

Sales--Breach of Implied Warranty--Privity Unnecessary for Recovery (Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960))

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with the term "employee," the courts and the NLRB have excluded those supervisory personnel whose functions identified them closely with management. It is submitted that section 8(b)(4)(i) was designed primarily to bring those "employees," excluded under the old section, within the ambit of the secondary boycott provisions. However, nowhere does it appear that Congress intended to abolish the distinction between "supervisors" and "employees." Hence, section 8(b)(4)(i) has properly been interpreted as excluding persons with management-like authority, since such authority justifies their treatment as "agents" of the neutral employer, rather than as employees.



SALES—BREACH OF IMPLIED WARRANTY—PRIVITY UNNECESSARY FOR RECOVERY.—Plaintiff husband bought an automobile from defendant dealer which had been manufactured by defendant Chrysler Corporation. The dealer-manufacturer warranty disclaimed all warranties except the replacement of parts.¹ Ten days after purchase, plaintiff wife received injuries in an automobile accident when the car went out of control due to a defective steering mechanism.² Plaintiff wife and plaintiff husband brought a breach of warranty action against both dealer and manufacturer. The Supreme Court of New Jersey held that the wife could recover for personal injuries, and the husband, for loss of services, against both dealer and manufacturer regardless of privity. The Court further stated that the dealer-manufacturer warranty disclaimer was invalid as a matter of public policy. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

In 1890 the New York Court of Appeals emphasized that "a sound public policy . . . demands that the doctrine of *caveat emptor* shall be still further encroached upon, rather than that the public health shall be endangered."³ Some years later, when an eminent

¹ The warranty expressly guaranteed the replacement of parts for 90 days or 4,000 miles, whichever occurred first. It expressly disclaimed all other warranties.

² The car was demolished in the accident, making it impossible to discover where the defect had occurred. The only substantial evidence of a defect, aside from the wife's testimony that the car went completely out of control, was an opinion by the insurance inspector that there must have been some mechanical defect to cause the car to react the way it did. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, —, 161 A.2d 69, 75 (1960).

³ *Fairbank Canning Co. v. Metzger*, 118 N.Y. 260, 267, 23 N.E. 372, 374 (1890).

jurist⁴ wrote the celebrated opinion in *MacPherson v. Buick Motor Co.*,⁵ a most decisive blow was struck in the name of public policy and the manufacturer's shield of privity was pierced with a broad exception. The right to bring a personal injury action against a manufacturer for negligence was granted to the ultimate buyer despite a lack of any contractual relationship, provided the defective product was likely to cause injury. With the passage of more than forty years this right has apparently been extended "to anyone who may reasonably be expected to be in the vicinity of the chattel's probable use and to be endangered if it is defective."⁶ Thus today, almost the entire public is guaranteed the right of indemnification for personal injuries where a manufacturer is shown to be at fault.⁷

Recognizing, however, the difficulty of proof in negligence actions,⁸ the buyer has oftentimes elected to proceed against his immediate vendor (the retailer) in an action for breach of implied warranty of merchantability.⁹ This enables him to establish a cause of action without any evidence of negligence. The retailer is held strictly liable upon a mere showing that the product was defective when sold to the plaintiff, and that the defect resulted in the plaintiff's injury.¹⁰

In recent years there has been a considerable effort by a number of courts and legal writers to make the manufacturer a guarantor

⁴ Judge Cardozo, fifteen years after the *MacPherson* decision, commented with approval: "The assault upon the citadel of privity is proceeding in these days apace." *Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

⁵ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁶ *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31, 34 (S.D.N.Y. 1959); cf. *Kalinowski v. Truck Equipment Co.*, 237 App. Div. 472, 261 N.Y. Supp. 657 (4th Dep't 1933) (injured pedestrian's complaint for negligent repair of truck sustained as against repair company); *Odom v. Ford Motor Co.*, 230 S.C. 320, —, 95 S.E.2d 601, 604 (1956).

⁷ An injured plaintiff may also bring suit against the middleman who contributed to the finished product and whose failure to discover an existing defect might well constitute negligence. *Mueller v. Teichner*, 6 N.Y.2d 903, 190 N.Y.S.2d 709 (1959) (memorandum decision); *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 576 (1932).

⁸ See PROSSER, *TORTS* 505 (2d ed. 1955), wherein the author points out the evidentiary problems which face the plaintiff.

⁹ N.Y. PERS. PROP. LAW § 96(2); *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105 (1931). The *Ryan* case held the retailer liable to his immediate vendee where the vendee acted through an agent. The case is miscited in the present decision for the proposition that recovery may be had regardless of privity. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, —, 161 A.2d 69, 83 (1960).

¹⁰ PROSSER, *op. cit. supra* note 8, at 494; *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 9, at —, 161 A.2d at 77.

The defect must be the proximate cause of the plaintiff's injury. See *Epstein v. John Mullens & Sons*, 266 App. Div. 665, 40 N.Y.S.2d 212 (2d Dep't 1943) (memorandum decision), *aff'd mem.*, 292 N.Y. 535, 54 N.E.2d 381 (1944) (recovery denied where splinter resulting from dusting a bed was held not incidental to the proper use of the bed).

of his products.¹¹ This has been motivated primarily by "an increased feeling that social policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer, since he is best able to distribute the risk to the general public by means of prices and insurance."¹² The result has been an extension of the manufacturer's warranty to the ultimate buyer.¹³ There appears to be little contest¹⁴ over the virtues of such an extension.¹⁵

The amount of damages for personal injuries is governed by foreseeability. *Ryan v. Progressive Grocery Stores*, *supra* note 9 (injuries caused by a pin in a loaf of bread held compensable).

¹¹ PROSSER, *op. cit. supra* note 8, at 506.

¹² *Ibid.* Dean Prosser continues: "Added to this is the difficulty of proving negligence in many cases where it exists, even with the aid of *res ipsa loquitur*, together with the wastefulness and uncertainty of a series of warranty actions carrying liability back through retailer, jobber and wholesaler to the original maker, the practice of reputable manufacturers to stand behind their goods as sound business policy, and a recognition that the intermediate dealer is usually a mere conduit to market the product." *Id.* at 506-07 (footnotes omitted).

¹³ PROSSER, *op. cit. supra* note 8, at 506-07. Most of the cases have adopted some theory of warranty in order to hold the manufacturer strictly liable to the buyer. The extension has been made primarily in the area of food cases. Sixteen jurisdictions have previously made the extension by judicial decision (Arizona, California, Florida, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Texas, Virginia and Washington). Thirteen jurisdictions still refused to make the extension (Alabama, Arkansas, District of Columbia, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, South Dakota, Tennessee and Wisconsin). North Carolina and West Virginia probably still reject strict liability although their position is doubtful. Five states have strict liability under statute (Connecticut, Georgia, Minnesota, Montana and South Carolina). Thirteen states appear to have no definite law (Alaska, Colorado, Delaware, Hawaii, Idaho, Indiana, Nebraska, Nevada, North Dakota, Oregon, Utah, Vermont and Wyoming). Prosser, *The Assault Upon the Citadel*, 69 *YALE L.J.* 1099, 1106-10 (1960). The present case apparently places New Jersey among those states applying strict liability. It is also notable that strict liability may be achieved in food cases in New York under the Agriculture and Markets Law. See note 25 *infra*.

In the area of products other than food most courts refuse to apply strict liability. However, a few recent decisions have continued the attack on privity and have held the manufacturer liable to the buyer for defects in such things as hair dye, soap, a permanent wave set, a cigarette, a grinding wheel, an electric cable, and an automobile tire. Prosser, *supra* at 1110-13. The present case appears to be the most sweeping extension yet, since recovery was permitted though privity had been *twice* removed (the buyer's wife recovering against the manufacturer of the automobile). How far this extension may go the Court refused to say, but there was no disapproval expressed over an extension to any member of the public whose injury might be reasonably foreseen. *Henningsen v. Bloomfield Motors, Inc.*, 32 *N.J.* 358, 161 *A.2d* 69, 100-01 (1960).

¹⁴ PROSSER, *TORTS* 506 (2d ed. 1955).

¹⁵ Prosser, *supra* note 13, at 1114-24. The noted author presents an excellent discussion of the pros and cons of strict manufacturer liability, favoring the latter.

There is, however, some question as to how this extension should be accomplished.¹⁶

In the present case, the Supreme Court of New Jersey, under the banner of public policy, has established manufacturer warranty liability in defiance of both lack of privity¹⁷ and disclaimer.¹⁸ Whether the New York Court of Appeals will follow this example may be answered in the near future.¹⁹

Under the New York Constitution's separation of powers, it has long been recognized that judicial bodies were created to apply laws,²⁰ not to make them.²¹ "When the judicial function impinges upon the legislative, no matter how salutary or noble the motives, it subverts the constitutional structure of our state government."²²

¹⁶ As already indicated, the majority of jurisdictions have achieved this extension by judicial decision. See note 13 *supra*. There is, however, an opposing view which emphasizes that such change should be brought about *only* by legislation. See *Torpey v. Red Owl Stores*, 129 F. Supp. 404, 410 (D. Minn. 1955), *aff'd*, 228 F.2d 117 (8th Cir. 1955); *Chanin v. Chevrolet Motor Co.*, 15 F. Supp. 57, 58-59 (N.D. Ill. 1935).

¹⁷ Some automobile cases concerning denials of recovery for implied warranty on the grounds of lack of privity *alone* are: *Dennis v. Willys-Overland Motors, Inc.*, 111 F. Supp. 875 (W.D. Mo. 1953); *MacDonald v. Packard Rochester, Inc.*, 206 Misc. 16, 132 N.Y.S.2d 322 (Sup. Ct. 1954); *Smith v. Ford Motor Co.*, 327 S.W. 2d 535 (Mo. Ct. App. 1959). See also *Shoopak v. U.S. Rubber Co.*, 17 Misc.2d 201, 183 N.Y.S.2d 112 (Sup. Ct. 1959).

¹⁸ Similar cases which have *denied* recovery on the grounds of a disclaimer in the automobile warranty are: *Still v. Rabin*, 83 N.Y.S.2d 137 (App. T. 1948) (*per curiam*); *Sonnenberg v. Nolan Motors, Inc.*, 2 Misc.2d 185, 36 N.Y.S.2d 549 (App. T. 1942) (*per curiam*); *Hall v. Everett Motors, Inc.*, — Mass.2d —, 165 N.E.2d 107 (1960); *Getzoff v. Von Lengerke Buick Co.*, 14 N.J. Misc. 750, 187 Atl. 539 (Sup. Ct. 1936) (*per curiam*); *Norton Buick Co. v. E. W. Tune Co.*, — Okla. —, 351 P.2d 731 (1960). The disclaimers which were sustained in the *Hall* and *Norton Buick Co.* cases were in effect identical to the disclaimer held invalid in the present case.

¹⁹ Two recent warranty cases are pending on appeal to the Court of Appeals. *Greenberg v. Lorenz*, 12 Misc.2d 883, 178 N.Y.S.2d 407 (App. T.), *modified*, 7 App. Div.2d 968, 183 N.Y.S.2d 46 (1st Dep't), *leave to appeal granted*, 8 App. Div.2d 609, 185 N.Y.S.2d 740 (1st Dep't 1959); *Papp v. Jackson Mfg. Co.*, 8 App. Div.2d 637, 185 N.Y.S.2d 872 (2d Dep't), *leave to appeal granted*, 6 N.Y.2d 845, 160 N.E.2d 86, 188 N.Y.S.2d 551 (1959). In both cases the Appellate Division found no warranty liability where there was a lack of privity. The *Greenberg* lower court opinion, which has in effect been overruled, was cited as authority in the present case. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, —, 161 A.2d 69, 83 (1960).

²⁰ "That which distinguishes a judicial from a legislative act is, that the one is the determination of *what the existing law is* in relation to some existing thing already done or happened, while the other is a predetermination of *what the law shall be* for the regulation of all future cases falling under its provisions." *Nash v. Brooks*, 251 App. Div. 616, 618, 297 N.Y.Supp. 853, 855-56 (3d Dep't 1937), *aff'd*, 276 N.Y. 75, 11 N.E.2d 545 (1938) (emphasis added), quoting 1 COOLEY, CONSTITUTIONAL LIMITATIONS 183 (8th ed. 1927).

²¹ *Cort v. Smith*, 249 App. Div. 1, 291 N.Y. Supp. 54 (4th Dep't), *aff'd mem.*, 273 N.Y. 481, 6 N.E.2d 414 (1936). See also *Bareham v. Board of Supervisors*, 247 App. Div. 534, 288 N.Y. Supp. 185 (4th Dep't 1936).

²² *People v. Johnson*, 13 Misc.2d 376, 380, 169 N.Y.S.2d 217, 221 (Westchester County Ct. 1957).

By statute²³ as well as decision²⁴ the law of New York appears quite clear that actions for breach of implied warranty are limited to the immediate parties of the sale, namely, the buyer and seller. Where public policy has demanded change the legislature has not remained silent. In 1939 the Agriculture and Markets Law²⁵ imposed

²³ Section 96 of the Personal Property Law sets forth the *exclusive* conditions under which an implied warranty may arise, and speaks only in terms of "buyer" and "seller." The terms "buyer" and "seller" were incorporated into the law with the immediate parties to the sale in mind, and at a time when there was no such thing as a warranty to any third person. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1128-29 (1960). The statute became law even before the *MacPherson* case.

²⁴ *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950); *Bourcheix v. Willow Brook Dairy, Inc.*, 268 N.Y. 1, 196 N.E. 617 (1935); *Turner v. Edison Storage Battery Co.*, 248 N.Y. 73, 161 N.E. 423 (1928); *Chysky v. Drake Bros. Co.*, 235 N.Y. 468, 472, 139 N.E. 576, 577-78 (1923).

There have been a number of lower court food cases which have attacked the privity requirement in allowing recovery. *Parish v. Great Atlantic and Pacific Tea Co.*, 13 Misc.2d 33, 177 N.Y.S.2d 7 (N.Y. Munic. Ct. 1958); *Welch v. Schiebellhuth*, 11 Misc.2d 312, 169 N.Y.S.2d 309 (Sup. Ct. 1957); see *Walker v. Hot Shoppes, Inc.*, 21 Misc.2d 103, — N.Y.S.2d — (Albany County Ct. 1960); *Singer v. Zabelin*, 24 N.Y.S.2d 962 (N.Y. City Ct. 1941). But in 1959, three departments of the New York Appellate Division directly held that privity *was required* for recovery. *Greenberg v. Lorenz*, 7 App. Div.2d 968, 183 N.Y.S.2d 46 (1st Dep't 1959); *Papp v. Jackson Mfg. Co.*, 8 App. Div.2d 637, 185 N.Y.S.2d 872 (2d Dep't 1959) (memorandum decision); *Burke v. Associated Coca-Cola Bottling Plants, Inc.*, 7 App. Div.2d 942, 181 N.Y.S.2d 800 (3d Dep't 1959) (memorandum decision).

A strict application of the privity requirement can result in extremely harsh decisions. See *Vaccaro v. Prudential Condensed Milk Co.*, 133 Misc. 556, 232 N.Y. Supp. 299 (N.Y. City Ct. 1927). However, the Court of Appeals, in an attempt to insure just results, has applied the agency theory in favor of the injured plaintiff in most cases. Note, 44 CORNELL L.Q. 608, 611 (1959), wherein the author cites the important Court of Appeals decisions in this area.

The present case cites *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953), as holding "by clear implication" that New York has abolished the privity rule. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, —, 161 A.2d 69, 83 (1960). The *Blessington* case held that the six year contract period of limitations applied to breach of warranty actions. In so holding, the Court of Appeals affirmed the Appellate Division which had stated, "the action for breach of warranty, even though it rests on a tortious or wrongful act committed by the defendant is independent of an action for negligence. The wrongful act is not neglect, and *privity is an essential to recovery.*" *Blessington v. McCrory Stores Corp.*, 279 App. Div. 806, 109 N.Y.S.2d 719 (2d Dep't 1952) (memorandum decision) (emphasis added).

A recent federal case applying New York law *disallowed* recovery where no privity existed. *McDonald v. Blue Jeans Corp.*, 183 F. Supp. 149 (S.D. N.Y. 1960) (action against manufacturer of a cowboy suit which had caught fire and burned infant for whom the suit was purchased—facts identical with the *Blessington* case).

²⁵ N.Y. AGRIC. & MKTS. LAW §§ 199, 199-a, 200. Section 199-a provides: "No person or persons, firm, association or corporation shall within this state manufacture, compound, brew, distill, produce, process, pack, transport, possess, sell, offer or expose for sale, or serve in any hotel, restaurant, eating house

a statutory standard of care on the manufacturer of food products, the violation of which is negligence per se.²⁶ A liberal application of the statute would permit recovery by anyone injured eating defective food, regardless of privity.²⁷

In 1959, an even further extension of liability was considered by the legislature in the form of a bill which would permit implied warranty actions against *any* seller by employees, members of the household, or guests of the buyer who had been injured due to a defective product.²⁸ Whether this bill or a bill holding all manufacturers strictly liable²⁹ for their products will ever become law in

or other place of public entertainment any article of food which is adulterated. . . ."

²⁶ *Alphin v. La Salle Diners, Inc.*, 197 Misc. 415, 98 N.Y.S.2d 511 (N.Y. City Ct. 1950); see *Catalanello v. Cudahy Packing Co.*, 264 App. Div. 723, 34 N.Y.S.2d 37 (2d Dep't 1942) (memorandum decision).

²⁷ See Note, 44 CORNELL L.Q. 608, 615 (1959), wherein the author suggests that the reason the statute is not used more often is due to its obscurity in a "maze of the New York statutes." It seems more likely, however, that the reluctance of plaintiffs to make use of the statute is the result of its strict application. It has been held not to apply to broken glass in a bottle of milk and a screw in a slice of rye bread, both of which are apparently covered by implied warranty if privity can be shown. See *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E.2d 105 (1931) (holding implied warranty applicable to loaf of bread with a pin in it); *Courter v. Dilbert Bros.*, 19 Misc.2d 935, 945, 186 N.Y.S.2d 334, 344 (Sup. Ct. 1959) (discussing the Agriculture and Markets Law).

²⁸ See 1959 Leg. Doc. No. 65(B), N.Y. LAW REVISION COMMISSION REP. 58 (1959); Note, 44 CORNELL L.Q. 608 (1959). The bill provides: "A seller's warranty whether express or implied extends to any natural person who is an employee, member of the household or guest of the buyers, if it is reasonable to expect that such person may use, consume or be affected by the goods." *Id.* at 613. The bill apparently applies to the manufacturer only if he sells directly to the buyer.

The Uniform Commercial Code has an identical section which further adds: "A seller may not exclude or limit the operation of this section." UNIFORM COMMERCIAL CODE § 2-318 (1959).

The comment of the Commissioners adds: "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." *Ibid.*

²⁹ Thus far the only New York case permitting the ultimate consumer to sue the manufacturer for breach of warranty is *Lardaro v. MBS Cigar Corp.*, 10 Misc.2d 873, 177 N.Y.S.2d 6 (N.Y. Munic. Ct. 1957) (defective candy bar). See Note, *supra* note 28, at 614.

There is, of course, a vital distinction between manufactured goods in a sealed container as in the *Lardaro* case, and manufactured goods which are fully exposed as the automobile in the present case. In the latter instance there was a great opportunity for the defect in the car to have occurred in shipment from manufacturer to dealer or even during the period when the dealer was servicing the car. If the automobile in the present case had become defective *after* leaving the manufacturer, the plaintiff should not have recovered from him in warranty. *Tiffin v. Great Atl. & Pac. Tea Co.*, 18 Ill.2d 48, 162 N.E.2d 406 (1959); *Cudahy Packing Co. v. Baskin*, 170 Miss. 834, 155 So. 217 (1934); PROSSER, TORTS 509 (2d ed. 1955). The exact time when the defect occurred, however, was not discussed in the present decision.

New York is a matter to be ultimately decided by the public's elected representatives, and the courts have no power to accelerate, or rather pre-empt, the legislative process by envisioning the public's demands.³⁰ As the Court of Appeals itself has stated, "to impose upon a manufacturer the duty of producing an accident-proof product may be a desirable aim, but no such obligation has been—or, in our view, may be—imposed by judicial decision."³¹

Section 152 of the Personal Property Law, a vital section in the warranty area, provides: "Where *any* right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be *negatived*, or varied by express agreement. . . ." ³² This section has been construed to allow a seller to expressly negate implied warranties,³³ and even upon the sale of an automobile such a disclaimer has been held valid.³⁴ The creation of an exception to such a statute, as was in effect done by the present decision,³⁵ is again properly within the province of the legislature rather than the courts.³⁶

³⁰ Strict liability is still the exception in this country. See *Petition of Oskar Tiedemann & Co.*, 179 F. Supp. 227, 238 (D. Del. 1959). The United States Supreme Court has stated the law as follows: "It is a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chanced to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing, there lies the *legislative power*, which, in the absence of organic restraint, may, for the general welfare of society, impose obligations and responsibilities otherwise non-existent." *City of Chicago v. Sturges*, 222 U.S. 313, 322 (1911) (emphasis added).

³¹ *Campo v. Scofield*, 301 N.Y. 468, 472, 95 N.E.2d 802, 804 (1950). The *Campo* case was cited with approval in *Inman v. Binghamton Housing Authority*, 3 N.Y.2d 137, 145, 143 N.E.2d 895, 899, 164 N.Y.S.2d 699, 704 (1957). Both of the decisions were made by a unanimous Court of Appeals. Six of the judges in the *Inman* case and four in the *Campo* case are still on the Court of Appeals. Thus, unless these judges have changed their positions, it seems very unlikely that strict liability will be imposed on a manufacturer in New York by judicial decision, as was done in the present case.

³² N.Y. PERS. PROP. LAW § 152 (emphasis added). New Jersey has an identical statute. N.J. STAT. ANN. § 46:30-3 (1940).

³³ *Lumbrazo v. Woodruff*, 256 N.Y. 92, 175 N.E. 525 (1931).

³⁴ See note 18 *supra*.

³⁵ Whether a disclaimer upon the sale of automobiles is against public policy, as was held in the present case, is highly questionable in New York. In *Broderick Haulage v. Mack-International Motor Truck Corp.*, 1 App. Div.2d 649, 153 N.Y.S.2d 127 (1st Dep't 1956) (per curiam), the court stated that a "disclaimer of warranty provision (in a contract for the sale of trucks) does not offend public policy. Such provisions are permitted by statute, Personal Property Law, § 152, and have been recognized as valid and binding provisions of sales contracts." *Id.* at 650, 153 N.Y.S.2d at 128. Compare *Linn v. Radio Center Delicatessen, Inc.*, 169 Misc. 879, 9 N.Y.S.2d 110 (N.Y. Munic. Ct. 1939), wherein plaintiff recovered in warranty for injury caused by a tack in pastry regardless of bakery's disclaimer which was held to be against natural justice and good morals.

³⁶ See *Martin v. School Bd.*, 301 N.Y. 233, 239, 93 N.E.2d 655, 658 (1950);

The rule of construction of legislative enactment is that a statute be read and given effect as it is written by the Legislature. The Court may not in the face of clear language, substitute its concept of what should or would have been written if all the problems and complications had been foreseen in the course of the application of the statute.³⁷

The fact that there has not as yet been a legislative change in the law of warranty in New York compelling the manufacturer to place an absolute guarantee on his products³⁸ may be some indication that public opinion has failed to rally behind this "attack on the citadel of privity."³⁹ Two recent New York negligence cases may explain this passivity.

In *Mueller v. Teichner*⁴⁰ the defendant middleman contributed to the completion of bottles of soda water by placing siphons in the bottles. The defendant then sold the bottles to another party who filled them with soda water, and the finished product was ultimately distributed to the public. A defective bottle exploded, causing the plaintiff injury. The Court of Appeals held that the defendant middleman's failure to inspect the bottles properly prior to inserting the siphons constituted negligence even though he did not *cause* the defect.

The case of *Markel v. Spencer*⁴¹ was very similar to the present case. Defendant Ford Motor Co. had manufactured a car which was ultimately bought by defendant Spencer. Spencer's car collided with plaintiffs' car causing them injury. Spencer testified that his car failed to stop upon a proper application of the brakes, due to a de-

Kane v. Walsh, 295 N.Y. 198, 207, 66 N.E.2d 53, 56-57 (1946); Kiriloff v. A.G.W. Wet Wash Laundry, 293 N.Y. 222, 227, 56 N.E.2d 559, 561 (1944).

³⁷ *Bryant Park Bldg., Inc. v. Frutkin*, 10 Misc.2d 198, 202, 167 N.Y.S.2d 184, 189 (N.Y. Munic. Ct. 1957). "It is the province of the statesman . . . and the Legislature to determine what is best for the public good and to provide for it by proper enactments. It is the province of the judge to expound the law only . . . not to speculate upon what is best in his opinion, for the advantage of the community." *WHITNEY, CONTRACTS* 189 (5th ed. 1953), quoting Baron Parke.

³⁸ An extension of the manufacturer's warranty as in the present case would grant the dealer only a hope of not being joined in the suit by the plaintiff. Even if the plaintiff brings suit against the manufacturer alone there is the possibility that the dealer would be impleaded by the manufacturer on the grounds that his negligence caused the defect in the product. See *Derby Junior Coat & Suit Co. v. Wollman Mills, Inc.*, 207 Misc. 330, 137 N.Y.S.2d 703 (Sup. Ct. 1955); cf. *Eisenbach v. Gimbel Bros.*, 281 N.Y. 474, 24 N.E.2d 131 (1939). Thus it appears that the only real benefit of an extension of warranty is to the buyer.

³⁹ See note 4 *supra*. There is, of course, the possibility that there is a lack of public interest in the area of warranty, for the simple reason that very few people encounter injuries which would bring an action in warranty into play.

⁴⁰ 6 N.Y.2d 903, 161 N.E.2d 14, 190 N.Y.S.2d 709 (1959) (memorandum decision).

⁴¹ 5 App. Div. 2d 400, 171 N.Y.S.2d 770 (4th Dep't 1958).

fective bolt in the mechanism. No other evidence was adduced to establish the fact of a defective bolt. In holding Ford liable, the Appellate Division stated that the jury could reasonably *infer* that the car was defective when it left the manufacturer and that such defect was due to the manufacturer's negligence. The case was affirmed by the Court of Appeals.⁴²

Had the present case arisen in New York, the *Mueller* and *Markel* decisions might very well have permitted recovery in negligence⁴³ against both dealer⁴⁴ and manufacturer.⁴⁵ Indeed, in view of such decisions, both dealer and manufacturer would do their utmost to settle the case before trial.⁴⁶ Such a result, of course, would emphasize that what remains of the manufacturer's shield of privity has already been effectively circumvented in New York by liberal application of the *MacPherson* doctrine.

⁴² *Markel v. Spencer*, 5 N.Y.2d 958, 157 N.E.2d 713, 184 N.Y.S.2d 835 (1959) (memorandum decision); *accord*, *Guagliardo v. Ford Motor Co.*, 7 App. Div.2d 472, 184 N.Y.S.2d 1012 (4th Dep't 1959); see *Alexander v. Nash-Kelvinator Corp.*, 261 F.2d 187 (2d Cir. 1958).

Another case where negligence *appears* to have been liberally inferred is *Alexander v. Torridaire Co.*, 265 N.Y. 616, 193 N.E. 412 (1934).

⁴³ The manufacturer-dealer warranty did not disclaim negligence.

⁴⁴ The jury under the *Mueller* decision could find that the dealer's failure to discover the defect in servicing the car indicated a failure to exercise reasonable care, thus constituting negligence.

⁴⁵ The *Markel* decision would apparently prevent a directed verdict against the plaintiff in the present case. A jury verdict in favor of a defendant manufacturer on the issue of negligence is virtually unknown. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1114-15 (1960). The plaintiff's prime concern comes on appeal, but in view of the *Markel* case, such concern may be greatly dispelled.

⁴⁶ A very small number of personal injury and wrongful death actions go to trial. See *Gair v. Peck*, 6 N.Y.2d 97, 102, 160 N.E.2d 43, 45-46, 188 N.Y.S.2d 491, 494 (1959).