are of imminent danger. His words have been turned into the "imminently dangerous" or "dangerous instrumentality" qualification presently used by the courts. All three terms are mixed up without an understanding of what they mean. *Matthews v. Lawnlite*, 88 So.2d 299 (Fla. 1956) is a good example of this.

59. See note 58 *supra*.

60. See, *e.g.*, *Toombs v. Fort Pierce Gas Co.*, 208 So.2d 615, 617 (Fla. 1968); *Carter v. Hector Supply Co.*, 128 So.2d 390, 392 (Fla. 1961); *King v. Douglas Aircraft*, 159 So.2d 108, 110 (Fla. 3d Dist. 1964).

61. *Kolodgy & Capps, Torts, Florida Survey*, 12 U. MIAMI L. REV. 469, 490-91 (1958).

62. 104 So.2d 40 (Fla. 3d Dist. 1958); see also *Power Ski of Florida, Inc. v. Allied Chemical Corp.*, 188 So.2d 13 (Fla. 3d Dist. 1966).

63. 128 So.2d 390 (Fla. 1961).

64. 88 So.2d 299 (Fla. 1961).

65. 128 So.2d at 391.

66. 137 So.2d 563 (Fla. 1962). It is interesting to note that Thornal, author of the *Carter* opinion, did not sit on this court.

67. *Id.* at 566.

68. *Id.* at 565.

69. *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743, 751 n.4 (Fla. 3d Dist. 1967); *Winston v. Friedor Realty Corp.*, 201 So.2d 96, 97 (Fla. 3d Dist. 1967); *Power Ski of Fla., Inc. v. Southern Resin & Fiberglass Corp.*, 174 So.2d 561 (Fla. 3d Dist. 1965).

to allow a bystander a cause of action.⁷⁰ Then, in *Brookshire v. Florida Bendix Co.*, a district court held that there must be a sale and not just a bailment to recover in the absence of privity.⁷¹

Lily-Tulip Corp. v. Bernstein, held that a hospital patient who was burned while using a paper cup could recover on implied warranty⁷² and flatly stated that privity was no longer required to maintain an action for implied warranty in Florida.⁷³ This sweeping, "no holds barred" attitude remained dicta until confirmed by the holding in *Toombs*.⁷⁴

The reasoning in the *Toombs* case was not based on *Lily-Tulip Corp. v. Bernstein*,⁷⁵ but on *Matthews v. Lawnlite*⁷⁶ and *McBurnette v. Playground Equipment Corp.*⁷⁷ The *Matthews* decision meant that privity was not required for breach of implied warranty in cases involving a "dangerous instrumentality."⁷⁸ The *McBurnette* case held that privity was not required for a child who stood in the shoes of his father, the purchaser.⁷⁹ The court in *Toombs* concluded that the bystanders could recover for breach of implied warranty in the absence of privity in dangerous instrumentality cases if they were necessarily in the vicinity of the hazard.⁸⁰

The instant case removed the requirements of privity and use. The court expressly discredited *Rodriguez v. Shell's City, Inc.*⁸¹ and its re-

70. 141 So.2d 590 (Fla. 3d Dist. 1962).

71. 153 So.2d 55 (Fla. 3d Dist. 1963). The lower court in the *Toombs* case, 193 So.2d 669 (Fla. 4th Dist. 1966), cited *Brookshire v. Fla. Bendix* as support for the proposition that breach of implied warranty does not apply to a bailment. Since the supreme court distinguished the *Toombs* case from a bailment (see note 4 *supra*) the *Brookshire* case still stands. Only a few courts have considered breach of implied warranty in non-sale cases, and most of them hold that the bailor is only under a duty to make the chattel reasonably safe. An excellent case holding the bailor liable and exploring the pros and cons of doing so is *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965). An excellent article on the subject is Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653 (1957).

72. 181 So.2d 641 (Fla. 1966), *aff'g* 177 So.2d 362 (Fla. 3d Dist. 1965).

73. 181 So.2d at 641.

74. Many courts use sweeping language that privity is abolished, but such language is not always followed when the court is confronted with a bystander situation. See *Berzon v. Don Allen Motors, Inc.*, 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (4th Dept. 1965).

75. 181 So.2d 641 (Fla. 1966).

76. 88 So.2d 299 (Fla. 1956).

77. 137 So.2d 563 (Fla. 1962).

78. 208 So.2d 615, 617 (Fla. 1968).

79. *Id.*

80. *Id.*

81. 141 So.2d 590 (Fla. 3d Dist. 1962). An understanding of the import of the *Toombs* case requires an understanding of the word "bystander." To the Florida courts it means a non-user. In the case of *Rodriguez*, the bystander was a sister of the user, not just a stranger. The true bystander would be someone more than just a non-user, a stranger or a member of the general public. Only one case, *Mitchell v. Miller*, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965), has given recovery to this type bystander. The bystander in *Piercefield v. Remington Arms*, 375 Mich. 85, 133 N.W.2d 129 (1965), was the brother of the purchaser. The *Toombs* case, involving people who lived next door, is somewhere in the middle of these two cases. One case, *Shamrock Fuel & Oil Sales Co. v. Tunks*, 406 S.W.2d 483 (Tex. Civ. App. 1966) involved a situation like *Rodriguez* (boy poured kerosene on son of purchaser), but the bystander implications were not even discussed when recovery was allowed. A user requirement certainly would have been absurd in that situation.

Under the Uniform Commercial Code, § 2-318, note 32 *supra*, there is no requirement

quirement that the plaintiff be a user. It replaced these limits on liability with a more reasonable requirement, a foreseeability test. A prognostication from the case is a little difficult because the court used language such as "imminently dangerous." It is also unclear as to the test for those "necessarily in the vicinity of the hazard." However, most items that cause injury can be classed as "imminently dangerous" if defective, their danger being proved by the fact that they caused injury.⁸² The words "imminently dangerous" are significant as they leave the court a possible "way out" in a fact situation where they do not wish to find for the plaintiff. However, such situations seem unlikely when the law provides the principles necessary to find liability.

One thing seems clear. The usual case involving a bystander is that of the pedestrian or person in the "other car" who is involved in an automobile accident. The automobile is considered a "dangerous instrumentality" under Florida products liability law.⁸³ Now, the manufacturer of defective automobiles will be liable to those necessarily within the vicinity of the hazard when injured. In a day when defective vehicles can so frequently cause death, in a world of mass-production luxury and a prosperous Detroit, is it so dire a consequence that Lord Arbinger's prophecy of "any person passing along the road" having a cause of action comes true?⁸⁴ This observer thinks not.

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that the third party beneficiaries be users. Members of the family and guests in the home, who might be denied recovery as bystanders, could recover under that section. Comment, 13 KAN. L. REV., *supra* note 29, at 418.

82. See note 59 *supra*.

83. *Carter v. Hector Supply Co.*, 128 So.2d 390 (Fla. 1961); *Matthews v. Lawnlite*, 88 So.2d 299 (Fla. 1956). This classification provided the rationale of allowing an airplane passenger to recover (airplanes were termed along with the automobile as dangerous instrumentalities in these cases) in *King v. Douglas Aircraft Co.*, 159 So.2d 108 (Fla. 3d Dist. 1963). *But see* *Heilman v. Hertz Corp.* 306 F.2d 100 (5th Cir. 1962), where the federal court would not allow recovery in a bailment case, by refusing to call the automobile a dangerous instrumentality under Florida warranty law and confining the application to tort law where the plaintiff sues a defendant driver for negligence in the operation of the vehicle.

84. Freedman, *supra* note 45, believes that allowing recovery by the bystander is not foreseeable and is a travesty on justice. It is true that those involved in automobile accidents may forego suing the other driver and sue the manufacturer. However, in cases where the other car was defective, and this, not the driver's negligence caused the accident, what other recourse would the injured party have other than a cause of action against the manufacturer?