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two questions are considered by the court, a just decision can be reached. Courts should then take the initiative and prescribe the permissible bounds for racial picketing.

It seems evident that it is but a short time until peaceful picketing by racial groups protesting discriminatory practices will be one of the pursuits protected by the constitutional guarantee of "freedom of speech." It should be remembered when dealing with racial picketing:

The right of an individual or group of individuals to protest in a peaceable manner against injustice or oppression . . . is one to be cherished and not to be proscribed in any well-ordered society. It is an essential prerogative of free men living under democratic institutions.⁶²

ROBERT R. BEBERMEYER

LIABILITY OF AUTOMOBILE MANUFACTURER— NEGLIGENCE WITHOUT FAULT?

The headlights of the plaintiff's Ford automobile failed as the result of a defective dimmer switch. The vehicle veered off the road in the darkness and collided with a tree causing property damage and personal injuries to the plaintiff. The dimmer switch had been manufactured by an independent supplier for the Ford Motor Company. Ford had conducted a reasonable inspection of the dimmer switch which was found to have been negligently manufactured, without discovering the defect. The plaintiff's action against Ford was successful and on appeal to the United States Court of Appeals, Fifth Circuit, *held*, affirmed: a manufacturer is liable for injuries caused by defective parts negligently constructed by another, although the defect could not have been discovered by a reasonable inspection. *Ford Motor Co. v. Mathis*, 322 F.2d 267 (5th Cir. 1963).

In dealing with the liability of manufacturers for injuries caused by defective products, the law has gone through various stages and it is far from uniform today. Two theories of liability are available: (1) negligence; and (2) strict liability on the basis of an implied warranty that the goods are fit for the purpose for which they are sold. Under the negligence theory, *MacPherson v. Buick Motor Co.*,¹ the landmark case in this area, eliminated the necessity for privity between the manufacturer and the injured party and it is followed today in all jurisdictions.² Sub-

62. *Julie Baking Co. v. Graymond*, 152 Misc. 846, 847, 274 N.Y. Supp. 250, 251-52 (Sup. Ct. 1934).

1. 217 N.Y. 382, 111 N.E. 1050 (1916).

2. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

sequent cases extended the manufacturer's liability to persons other than the ultimate buyer³ and enlarged it to include property damage.⁴

Under the theory of implied warranty, however, privity is the main obstacle that a plaintiff must overcome in order to recover against a manufacturer. The requirement of privity is presently under heavy attack.⁵ It was first rejected when a food article produced an injury and strict liability was imposed on the manufacturer. The justification for it was found in an "implied" warranty by the manufacturer that the food was fit for human consumption.⁶ The requirement of privity was also discarded when the injury was caused by bottles,⁷ drugs,⁸ and articles of *external use*, such as soap,⁹ hair dyes and permanent waves.¹⁰ Recent decisions have also included a variety of unrelated articles such as an insecticide spray,¹¹ a chair,¹² a tire,¹³ a bed,¹⁴ a folding chair,¹⁵ an inflammable skirt,¹⁶ and many others.¹⁷

3. Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928).

4. International Harvester Co. v. Sharoff, 202 F.2d 52 (10th Cir. 1953); Todd Shipyard's Corp. v. United States, 69 F. Supp. 609 (S.D. Me. 1947); Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (1915).

5. See generally Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1958); Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1 (1963); James, *Products Liability, II, Manufacturers*, 34 TEXAS L. REV. 192 (1955); James, *General Products. Should Manufacturers be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 939 (1957); Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). *But see*, Green, *Should the Manufacturer of General Products Be Held Without Negligence?*, 24 TENN. L. REV. 928 (1957); Keeton, *Products Liability—Current Developments*, 40 TEXAS L. REV. 193 (1961).

6. Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914); Mazetti v. Armour Co., 75 Wash. 622, 135 Pac. 633 (1913).

7. Nichols v. Nold, 174 Kan. 613, 258 P.2d 317 (1953); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942); Coca-Cola Bottling Co. v. Burgess, 195 S.W.2d 379 (Tex. Civ. App. 1946); Coca-Cola Bottling Co. v. Smith, 97 S.W.2d 761 (Tex. Civ. App. 1936).

8. Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

9. Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961).

10. Graham v. Bottenfields Inc., 176 Kan. 68, 269 P.2d 413 (1954); Markovich v. McKesson Robbins Inc., 106 Ohio App. 265, 149 N.E.2d 181 (1958); Esborg v. Bailey Drug Co., 378 P.2d 298 (Wash. 1963).

11. McQuaide v. Bridgeport Brass Co., 190 F. Supp. 252 (D. Conn. 1960).

12. Sheward v. Virtue, 20 Cal. 2d 410, 126 P.2d 345 (1942).

13. B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959).

14. Simmons Co. v. Hardin, 75 Ga. App. 420, 43 S.E.2d 553 (1947).

15. Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N.W.2d 224 (1954).

16. Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962).

17. Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963) (water heater); Smith v. S. S. Kresge Co., 79 F.2d 361 (8th Cir. 1935) (hair comb); McAfee v. Cargill Inc. 121 F. Supp. 5 (S.D. Cal. 1954) (dogfood); Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 67, 377 P.2d 897 (1962) (powertool); Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575 (1960) (grinding wheel); Spencer v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (cinder blocks); Midwest Game Co. v. M. F. A. Milling Co., 320 S.W.2d 547 (Mo. 1959) (fish food); Jakubowski v. Minnesota Mining & Mfg. Co., 80 N.J. Super. 184, 193 A.2d 275 (1963) (grinding wheel); Okker v. Chrome Furniture Mfg. Co., 26 N.J. Super. 295, 97 A.2d 699 (1953) (barstool).

That privity is no longer a requirement in food cases is acknowledged in a majority of jurisdictions, but most states,¹⁸ including Florida,¹⁹ still apply the rule of privity, when a non-food article has caused the injury.

In *Henningsen v. Bloomfield Motors Inc.*,²⁰ the New Jersey Supreme Court unequivocally rejected the requirement of privity in a suit against an automobile manufacturer. In that case, a defective steering wheel caused a car to veer off the road and to crash into a brick wall. The wife of the purchaser was driving it and she was injured. The court held that

18. *Birmingham Chero-Cola Bottling Co. v. Clark*, 205 Ala. 678, 89 So. 64 (1921); *Drury v. Armour & Co.*, 140 Ark. 371, 216 S.W. 40 (1919); *J. I. Case Threshing Mach. Co. v. Dulworth*, 216 Ky. 637, 287 S.W. 994 (1925); *Smith v. Salem Coca-Cola Bottling Co.*, 92 N.H. 97, 25 A.2d 125 (1942); *Wood v. General Elec. Co.*, 159 Ohio St. 273, 112 N.E.2d 8 (1953); *Crigger v. Coca-Cola Bottling Co.*, 132 Tenn. 545, 179 S.W. 155 (1915).

With specific reference to automobiles, see: *Dennis v. Willys-Overland Co.*, 111 F. Supp. 875 (W.D. Mo. 1953); *Smith v. Ford Motor Co.*, 327 S.W.2d 535 (Mo. App. 1959); *Miller v. Chrysler Corp.*, 99 Ohio L. Abs. 317, 183 N.E.2d 421 (Ct. App. 1962). See also *Murray v. Bensen Aircraft Corp.*, 259 N.C. 638, 131 S.E.2d 367 (1963); *Odom v. Ford Motor Co.*, 230 S.C. 320, 95 S.E.2d 601 (1956) (*tractor*).

The existence of the *Uniform Sales Act* has not impeded the erosion of the privity requirement, since by its terms, it only attempts to regulate the buyer-seller relationship. Absent privity, it affords no remedy to the injured party. The rule is somewhat relaxed under the new *Uniform Commercial Code* adopted in a few states. It extends protection to the family of the buyer and to his guests. The commissioners added this comment to the extended protection: "Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." UNIFORM COMMERCIAL CODE § 2-318, and *comment*. In *Esborg v. Bailey*, *supra* note 10, at 381, the court states that implied warranties from manufacturer to consumer, if any, arise from the common law. This is also the position taken by *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). However, in *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), the UNIFORM COMMERCIAL CODE § 2-318 was used to re-establish the requirement of privity, which had been abolished by case law. The argument was made that the intent of the framers of the UNIFORM COMMERCIAL CODE was not to restrict the case law in this field. The court, however, sidestepped the argument by stating that Pennsylvania has not rejected the theory of privity, but occasionally has made an exception in favor of a purchaser on the basis of "social justice." This decision is sharply criticized in *Jaeger, Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE L. REV. 1 (1963).

19. In Florida, in implied warranty under strict liability, the requirement of privity has been eliminated only in food cases, and in one intermediate court decision involving a soda bottle. In that case, the bottle broke injuring the hand of the plaintiff who was attempting to open it. *Canada Dry Bottling Co. v. Shaw*, 118 So.2d 840 (Fla. 2d Dist. 1960). The "food" cases are: *Valdosta Milling Co., v. Garretson*, 217 F.2d 625 (5th Cir. 1955); *Florida Coca-Cola Bottling Co. v. Jordan* 62 So.2d 910 (Fla. 1953); *Cliett v. Lauderdale Biltmore Corp.*, 39 So.2d 476 (Fla. 1949) (*dictum*); *Blaton v. Cudahy Co.*, 154 Fla. 872, 19 So.2d 313 (1944).

No cases have been found to show that the privity rule has been abandoned in cases involving other types of articles. Privity was required in *Odum v. Gulf Tire & Supply Co.*, 196 F. Supp. 35 (N.D. Fla. 1961), and in *Carter v. Hector Supply Co.*, 128 So.2d 390 (Fla. 1961). Recovery was allowed on a third party beneficiary theory in *McBurnette v. Playground Equip. Corp.*, 137 So.2d 563 (Fla. 1962). The privity question was not raised in the certified question involved in *Green v. American Tobacco Co.*, 154 So.2d 169 (Fla. 1963), nor was it decided in *Rodriguez v. Shell City Inc.*, 141 So.2d 590 (Fla. 3d Dist. 1962). The following cases were decided on negligence: *Matthews v. Lawnlite Co.*, 88 So.2d 299 (Fla. 1956); *Hoskins v. Jackson Grain Co.*, 63 So.2d 514 (Fla. 1953); *Continental Copper & Steel Indus. v. E. C. "Red" Cornelius, Inc.*, 104 So.2d 40 (Fla. 3d Dist. 1958).

20. 32 N.J. 358, 161 A.2d 69 (1960).

the absence of privity was neither a bar to the buyer's action against the manufacturer nor to the action of the user against the manufacturer. The case was decided on the theory of implied warranty and strict liability imposed by law.²¹ The court's statement that recovery of damages does not depend upon proof of negligence or knowledge of the defect,²² impliedly overrules *Martin v. Studebaker Corp.*,²³ which held that the manufacturer is not liable for latent defects in a wheel procured from a reliable supplier. *Henningsen* was immediately followed in Iowa,²⁴ Connecticut,²⁵ and the District of Columbia,²⁶ in cases involving automobile manufacturers, and recently New York relied upon it to reject the requirement of privity in a suit against an airplane manufacturer.²⁷ A growing trend exists in the acceptance of the principles espoused by the *Henningsen* decision. A variety of reasons have been advanced to justify the demise of the privity concept. These reasons embody concepts including agency,²⁸ third-party beneficiary,²⁹ warranty running with the goods,³⁰ the idea that the manufacturer's advertising is an express warranty to the consumer,³¹ and public policy.³²

Under the negligence theory, if the defendant is a manufacturer-assembler, the plaintiff has the burden of proving negligence and he does

21. "At the trial the negligence counts were dismissed by the court and the cause was submitted to the jury for determination solely on the issue of implied warranty of merchantability." *Id.* at 365, 161 A.2d at 73. "[S]trict liability is imposed upon the maker or seller of the product." *Henningsen v. Bloomfield Motors Inc.*, 32 N.J. 358, 372, 161 A.2d 69, 77 (1960).

22. *Id.* at 372, 161 A.2d at 77.

23. 102 N.J.L. 612, 133 Atl. 384 (Ct. Err. & App. 1926).

24. *State Farm Mut. Auto. Co. v. Anderson-Weber Inc.*, 252 Iowa 1289, 110 N.W.2d 449 (1961).

25. *Connolly v. Hagi*, 24 Conn. Supp. 198, 188 A.2d 884 (1963).

26. *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. Munic. Ct. App. 1962).

27. *Goldberg v. Kollsman Instruments Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963). In that case, the plane manufacturer was held liable for the accidental death of a passenger in a crash caused by a faulty altimeter bought from an outside supplier. The following cases have permitted recovery against manufacturers of airplanes for passengers' accidental death, *without* requiring privity: *Conlon v. Republic Aviation Corp.*, 204 F. Supp. 865 (S.D.N.Y. 1960); *Middleton v. United Aircraft Corp.*, 204 F. Supp. 856 (S.D.N.Y. 1960); *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959).

28. *Grinnell v. Carbide & Carbon Chem. Corp.*, 282 Mich. 509, 276 N.W. 535 (1937); *Wisdom v. Morris Hardware Co.*, 151 Wash. 86, 274 Pac. 1050 (1929).

29. *McBurnette v. Playground Equip. Co.*, 137 So.2d 563 (Fla. 1962); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928).

30. *Patargias v. Coca-Cola Bottling Co.*, 332 Ill. App. 117, 74 N.E.2d 162 (1947); *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927).

31. *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932).

32. *Campbell Soup Co. v. Ryan*, 328 S.W.2d 821 (Tex. Civ. App. 1959); *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942). See the concurring opinion by Judge Traynor in *Escola v. Coca-Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944), wherein he said: "Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." It is submitted that fictions should no longer be necessary once the liability is considered to be in tort. Public policy appears to be the most reasonable ground.

so either by proving that the manufacturer was negligent in assembling the finished product or in failing to detect defects in the parts bought from an outside supplier which are discoverable by reasonable inspection. The prevailing view seems to be that by a reasonably careful inspection of the component parts ordered from a reliable supplier, the assembler insulates himself from liability for accidents due to defective parts supplied by another.³³ *The Restatement of Torts*, however, takes the position that the requirement of inspection exists only for the protection of the consumer and the discharge of that duty does not insulate the manufacturer from liability.³⁴

Section 400 of the *Restatement* was the principal ground relied upon by the court in the instant decision.³⁵ The defendant argued the contrary position to no avail, since Texas law had adopted the *Restatement* view in the earlier case of *S. Blickman & Sons, Inc. v. Chilton*.³⁶ In that case, a general contractor was held liable to a patron of a bar for the injuries he suffered as the result of a fall from a defective bar stool, on the grounds that the contractor had represented the stools to be a "fabrication of . . . [his] factory."³⁷ This, however, was the first time in Texas that an automobile manufacturer was sued on that theory.³⁸ The court looked for precedent in other jurisdictions and gave great weight to *Boeing Airplane Co. v. Brown*,³⁹ in which an airplane manufacturer was held liable for the negligence of the supplier of a part, and *Markel v. Spencer*,⁴⁰ a New York decision imposing liability of an automobile manufacturer on facts similar to those of the instant case.⁴¹

The import of the instant case is that the manufacturer-assembler who represents himself as the maker of the finished product is liable as

33. *O'Rourke v. Day & Night Water Heater Co.*, 31 Cal. App. 2d 364, 88 P.2d 191 (1939); *Griffith v. Chevrolet Motor Div.*, 105 Ga. App. 588, 125 S.E.2d 525 (1962); *Washburn Storage Co. v. General Motors Corp.*, 90 Ga. App. 380, 83 S.E.2d 26 (1954); *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 576 (1932); *Favo v. Remington Arms Co.*, 67 App. Div. 414, 73 N.Y. Supp. 788 (Sup. Ct. 1901).

34. RESTATEMENT, TORTS § 400 (Supp. 1948).

35. *Ford Motor Co. v. Mathis*, 322 F.2d 267, 270 (5th Cir. 1963). The case was submitted to the jury on the issue of negligence and decided on that basis.

36. 114 S.W.2d 646 (Tex. Civ. App. 1938).

37. The *Restatement* position was followed in: *Dow v. Holly Mfg. Co.*, 49 Cal. 2d 720, 321 P.2d 736 (1958); *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130 (1936); *Tornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N.E. 474 (1915); *Commissioner v. City Chem. Corp.*, 290 N.Y. 64, 48 N.E.2d 262 (1943).

38. *Ford Motor Co. v. Mathis*, 322 F.2d 267, 272 (5th Cir. 1963). The court pointed out that no Texas case directly on point has been found.

39. 291 F.2d 310 (9th Cir. 1961).

40. 5 App. Div. 2d 400, 171 N.Y.S.2d 770 (1958), *aff'd*, 5 N.Y.2d 958, 184 N.Y.S.2d 835, 157 N.E.2d 713 (1959).

41. The manufacturer of an automobile which collided with the plaintiff's car due to a brake failure caused by a defective bolt was held liable for the plaintiff's injuries, and the decision expressly followed § 400 of the *Restatement of Torts*. A similar statement was made by a federal district court in Pennsylvania, in *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888 (E.D. Pa. 1962). *But see Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), and note 18 *supra*.

if he had manufactured the component part himself and is answerable for the negligence of the manufacturer of the component part. He is *negligent* regardless of the fact that he could not have discovered the defect by reasonable inspection. By operation of law the manufacturer-assembler is made to assume liability for the negligence of another; this is a concept akin to *imputed negligence*.⁴²

Under the theory of implied warranty without privity the law would not hold the manufacturer-assembler *negligent* in a factual situation similar to that in *Mathis*, but would nevertheless impose liability. This result would be reached under the concept of strict liability. In states where privity is no longer the rule, liability would result under either theory, with one possible qualification. Under warranty, when the defect has been proved, the manufacturer-assembler has no further defense, while under *imputed negligence*, a showing by the assembler-manufacturer that the maker of the component part used reasonable care in the manufacture, would *theoretically, at least*, relieve the assembler of responsibility.⁴³

It is submitted that under the two avenues of approach, imputed negligence or implied warranty without the privity requirement, the imposition of liability can only be justified under the concept of "public policy." Strict liability is imposed on that basis, and on what grounds, except "public policy," can liability of the component-parts maker be imputed to the assembler? The traditional concepts of the law of negligence do not afford that result. While the writer has no quarrel with the result,⁴⁴ it is submitted that cases involving manufacturers' liability for defective component parts are more satisfactorily handled under the strict liability view of the *Henningsen*⁴⁵ case. The accelerated removal of the privity barrier in all types of articles is making it possible for the courts to follow *Henningsen*, and recent cases seem to indicate that this is the probable path that the law will travel.

JOSEPH A. DEMEURE

42. "[W]e hold [that] negligence of the supplier was *imputed to it*" *Ford Motor Co. v. Mathis*, 322 F.2d 267, 276 n.18 (5th Cir. 1963). (Emphasis added.)

43. In the instant case the maker was found negligent. "Do you find . . . that such inherently dangerous condition of [plaintiff's] automobile . . . was due to the failure of the manufacturer of the dimmer switch to use ordinary care in the manufacture thereof? Answer: It was." *Id.* at 272 n.4.

44. "But approaching it as does the Supreme Court of Texas on the straight forward plane of public policy in protecting what it conceives to be precious Texas lives, we cannot believe that it will differentiate between a Texan felled by a microbe and one killed by a negligently-defective machine hurtling through space at great, but expected, speed. Whatever distinctions are maintained in substantive standards of strict rather than negligence liability because of the relative sureness of identifying the manufacturer with the harmful consequence and the harm causing quality of the product, none will exist as to privity. If privity is not needed for one, it will not be required for the other."

Ford Motor Co. v. Mathis, 322 F.2d 267, 276 (5th Cir. 1963).

45. *Supra* note 20.