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Plaintiffs were injured in a frontal collision when their automobile was struck by defendant's oncoming automobile. Alleging that a cause of the accident was a defective steering mechanism in defendant's automobile, plaintiffs sued defendant manufacturer for negligence and breach of implied warranty. Affirming, the New York Court of Appeals, *held*, a manufacturer of a defective product, even though not negligent, may be liable for damages sustained as a consequence of the defect by bystanders. *Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).*

Although it is partially couched in warranty terms, this decision is in effect a consolidation of strict liability and common law implied warranty principles. n1 As such, it constitutes an extension [*757] of a line of New York cases in which the distinction between common law implied warranty and strict liability has become blurred. The clouding of this distinction has led to the elimination in most jurisdictions of the warranty requirement of contractual privity between the manufacturer and the party injured by the defective product, thus allowing recovery by nonpurchasing users of the product in strict liability actions. The instant decision places New York among a growing number of jurisdictions which have extended the line of development still further by making the strict products liability action available to nonusers of a defective product who are injured as a result of the defect. These persons are generally referred to as "bystanders."

Beginning with *Greenberg v. Lorenz* n2 in 1961, the New York Court of Appeals gradually abandoned its previously rigid adherence to the requirement that privity of contract exist between the injured party and the seller before an implied warranty action could be maintained. n3 This policy of de-emphasizing the contractual requirement of privity prompted the New York court to conclude in *Goldberg v. Kollsman Instrument Corp.* n4 in 1963, that "[a] breach of warranty . . . is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer." n5 In the same opinion, the court suggested that strict tort liability is "surely a more accurate phrase" for the kind of liability being imposed in these cases. n6

By thus recognizing that the implied warranty action was more realistically a strict liability action sounding in tort, the court in *Goldberg* joined a movement which led ultimately to adoption of the strict tort liability doctrine in the *Restatement* [*758] *(Second) of Torts* in 1965. n7 The *Restatement* strict liability formulation was a response to the fact that the contractual nature of the implied warranty action presented potential pitfalls for the injured consumer; n8 its effect was to eliminate these troublesome sales law concepts from the products liability field. Even though the instant case was originally brought in implied warranty, this court's decision buttresses New York's acceptance of the strict tort liability action and implicitly removes any requirement that a breach of implied warranty be proved in a products liability case.

Although a large majority of states now make the strict products liability action available to purchasers and users of defective products, n9 extension of strict liability protection to bystanders has not been so widespread. Denial of recovery to bystanders in strict liability actions has been based primarily on two rationales. First, some courts believe that the extension to bystanders is too radical a departure from previous law. n10 In their view, if this extension is to be instituted, it should be by legislative action and not by judicial construction. n11 Second, denial of bystander recovery has

been rationalized on the ground that bystanders do not have the expectations of product safety and performance that users and purchasers have. n12

It seems, however, that the policy considerations underlying the strict liability action support its extension to injured bystanders, and a number of jurisdictions have so held. n13 The major policy [*759] arguments advanced in support of the strict products liability doctrine are that the risk of loss should be shifted from the injured party to sellers or manufacturers, who are best able to absorb or distribute the loss and to control the quality of their product, and that those who place the product on the market and thus represent that it is fit for the use intended should be liable if it causes injury. n14 The theory of loss distribution seems equally applicable to the case of an injured bystander, since he, like a purchaser or seller, may be unable to bear the financial burden of injuries stemming from defective products. Likewise, in *Piercefield v. Remington Arms Co.*, n15 one of the first cases to extend strict products liability protection to bystanders, the Michigan Supreme Court reasoned that a manufacturer should be responsible for any damage arising from defective products because he is best able to eliminate the defects. n16 Expanding this view somewhat, the California Supreme Court in *Elmore v. American Motors Corp.* n17 concluded that bystanders were entitled to even more protection than purchasers or users since bystanders have no opportunity to inspect the product and are thus completely dependent upon the manufacturer's implied representation of his product's fitness.

In deciding the *Codling* case the New York Court of Appeals accepted the reasoning of *Elmore* and agreed that it is unrealistic to restrict bystander recovery in view of the fact that bystanders have less opportunity to discover defects than do purchasers or consumers. n18 In considering public policy, the *Codling* court was particularly concerned with the changes that have occurred in the market place. Because of the mass production and distribution in today's market, the court reasoned that justice and equity dictate that injury costs be apportioned among all purchasers of a manufacturer's product. The court also suggested that imposition of this economic burden on the manufacturer should encourage [*760] safety in product design and that the resulting increase in price of individual units should be acceptable to the purchaser if he is given added assurance of his own safety. By thus basing its decision on the public policies underlying strict tort liability rather than on the contractual implied warranty doctrine, the court avoided problems associated with lack of privity between the seller and the injured bystander.

In Tennessee, no court has yet been confronted with the issue of bystander recovery in strict liability. In *Hargrove v. Newsome*, n19 however, the Tennessee Supreme Court refused to allow recovery to a bystander in an action for breach of implied warranty. Noting that the legislature, in adopting *Tennessee Code Annotated section 47-2-318*, selected the most restrictive alternative offered by the *Uniform Commercial Code*, n20 the court determined that the requirement of privity should be modified only to the extent specifically allowed in the provision. This ruling effectively excluded any bystander from bringing an implied warranty action in Tennessee. Nevertheless, the *Hargrove* court indicated that policy considerations might have been persuasive for dispensing with privity if the bystander plaintiff had not had an alternative remedy under negligence or strict liability in tort. n21

Subsequent to *Hargrove*, the Tennessee legislature enacted a statute which potentially will yield a different result in bystander cases brought in implied warranty. The statute, *Tennessee Code Annotated* section 23-3004, provides:

> In all causes of action for personal injury or property damage brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain such action. n22

[*761] This statute presumably was enacted in response to *Hargrove* and also to the narrow construction given *Tennessee Code Annotated section 47-2-318* by the Tennessee Court of Appeals in *Leach v. Wiles*. n23 In the latter case, the court concluded that the enactment of section 47-2-318 did not eliminate the requirement of privity between a manufacturer and plaintiff purchaser, but only expanded the group of persons who had an action against their *immediate* vendor. Given this construction, a plaintiff's action in implied warranty could be brought only against an immediate seller.

Although the result dictated by *Leach* was changed with enactment of the "anti-privity" statute, the rights of bystanders in implied warranty actions under the statute are still not clearly defined. The statute's effect in this area must await judicial interpretation or further legislative clarification. The anti-privity provision may be construed as merely supplementing section 47-2-318, thus giving beneficiaries included in that section an additional action against the manufacturer. Alternatively, it may be construed to dispense with privity in all implied warranty actions, thereby affording plaintiffs other than section 47-2-318 beneficiaries, including bystanders, an action in implied warranty. Given the rule of statutory construction that conflicting statutes should be harmonized if practicable and construed to render every

word operative, n24 the first interpretation is arguably correct. Nevertheless, the breach of warranty language of the anti-privity statute and its apparent enactment in response to *Hargrove* and *Leach* would seem to support the latter interpretation. To construe this statute narrowly and require privity would frustrate its evident purpose n25 and allow a previously enacted statute to take precedence over a subsequent one. The phrase "in all causes of action" n26 seems clearly indicative of legislative intent to eliminate completely the privity requirement, notwithstanding section 47-2-318. n27

[*762] While bystander actions in implied warranty may eventually be successful in Tennessee under the above rationale, the principle of strict liability in tort holds more promise. Tennessee courts recognize that strict tort liability applies under the circumstances outlined in *section 402A of the Restatement (Second) of Torts*. n28 While the *Restatement* specifically expresses neither approval nor disapproval of expanding strict tort liability to encompass bystander actions, n29 at least one statute similar to Tennessee's anti-privity statute has been construed to allow bystander recovery in strict tort liability. n30

Given the policies underlying the strict liability doctrine, it should now be recognized that bystander injuries are a foreseeable risk of doing business. The extension of strict liability to bystanders does not make the manufacturer an insurer of the general public, since the bystander must prove that a defect attributable to the manufacturer was the legal cause of his injuries before strict tort liability or implied warranty can be invoked. This limitation provides adequate safeguards for the manufacturer while affording a satisfactory remedy to innocent bystanders. The bystander should be entitled to recover since he, of all potential plaintiffs, has the least opportunity to prevent his injuries, and since the additional costs placed on the manufacturer can easily be distributed. Because of strong public policy considerations, it may be expected that other courts will follow the views of the influential courts that have extended strict liability to bystanders. n31 The Tennessee courts, by utilizing *Tennessee Code Annotated* section 23-3004, should follow the *Codling* decision and extend the scope of strict liability in tort and implied warranty to bystanders.

FOOTNOTES:

n1 The court initially employs implied warranty language, since the jury's finding at trial indicated that the steering mechanism of the automobile was not fit for the purpose for which it was intended. *32 N.Y.2d at 338, 298 N.E.2d at 625, 345 N.Y.S.2d at 465.* The warranty provisions of the Uniform Commercial Code, however, are not mentioned in the decision.

n2 *9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).*

n3 The *Greenberg* court held that members of the purchaser's immediate household, although they were not in privity with the seller, could nevertheless bring an action in implied warranty when injured by defective food products and household goods. A second step in the movement away from the technical privity requirement came in 1962, when *Randy Knitwear v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962),* held that an express warranty extended from the manufacturer to a remote purchaser who had relied on the manufacturer's representations.

n4 *12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).*

n5 *Id. at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.* This view was affirmed in *Rooney v. S.A. Healy Co., 20 N.Y.2d 42, 228 N.E.2d 383, 281 N.Y.S.2d 321 (1967).*

n6 *12 N.Y.2d at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.*

n7 *RESTATEMENT (SECOND) OF TORTS § 402A* (1965). *See generally* Prosser, *The Fall of the Citadel*, *50 MINN. L. REV. 791 (1966).*

n8 *Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962);* Prosser, *The Assault Upon the Citadel*, *69 YALE L.J. 1099 (1960).* Sections 2-316 and 2-719 of the Uniform Commercial Code permit the seller to limit or completely disclaim any implied warranty. Section 2-607 permits the seller to require as a condition of the warranty that the buyer give him notice of any breach within a specified period of time. Because they are usually unaware of these provisions, buyers could easily find themselves barred from recovering in a warranty cause of action through failure to meet the warranty requirements.

n9 Noel, *Defective Products: Extension of Strict Liability to Bystanders*, *38 TENN. L. REV. 1 (1970)* [hereinafter cited as Noel].

n10 "The courts of this state have never relaxed the requirement that the injured be a user of the product involved." *Rodriguez v. Shell's City, Inc., 141 So. 2d 590, 591 (Fla. App. 1962).*

n11 *See, e.g.*, *Berzon v. Don Allen Motors, Inc., 23 App. Div. 2d 530, 531, 256 N.Y.S.2d 643, 644 (1965).*

n12 *See RESTATEMENT (SECOND) OF TORTS § 402A*, Comment *o* (1965).

n13 *See, e.g.*, *Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83 (1970); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).*

n14 *See Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944)* (concurring opinion); *Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).*

n15 *375 Mich. 85, 133 N.W.2d 129 (1965).*

n16 *See also Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (1965).*

n17 *70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).*

n18 *32 N.Y.2d at 340, 298 N.E.2d at 627, 345 N.Y.S.2d at 467.*

n19 *470 S.W.2d 348 (Tenn. 1971), appeal dismissed*, *405 U.S. 907 (1972).*

n20 UNIFORM COMMERCIAL CODE § 2-318, Alternative A, 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 the breach of warranty. A seller may not exclude or limit the operation of this section.

Alternative B enlarges the class of beneficiaries to any natural person who may "reasonably be expected to use, consume or to be affected by the goods and who is injured in person . . . ." *Id.* Alternative C extends the rule of Alternative B to "any person" and does not limit recoverable injury to the person of the plaintiff. *Id.*

n21 *470 S.W.2d at 351.*

n22 TENN. CODE ANN. § 23-3004 (Supp. 1974).

n23 *58 Tenn. App. 286, 429 S.W.2d 823 (1968).*

n24 *Bible & Godwin Constr. Co. v. Faener Corp., 504 S.W.2d 370, 372 (Tenn. 1974).*

n25 Such a narrow construction would be contra to the rule that "[a] construction should be avoided which would operate to impair, frustrate or defeat the object of the statute . . . ." *First Nat'l Bank v. McCanless, 186 Tenn. 1, 9, 207 S.W.2d 1007, 1010 (1948).*

n26 TENN. CODE ANN. § 23-3004 (Supp. 1974).

n27 3 MEMPHIS ST. L. REV. 212, 224 (1972).

n28 *Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966).*

n29 *RESTATEMENT (SECOND) OF TORTS § 402A*, Comment *o* (1965).

n30 *Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970)* (applying Vermont law). The court concluded that in deciding the scope of strict tort, it should look to the legislature's expansion of warranty as a guide to the legislature's intentions regarding strict tort liability.

n31 Noel, *supra* note 9, at 13.

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