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Article 15

Torts--Manufacturers' Liability for Damage to Defective Product--Scope of MacPherson Doctrine (Trans World Airlines, Inc. v. Curtiss-Wright Corp., 148 N.Y.S.2d 284 (Sup. Ct. 1955))

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The Court, by utilizing federal law to establish liability, relieves federal judges of the task of wading through the quagmire of innumerable state approaches to the problem of distinguishing between what is "governmental" and what is "proprietary." [17] The abandonment of this tenuous distinction serves to broaden federal liability to a considerable extent, approaching the liberal attitude of the New York courts.[18] But perhaps a more important result of this case is that the Court, without defining discretion, has at last limited its application,[19] something they refused to do in the *Dalehite* case.[20] That the limitation imposed by the instant case will destroy much of the importance of the broad definition of the discretionary clause as propounded in that decision—a construction which has hitherto thwarted the legislative intent [21]—seems to be quite evident. Thus, after a lapse of ten years marked by judicially superimposed legislation, the Court has finally agreed to admit that Congress had waived governmental tort immunity.

TORTS — MANUFACTURERS' LIABILITY FOR DAMAGE TO DEFECTIVE PRODUCT — SCOPE OF *MacPherson* DOCTRINE. — Plaintiff purchased airplanes equipped with latently defective engines. These

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[17] For examples of the disharmony among the states, see Haley v. Boston, 191 Mass. 291, 77 N.E. 888 (1906). While defendant's employees were collecting ashes from dwelling houses, they ran their cart over the plaintiff's leg. It was held that the city was not liable since the service performed by the city was without charge. But the court intimated that the decision would probably be different if the plaintiff could show that the cart in question had at some time also carted away steam engine ashes for which the city charged 10 cents a barrel. See also Williams v. City of New York, 57 N.Y.S.2d 39 (Sup. Ct. 1945); Irvine v. Greenwood, 89 S.C. 511, 72 S.E. 228 (1911); Borchard, *Government Liability In Tort*, 34 YALE L.J. 129 (1924).

[18] See Foley v. New York, 294 N.Y. 275, 62 N.E.2d 69 (1945) (state liable when negligent failure to replace burned-out bulb in traffic light caused accident); Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945) (city held liable in negligence action for damages caused by runaway police horse).

[19] This conclusion is borne out by the recent Supreme Court case of United States v. Union Trust Co., 350 U.S. 907, *affirming per curiam sub nom.* Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955). There, the Court affirmed a lower court determination that the discretionary exemption does not shield the Government from liability for the wrongful death of airline passengers killed in a plane collision caused by the negligent operation of a Government control tower. In reaching its decision, the Court relied solely on the instant case. See also Dahlstrom v. United States, 24 U.S.L. WEEK 2312 (8th Cir. Jan. 10, 1956).

[20] "It is unnecessary to define, apart from this case, precisely where discretion ends." Dalehite v. United States, 346 U.S. 15, 35 (1953).

[21] See Leflar, *Torts*, 1954 ANN. SURVEY AM. L. 549, 573, 30 N.Y.U.L. REV. 645, 669 (1955); Notes, 23 GEO. WASH. L. REV. 716, 717 (1955), 66 HARV. L. REV. 488 (1953).

defects were discovered after they caused further damage to the engines while in actual flight. The plaintiff brought a negligence action against the *manufacturer of the engines* and demanded damages for the cost of removing the defects and repairing the damage to the engines. The Court dismissed the complaint, *holding* that, until there is an accident, there can be no recovery from the manufacturer for negligence when there is no privity. *Trans World Airlines, Inc. v. Curtiss-Wright Corp.*, 148 N.Y.S.2d 284 (Sup. Ct. 1955).

Originally, where there was no privity of contract, a manufacturer was not liable to third parties for negligence.[1] Courts quickly recognized the harshness of this rule and allowed a recovery without privity where the instrumentality was "imminently dangerous" to life or limb.[2] The manufacturer was also held liable when he concealed a known defect which caused injury to third parties.[3] A third exception was recognized where an owner's negligence caused injuries to one whom he had invited on his premises to use his defective article.[4] Under this rule a manufacturer could be held liable.

It remained for Judge Cardozo to extend manufacturers' liability even further in the leading case of *MacPherson v. Buick Motor Co.*[5] Here recovery was allowed, without privity, for personal injuries caused by an inherently dangerous article. This decision imposed on the manufacturer a duty to use reasonable care in the manufacturing of his product, based upon the foreseeability of harm to subsequent users.[6] The *MacPherson* case was quickly followed by other American jurisdictions and today is almost universally accepted.[7] Massa-

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[1] Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842); *cf.* Savings Bank v. Ward, 100 U.S. 195 (1879).

[2] See Thomas v. Winchester, 6 N.Y. 397 (1852) (the leading case); Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S.E. 118 (1889); Norton v. Sewall, 106 Mass. 143 (1870).

[3] See Kuelling v. Roderick Lean Mfg. Co., 183 N.Y. 78, 75 N.E. 1098 (1905); Lewis v. Terry, 111 Cal. 39, 43 Pac. 398 (1896); *cf.* Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (Ex. 1837).

[4] Huset v. J.I. Case Threshing Mach. Co., 120 Fed. 865, 870 (8th Cir. 1903) (dictum); *cf.* Heaven v. Pender, 11 Q.B. 503 (C.A. 1883). See also PROSSER, TORTS § 84, at 499 (2d ed. 1955).

[5] 217 N.Y. 382, 111 N.E. 1050 (1916).

[6] "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully." MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916). See PROSSER, TORTS § 84, at 499-500 (2d ed. 1955); James, *Scope of Duty in Negligence Cases*, 47 NW. U.L. REV. 778, 798 (1953). *But cf.* Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931).

[7] See, *e.g.*, United States Radiator Corp. v. Henderson, 68 F.2d 87 (10th Cir. 1933) (*semble*), *cert. denied*, 292 U.S. 650 (1934); Johnson v. Cadillac Motor Car Co., 261 Fed. 878 (2d Cir. 1919); Carter v. Yardley & Co., 319

chusetts, one of the last jurisdictions to adopt the *MacPherson* doctrine, abolished the privity rule entirely in extending manufacturers' liability.[8] The Restatement not only accepts the *MacPherson* rule, but is more liberal in scope. It allows recovery for personal injury and property damage ". . . to those who lawfully use it [a manufactured chattel] . . . and to those whom the supplier should expect to be in the vicinity of its probable use. . . ." [9] England, which formulated the privity rule, has repudiated the necessity of privity in a negligence action against the manufacturer and adopted a liberal theory of liability.[10] New York courts, in various extensions of the *MacPherson* rule, held the manufacturer of component parts liable; [11] allowed recovery for property damage; [12] and imposed manufacturers' liability on suppliers and lessors of chattels.[13] Under the New York courts' liberal application of the *MacPherson* rule, almost anything is found to be inherently dangerous once injury has occurred.[14]

Mass. 92, 64 N.E.2d 693 (1946); Kalash v. Los Angeles Ladder Co., 1 Cal. 2d 229, 34 P.2d 481, 482 (1934) (dictum). See also PROSSER, TORTS § 84 (2d ed. 1955); RESTATEMENT, TORTS §§ 388, 395 (1934); Tucker & Kuhn, *The Decline Of The Privity Rule In Tort Liability,* 11 U. PITT. L. REV. 236 (1950); *cf.* Robey v. Richmond Coca-Cola Bottling Works, Inc., 192 Va. 192, 64 S.E.2d 723, 727 (1951) (dictum) (question of accepting the *MacPherson* doctrine left undecided).

[8] See Carter v. Yardley & Co., *supra* note 7. The ". . . asserted general rule no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth." 64 N.E.2d at 700. See Peairs, *The God In The Machine,* 29 B.U.L. REV. 37 (1949).

[9] RESTATEMENT, TORTS §§ 395, 497 (1934).

[10] See Donoghue v. Stevenson, [1932] A.C. 562; Feezer, *Tort Liability Of Manufacturers,* 19 MINN. L. REV. 752, 761 (1935); Friedmann, *Social Insurance And The Principles Of Tort Liability,* 63 HARV. L. REV. 241, 243 (1949); Miller, *Liability Of A Manufacturer For Harm Done By A Product,* 3 SYRACUSE L. REV. 106, 108 (1951). *But cf.* Candler v. Crane, Christmas & Co., 2 K.B. 164 (1951).

[11] See Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576 (1932); Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N.Y. Supp. 657 (4th Dep't 1933), *aff'd mem.,* 270 N.Y. 532, 200 N.E. 304 (1936).

[12] See Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, Inc., 263 N.Y. 463, 189 N.E. 551 (1934); Schuylerville Wall Paper Co. v. American Mfg. Co., 272 App. Div. 856, 70 N.Y.S.2d 166 (3d Dep't 1947) (mem. opinion).

[13] See La Rocca v. Farrington, 301 N.Y. 247, 93 N.E.2d 829 (1950) (per curiam); RESTATEMENT, TORTS §§ 388, 408 (1934).

[14] See, *e.g.,* Hoenig v. Central Stamping Co., 273 N.Y. 485, 6 N.E.2d 415 (1936) (mem. opinion); Moss v. Fred Perlberg, Inc., 29 N.Y.S.2d 922 (Sup. Ct. 1941), *aff'd,* 268 App. Div. 149, 49 N.Y.S.2d 460 (1st Dep't 1944), *aff'd mem.,* 294 N.Y. 680, 60 N.E.2d 839 (1945); Cohen v. Dugan Bros., Inc., 132 Misc. 896, 230 N.Y. Supp. 743 (Sup. Ct. 1928); Meditz v. Liggett & Myers Tobacco Co., 167 Misc. 176, 3 N.Y.S.2d 357 (N.Y. City Ct.), *aff'd per curiam,* 25 N.Y.S.2d 315 (App. T. 1st Dep't 1938); La Frumento v. Kotex Co., 131 Misc. 314, 226 N.Y. Supp. 750 (N.Y. City Ct. 1928). *But see* Timpson v. Marshall, Meadows and Stewart, Inc., 198 Misc. 1034, 101 N.Y.S.2d 583 (Sup. Ct. 1950).

The instant case is a limitation on the *MacPherson* doctrine since the nature of the alleged damages, *i.e.*, to the article itself, seems to be the underlying determinant in denying recovery.[15] The New York courts, in allowing a recovery for property damage, require an accompanying threat to life and limb,[16] though there is no valid reason for drawing such a distinction.[17] Even in view of the New York rule, however, the defective engines did constitute a threat to life and limb in the instant case.[18] It is therefore submitted that under the rule of *MacPherson v. Buick Motor Co.* there was no reason for denying a recovery simply because there was damage only to the property itself.[19] Since the manufacturer would be liable had the article caused injury to persons or property outside of itself, surely liability should be imposed for damage to the article alone because such an injury is even more readily foreseeable.[20]

The modern trend of judicial and legal thought is directed at extending manufacturers' liability so that they would respond as guarantors on an *enterprise liability* basis.[21] Thus the rationale of the

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[15] See Trans World Airlines, Inc. v. Curtiss-Wright Corp., 148 N.Y.S.2d 284 (Sup. Ct. 1955). *Compare* Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (3d Dep't 1915), *with* A.J.P. Contracting Corp. v. Brooklyn Builders Supply Co., 171 Misc. 157, 11 N.Y.S.2d 662 (Sup. Ct. 1939), *aff'd mem.*, 258 App. Div. 747, 15 N.Y.S.2d 424 (2d Dep't), *aff'd mem.*, 283 N.Y. 692, 28 N.E.2d 412 (1940). In Schmidt v. Merchants Despatch Trans. Co., 270 N.Y. 287, 200 N.E. 824 (1936), the Court of Appeals stated: "Though negligence may endanger the person or property of another, no actionable wrong is committed if the danger is averted. It is only the injury to person or property arising from negligence which constitutes an invasion of a personal right, protected by law, and, therefore, an actionable wrong." *Id.* at 300, 200 N.E. at 827.

[16] Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, Inc., 263 N.Y. 463, 189 N.E. 551 (1934). "We confine our decision to cases in which the use of the product is *imminently dangerous* to life and property." *Id.* at 473, 189 N.E. at 555 (emphasis added).

[17] See Spencer v. Madsen, 142 F.2d 820 (10th Cir. 1944); United States Radiator Corp. v. Henderson, 68 F.2d 87 (10th Cir. 1933), *cert. denied*, 292 U.S. 650 (1934). ". . . There is no reasonable ground for making a distinction between injury to property and injury to the person." Todd Shipyards Corp. v. United States, 69 F. Supp. 609, 610 (S.D. Me. 1947). See also RESTATEMENT, TORTS §§ 395, 497 (1934); Wilson, *Products Liability Part II The Protection of the Producing Enterprise*, 43 CALIF. L. REV. 809 (1955).

[18] Trans World Airlines, Inc. v. Curtiss-Wright Corp., *supra* note 15.

[19] See, *e.g.*, International Harvester Co. v. Sharoff, 202 F.2d 52 (10th Cir. 1953); Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (3d Dep't 1915); cases cited note 17 *supra*. *Contra*, Judson Pacific-Murphy, Inc. v. Thew Shovel Co., 127 Cal. App. 2d 828, 275 P.2d 841 (App. Dep't 1954), 2 U.C.L.A.L. REV. 293 (1955). However, the *Judson* decision has been severely criticized. See Thornton & McNiece, *Torts, 1955 Annual Survey of American Law*, 31 N.Y.U.L. REV. 344, 362 (1956).

[20] See MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916); PROSSER, TORTS § 84, at 499-500 (2d ed. 1955); Thornton & McNiece, *supra* note 19, at 362.

[21] See Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. Sup. Ct. 1944) (concurring opinion); Baxter v. Ford Motor Co., 168 Wash. 456,

MacPherson case was to impose a greater duty on the manufacturer.[22] Many other jurisdictions no longer require privity in their liberal extensions of liability.[23] New York, however, which originally extended liability,[24] now seems reluctant to follow the modern trend by not imposing a greater duty on the manufacturer.[25] Today the manufacturer engages in widespread advertising to promote his product, derives the ultimate economic benefit from its sale, and is in a better position financially to sustain a loss than is the ultimate consumer.[26] The manufacturer also has available liability insurance on which he may rely to protect himself in such instances.[27] For these reasons his liability should not be made to rest on an archaic rule that is unsound in principle and produces unjust results.[28]

The instant case, in denying recovery for negligence, suggested warranty as the mode of recovery.[29] This also requires privity so that a suit could only be maintained against the immediate vendor.[30] It is suggested that a sounder rule would be to finally repudiate the necessity of privity in a negligence action against the manufacturer as has been done in England and various American jurisdictions.[31]

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12 P.2d 409 (1932); PROSSER, TORTS § 84, at 506 (2d ed. 1955); James, *Products Liability*, 34 TEXAS L. REV. 44 (1955); Miller, *Liability Of A Manufacturer For Harm Done By A Product*, 3 SYRACUSE L. REV. 106, 126 (1951).

[22] See note 6 *supra*.

[23] See note 21 *supra*; Maryland Gas Co. v. Independent Metal Products Co., 203 F.2d 838 (8th Cir. 1953); Todd Shipyards Corp. v. United States, 69 F. Supp. 609 (S.D. Me. 1947); Ketterer v. Armour & Co., 200 Fed. 322 (S.D.N.Y. 1912), *aff'd*, 247 Fed. 921 (2d Cir. 1917); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557, 560 (1928). For some of the reasons why privity was required, see note 1 *supra*; Curtain v. Somerset, 140 Pa. St. 70, 21 Atl. 244, 245 (1891) (dictum).

[24] MacPherson v. Buick Motor Co., *supra* note 20.

[25] *Cf.* H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Bohlen, *Liability Of Manufacturers To Persons Other Than Their Immediate Vendees*, 45 L.Q. REV. 343 n.1 (1929).

[26] See Ketterer v. Armour & Co., *supra* note 23; Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-41 (Cal. Sup. Ct. 1944) (concurring opinion); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932); Friedmann, *Social Insurance And The Principles Of Tort Liability*, 63 HARV. L. REV. 241, 243-44 (1949).

[27] See Employers Mut. Liability Ins. Co. v. Underwriters At Lloyd's, 177 F.2d 249 (7th Cir. 1949); PROSSER, TORTS § 84, at 506 (2d ed. 1955); Patterson, *The Apportionment Of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335 (1924).

[28] See Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946).

[29] See Trans World Airlines, Inc. v. Curtiss-Wright Corp., 148 N.Y.S.2d 284 (Sup. Ct. 1955).

[30] Turner v. Edison Storage Battery Co., 248 N.Y. 73, 161 N.E. 423 (1928); Chysky v. Drake Bros. Co., 235 N.Y. 468, 139 N.E. 576 (1923); see Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931).

[31] See Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946); Carter v. Yardley & Co., *supra* note 28; Donoghue v. Stevenson, [1932] A.C. 562.