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HAS THE RULE OF MacPHERSON V. BUICK BEEN ADOPTED IN INDIANA?

Indiana presumably has aligned itself with the majority of other jurisdictions in the assault on the "citadel of privity." The United States Court of Appeals for the Seventh Circuit, interpreting the law of Indiana in the case of *Elliot v. General Motors Corp.*,[1] recently held that privity of contract is not a necessary element in order to state a cause of action against a manufacturer and recover for injuries suffered as a result of the negligent manufacture of a defective product.

The plaintiff in the *Elliot* case was employed as an automobile mechanic by a Chevrolet distributor. The defendant manufactured and sold an automobile to the distributor who in turn sold it to a consumer. A short time later it was taken to the distributor for some minor repairs which required the plaintiff to loosen certain bolts underneath the automobile. This necessitated reaching through an opening in a splash shield designed by the defendant to permit access to the automobile engine by a mechanic. The opening was defectively formed in that it had a sharp knife-like edge which was concealed from view. Plaintiff's hand slipped from a wrench with which he was loosening the bolt, came into contact with the sharp edge of the opening, and he sustained a severe injury to his arm.

Assuming negligence, since the appeal arose from the district court's dismissal of the complaint on the ground that it failed to state a claim upon which relief could be granted, the court postulated the issue as

1. 296 F.2d 125 (7th Cir. 1961).

whether Indiana had adopted the rule established by Judge Cardozo in *MacPherson v. Buick Motor Co.*[2] that a manufacturer can be held liable for the negligent construction of a product irrespective of the lack of privity of contract. Although the last definitive opinion by the Indiana Supreme Court upheld the necessity of this traditional requirement before a suit could be maintained against a manufacturer for negligence,[3] the court was influenced by two later decisions of the Indiana Appellate Court which approved the *MacPherson* rule.[4] The Court of Appeals felt that these two cases were significant in expressing the Indiana position on the privity rule because the Indiana Supreme Court denied petitions to transfer in each of them, indicating at least a tacit approval of the conclusions reached by the Indiana Appellate Court. It was also necessary for the Court of Appeals to deal with a much clearer and more recent precedent when the defendant relied on the case of *Gahimer v. Virginia-Carolina Chem. Corp.*[5] as controlling. This was a Seventh Circuit case, decided four years previously, interpreting Indiana law as requiring privity of contract in a similar fact situation. The court rejected this argument because the Indiana Supreme Court's denial of petitions to transfer in the two appellate court decisions approving the *MacPherson* rule was not brought to its attention in the *Gahimer* case. It therefore concluded "the rule of *MacPherson* applies to this case. It is our conclusion that, under Indiana law, plaintiff has charged actionable negligence against defendant. . . ."[6]

General History of the Privity Requirement

The case of *Winterbottom v. Wright*[7] established the general rule that governed tort law in both this country and England for more than three quarters of a century that absent privity of contract, a contractor, manufacturer or vendor was not liable for injuries arising out of a defect in an article constructed, manufactured or sold by him. In the *Winterbottom* case recovery was denied a mail-coach driver who brought suit against a man who maintained the coaches for the driver's employer. The result was based on the absence of any duty owed the plaintiff and the ensuing undesirable increase in litigation from allowing recovery by any other than the contracting parties. Articulation of this last reason engendered the famous dictum of Lord Abinger that:

2. 217 N.Y. 382, 111 N.E. 1050 (1916).
3. Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919).
4. Coca Cola Bottling Works v. Williams, 111 Ind. App. 502, 37 N.E.2d 702 (1944); Holland Furnace Co. v. Nauracj, 105 Ind. App. 574, 14 N.E.2d 339 (1938).
5. 241 F.2d 836 (7th Cir. 1957).
6. Elliot v. Gen. Motors Corp., 296 F.2d 125, 129 (7th Cir. 1961).
7. 10 M&W 109, 152 Eng. Rep. 402 (1842).

> if the plaintiff can sue, every passenger, or even every person passing along the road, who is injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who enter into them, the most absurd and outrageous consequences, to which there can be no limit, would ensue. . . .[8]

Anachronistic as this statement might seem today, in the England of the mid-nineteenth century, it was a perfectly justifiable statement of the law since the common law judges were still reacting against the strict responsibility imposed by the action of trespass for injuries which followed as the direct and immediate consequence of a voluntary act. Moreover, the industrial revolution was still in its embryonic stage with simple manufacturing processes, face to face dealing between maker and purchaser, and detailed product inspection by both parties before a sale was consummated. At this particular date industry and commerce were thought to need judicial protection in order to be encouraged to expand.

Although *Winterbottom v. Wright* became the general rule, courts soon began developing exceptions which diluted its vigor.[9] One of these posited liability on a theory of deceit when a seller knew that his product was dangerous for its intended use, but failed to disclose that fact to the buyer, and a third person was injured.[10] Another exception was recognized when the owner of land furnished a defective chattel for use on his premises.[11] The plaintiff, generally the employee of an independent contractor, was considered to have been invited on the premises and so owed a duty of care.

Thomas v. Winchester[12] marked the first significant breach in the manufacturer's "citadel of privity." The defendant manufacturer put a dandelion label on a bottle containing belladonna, a deadly poison, placed it in the stream of commerce, and a remote vendee was injured. The court declared privity of contract to be unnecessary when a manufacturer or seller is shown to be guilty of negligence in connection with a product which is dangerous by its very nature. This doctrine, known as the inherently dangerous product exception, has been accepted by nearly all

8. *Id.* at 114, 152 Eng. Rep. at 405.
9. See, *e.g.*, PROSSER, TORTS, 498 (2d ed. 1955); Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1232 (1951).
10. Landridge v. Levy, 2 M.&W. 519, 150 Eng. Rep. 863 (1837).
11. See, *e.g.*, Devlan v. Smith, 89 N.Y. 470 (1882); Heaven v. Pender, 11 Q.B.D. 503 (1883); Elliott v. Hall, 15 Q.B.D. 315 (1885).
12. 6 N.Y. 397 (1852).

American jurisdictions.[13] Such things as poison,[14] explosives and firearms[15] and unwholesome food and drink[16] are obviously included within this category. However, many courts attached themselves to the exception as a panacea for mechanically solving cases. They were concerned with whether such items as chewing tobacco[17] and saddles[18] fit the classification of an inherently dangerous product so as to come within the exception, instead of recognizing that the real problem lay within the fundamental concepts of negligence. In other words, one who prepares and sells food, drugs, and explosives is engaging in activity which is likely to cause serious harm if mismanaged even slightly. Furthermore, the defect cannot ordinarily be discovered through an ordinary inspection by the consumer. Therefore, there is a duty toward all persons not to fail to take adequate precautions because under such circumstances a reasonable and prudent man would anticipate serious injury as a natural and ordinary consequence of such failure. The nature of defendant's conduct rather than the type of product involved should be the subject matter of the court's analysis.

Finally, in 1916, Judge Cardozo, in *MacPherson v. Buick Motor Co.* "put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else."[19] In that case, the defendant sold an automobile to a retail dealer who in turn resold it to the plaintiff. While driving the automobile, the plaintiff was thrown out of the vehicle and injured when one of the wheels suddenly collapsed. Subsequent investigation revealed that the wheel was defectively made, causing its spokes to crumble. Although the wheel was not manufactured by the defendant, there was evidence that the defect could have been discovered by a reasonable inspection and that defendant had failed to make such inspection. The New York Court of Appeals affirmed a judgment for the plaintiff and stated:

> 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

13. Russell, *Manufacturer's Liability to the Ultimate Consumer,* 21 Ky. L.J. 388 (1933).

14. See, *e.g.,* National Savings Bank v. Ward, 100 U.S. 195 (1880); Norton v. Sewall, 106 Mass. 143 (1870); Loop v. Litchfield, 42 N.Y. 351 (1870).

15. See, *e.g.,* Weiser v. Halzman, 33 Wash. 87, 73 Pac. 797 (1903); Welhausen v. Charles Parker Co., 83 Conn. 231, 76 Atl. 271 (1910); Peterson v. Standard Oil Co., 55 Ore. 511, 106 Pac. 337 (1910).

16. See, *e.g.,* Tomlison v. Armour & Co., 75 N.J. 748, 70 Atl. 314 (1908); Wood v. Sloan, 20 N.M. 127, 148 Pac. 507 (1915); Haley v. Swift & Co., 152 Wisc. 570, 140 N.W. 292 (1913).

17. Liggett & Myers v. Cannon, 132 Tenn. 419, 178 S.W. 1009 (1915).

18. Bragdon v. Perkins-Campbell Co., 87 Fed. 109 (3d Cir. 1898).

19. 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916).

> thing of danger. Its nature gives warning of the consequences to be expected. 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.[20]

On its face, the *MacPherson* decision, which found immediate acceptance in nearly every jurisdiction in the United States,[21] merely expands the inherently or imminently dangerous exception to privity of contract beyond the traditional categories of foods, drugs and explosives exemplified by the cases following *Thomas v. Winchester.* However, close analysis of the opinion at least raises the question whether the privity requirement is not totally abolished in cases involving a manufacturer who markets a product defectively made with knowledge that further inspection by the consumer is highly improbable. To understand this, it must be remembered that before privity of contract becomes an issue in any negligence suit, the plaintiff must first establish a prima facie case of negligence. He must show that the defendant owed a duty of care to a class of persons of which he is a member, that the defndant failed to exercise the standard of care of a reasonable prudent man, and that defendant's failure to meet this standard of care resulted in a legal injury to the plaintiff. If the plaintiff establishes this prima facie case, it would be difficult to imagine a product that does not meet the test of imminent dangerousness stated by Judge Cardozo, namely that it is "reasonably certain to place life and limb in danger when negligently made."[22] The following statement from *Carter v. Yardley & Co.*[23] is representative of the several authorities which now state that privity of contract is no longer a requirement in a negligence action against a manufacturer:

> The *MacPherson* case caused the exception (inherently or imminently dangerous products) to swallow the asserted general rule of nonliability, leaving nothing upon which that rule could operate. Wherever that case is accepted, that rule in truth is abolished, and ceases to be part of the law.[24]

This repudiation of the *Winterbottom* rule is as correct in result as it is in its reasoning. The application of the privity requirement is un-

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20. *Id.* at 389, 111 N.E. at 1053.
21. PROSSER, TORTS, 500 (2d ed. 1955).
22. *Id.* at 389, 111 N.E. at 1053.
23. 319 Mass. 92, 64 N.E.2d 693 (1946). *But cf.,* Pears, *The God in the Machine,* 29 B.U.L. REV. 37 (1949).
24. *Id.* at 103, 64 N.E.2d at 700.

workable because of its inherent inability to secure justice in contemporary litigation involving injuries sustained from defective products. As stated above, when the *Winterbottom* rule was promulgated the industrial revolution was just developing. The manufacturer and ultimate consumer were engaged in constant face to face contact. Most products purchased were not complex and were subject to an intelligent inspection by both middleman and consumer. Moreover, this inspection was anticipated by all parties concerned. The contrast in manufacturing and merchandising between that era and today is staggering. Now even the simplest household appliance requires immensely complicated manufacturing processes. The same mechanical, electrical and chemical sciences that have so greatly raised the standard of living have also multiplied the possibilities and the seriousness of injury if the products created by these sciences are defectively made. Distribution has also become more complex. Products are shipped from one section of the country or part of the world to another, often passing through the hands of a score of middlemen. Inspection is no longer anticipated, nor is it possible in the thousands of products that come directly packaged or bottled from the manufacturer. Added to this is the constant barrage of mass media advertising urging consumers to rely on the quality of trade-marked products.

Considering these factors, it is difficult to conceive of a rule in a modern industrial society that would not impose liability for injuries caused by defective manufactured products within the realm of foreseeable harm. The manufacturer finishes the products, turns it over to a wholesaler who in turn passes it on to a retailer who sells it to a consumer. The consumer is the person who suffers the injury if the product is defective but he rarely has a contract with the manufacturer. On the other hand, the wholesaler or retailer who is in privity of contract is rarely hurt. The manufacturer has the best and many times the only opportunity to inspect the product thoroughly. He presumably receives a fair price for it and is able to spread the cost of protecting himself against consumer injury over a large quantity of goods sold. Therefore, it is certainly desirable to hold him to the same standard of care that other individuals must adhere to in dealing with society.

INDIANA HISTORY

The first Indiana case dealing with the privity requirement was *Daugherty v. Herzog*.[25] While walking along a sidewalk, plaintiff's decedent was killed when a building collapsed due to the negligence of the

25. 145 Ind. 255, 44 N.E. 12 (1896).

defendant contractor in fastening the beams and ironwork. The court held for the defendant on the ground that, after the repairs had been completed and accepted by the owner, a contractor owed no duty of care to anyone other than the party for whom he had done the work; the owner was considered an independent intervening cause breaking the connection between the negligence and the harm.

A manufacturer's liability for defective products, absent privity of contract, was first considered and disclaimed in the case of *Laudeman v. Russell.*[26] Plaintiff's decedent was killed when a defective boiler, which his employer had purchased from the defendant, exploded. Although an exception to the rule of no liability without privity was recognized in the case of an inherently dangerous article within the limits of *Thomas v. Winchester,* or when the manufacturer was guilty of deceit, the court was unwilling to extend the inherently dangerous category to things other than food, drugs or explosives.

So it seems, as of 1909, liability absent privity of contract in Indiana resulted only from negligence by a manufacturer or contractor when he actually knew of the defect in the product or structure and failed to disclose it, or as a result of the sale of an article which could come under the *Thomas v. Winchester* exception.

Ten years later the citadel of privity reached its high water mark in Indiana with the case of *Travis v. Rochester Bridge Co.*[27] The Indiana Supreme Court held that a man who contracted to build a bridge for a county was not liable for injuries incurred by a traveler due to its negligent construction after the bridge had been accepted by the county. Denial of liability without privity of contract was based on the same theory as in *Daugherty v. Herzog;* namely that acceptance of the bridge by the county " amounted to an intervention of an independent human agency which had the effect of breaking the chain of causation between any negligence of the contractor and an injury which might occur after acceptance."[28]

The idea that the surrender of the work by the contractor and the acceptance thereof by the owner is the intervention of an independent human agency breaking the chain of causation and insulating the contractor from the consequences of his negligence is not sound. It is well settled that intervening negligence is not a cause superseding the original substandard conduct when the defendant is under a duty to protect the

26. 46 Ind. App. 32, 91 N.E. 822 (1909).
27. 188 Ind. 79, 122 N.E. 1 (1919).
28. *Id.* at 82, 122 N.E. at 3.

plaintiff against it.[29] If a contractor owes a duty of care to third persons before turning the work over to the owner, the latter's failure, many times justified because of a lack of ability, to make an inspection of the work is within the risk reasonably to be foreseen by the contractor, and the contractor's negligence is the proximate cause of the injury regardless of who is in possession of the structure. A change of possession does not break the causal chain in negligence cases, and nothing could be more foreseeable than that the public will be injured by the negligent construction of a bridge.

Also significant to the future development of the law was the court's dictum regarding the liability of manufacturers for defective products. Faced with cases in other jurisdictions holding that a manufacturer was liable when negligent irrespective of contract, the court stated: "The relations involved in such cases are analogous to those in the case at bar, but they are not identical; and the rules of law which apply, while similar, in many respects, are not the same."[30]

Along with the doctrine of nonliability of manufacturers to consumers with whom they had no contract, a parallel rule regarding contractors also developed from the *Winterbottom* case. This rule stated that an independent contractor was not liable to persons with whom he had no contract for negligently induced injuries occurring after he had completed the work and turned it over to the owner.[31]

Accompanying the usual reliance on the *Winterbottom* rationale of a wholesale increase in litigation, the limitation of liability in this area has been justified on the grounds of absence of reliance by the third persons on the defendant's contract,[32] the inability of the contractor to exercise further control over the completed work after acceptance by the contracting party,[33] and, as we have seen in *Travis,* the intervening negligence of the owner in maintaining the dangerous condition which prevents the contractor's negligence from being the proximate cause of the injury.[34] This latter thesis was also the rationale of *Ford v. Sturgis,*[35] generally conceded to be the leading case in the area, which also made it clear that the *MacPherson* case was restricted to manufacturers of chattels.

Exceptions to the rule are as many and varied as when a manufac-

29. See PROSSER, TORTS, 268 (2d ed. 1955).
30. 188 Ind. 79, 84, 122 N.E. 1, 5 (1919).
31. Larrabee v. Des Moines Tent & Awning Co., 189 Iowa 319, 178 N.W. 373 (1920).
32. Cunningham v. T. A. Gillespie Co., 241 Mass. 280, 135 N.E. 105 (1922).
33. Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891).
34. 188 Ind. 79, 122 N.E. 1 (1919).
35. 14 F.2d 253 (D.C. Cir. 1926).

turer and a product are involved. These include liability when the contractor has actual knowledge of the defect,[36] when his activities create a public nuisance,[37] when the work done or structure built is, when turned over to the owner, inherently dangerous,[38] and finally, liability on general negligence grounds.[39]

It is self-evident from the reasons for and exceptions to the rule that there is little analytical difference between it and the manufacturer limitation, and realistically, its independent existence can probably be attributed to the common law propensity to dignify any legal situation pertaining to real property. However, it must be pointed out that structures, such as houses or bridges, are more thoroughly inspected before purchase or acceptance than are most chattels. Also, in the case of structures, usually the only persons involved are the owner and the contractor whereas in products there is often times multi party distribution which makes the ascertainment of actual fault more difficult.

Repudiation of privity of contract as a defense available to a contractor in an action for negligence is nevertheless bolstered by sound arguments. Dean Prosser[40] favors the extension of liability because (1) the contractor, for his own economic benefit, is engaged in affirmative conduct which may affect others' interests; (2) injury to those who come in contact with the finished work is to be anticipated if it is negligently done; and (3) the owner's reliance on the contractor may be expected to endanger others by preventing him from taking precautions for their protection. Additional public policy reasons that can be suggested supporting such a result are the availability of an additional defendant who can greatly eliminate such injuries by using greater care in construction, plus the fact that the contractor can absorb the costs of liability insurance into the expenses of operation and pass these costs on to the public.

After several Indiana cases[41] had imposed liability on a manufacturer or vendor within the boundaries of the *Thomas v. Winchester* exception, accepted as law in Indiana by *Daugherty v. Herzog,* a significant inroad on a contractor's immunity was reached in *Holland Furnace Co. v. Nauracaj.*[42] The defendant installed a furnace in plaintiff's dance

36. Note, 22 MINN. L. REV. 709 (1938).
37. O'Brien v. American Bridge Co., 110 Minn. 364, 125 N.W. 1012 (1910).
38. See cases collected in 41 A.L.R. 8 (1926).
39. Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir. 1948); Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1948).
40. PROSSER, TORTS, 518-19 (2d ed. 1955).
41. Ft. Wayne Drug Co. v. Flemion, 93 Ind. App. 40, 175 N.E. 670 (1931); Standard Oil Co. v. Robb, 85 Ind. App. 21, 149 N.E. 567 (1925).
42. 105 Ind. App. 574, 14 N.E.2d 339 (1938).

hall pursuant to a contract with the tenant in possession. The installation was completed and the work was accepted by the tenant. When the first fire was built in the furnace, considerable damage was caused by the building catching fire due to negligent installation. Despite defendant's contention that there was no liability without privity of contract, a judgment for plaintiff was affirmed. The court sidestepped the *Travis* precedent by pointing out that there was a public contract involved in that case,[43] concluding: "A contractor continues liable (after acceptance by the contracting party) where the work is turned over by him in a manner so negligently defective as to be imminently dangerous to third persons."[44]

This case has been cited for the proposition that the inherently dangerous exception was merely extended,[45] but it clearly rests liability on negligence alone. This is apparent by its use of authority, and the phrasing of the sentence ". . . work is turned over by him in a manner so negligently defective as to be imminently dangerous to third persons."[46] It is plainly a misinterpretation to regard this as imposing liability only when inherently or imminently dangerous things are negligently constructed instead of imposing liability for an article which is inherently or imminently dangerous *because* it is negligently constructed. Thus, by predicating liability on the nature of the foreseeable harm instead of on the nature of the product or article, or the existence of a contract, it would seem that a contractor's liability in Indiana is to be based on general negligence principles regardless of privity of contract. However, the facts and reasoning of the decision indicate, reinforcing the *Travis* distinction, that only the liability of a contractor was at issue and the case cannot be extended to manufacturers of chattels.

Privity of contract with regard to the product liability of manufacturers again came under attack in Indiana in *Coca Cola Bottling Works v. Williams*.[47] In an action for injuries caused by drinking a bottled beverage containing concrete chips, the court affirmed a verdict in favor of the plaintiff nothwithstanding the lack of privity in the following words:

> The rule now in the best reasoned cases is that the manufacturer of foods or bottled goods sold for human consumption may be

43. This distinction is tenuous since it does not appear that the holding in *Travis* rested in any way upon the fact that a public contract was involved.
44. 105 Ind. App. 574, 580, 14 N.E.2d 339, 344 (1938).
45. 24 IND. L.J. 289 (1939).
46. 105 Ind. App. 574, 580, 14 N.E.2d 339, 344 (1938).
47. 111 Ind. App. 502, 37 N.E.2d 702 (1944).

> held liable to the ultimate consumer for injuries caused by foreign deleterious substances in such goods, regardless of whether or not there was privity of contract between them.[48]

Although *MacPherson v. Buick* was cited with approval by the court, the actual decision is questionable authority for the conclusion that the rule is now applicable in this state. The difficulty in viewing the decision in this light results from the realization that the case would have been decided the same way regardless of *MacPherson.* The exception to the requirement of privity of contract for products manufactured and sold for human consumption such as food and drink, had been recognized since *Thomas v. Winchester* some ninety years before. Indiana had long approved and followed the exception[49] and many other jurisdictions had applied the principle to facts almost identical to those involved in the *Williams* case.[50]

Following this decision, there has been one important federal case which attempted to interpret Indiana law regarding the necessity of privity of contract in a negligence action. This case, *McCloud v. Leavitt Corp.,*[51] involved a contractor's liability for defects in construction. The court, relying on the fact that the Indiana Supreme Court denied a petition to transfer in both *Holland v. Nauracaj* and *Coca Cola Bottling Works v. Williams,* decisions believed to approve the *MacPherson* rule, determined that this meant the Indiana Supreme Court also had accepted the *MacPherson* doctrine with regard to the liability of contractors.

Without analyzing the soundness of such a conclusion at this time, it is still important to recognize that the *McCloud* case involved only the liability of a contractor and cannot control cases involving a manufacturer's product liability. It is obvious that Judge Lindley recognized this distinction since he concurred in a majority opinion of the Court of Appeals for the Seventh Circuit nine years later which held that a manufacturer of chattels was not liable to one with whom he was not in privity of contract.[52]

Rationale of the Elliot Case

It was seen above that the instant case, *Elliot v. General Motors Corp.,* was decided for the plaintiff because the Indiana Supreme Court had denied petitions to transfer in both *Holland Furnace v. Nauracaj* and

48. *Id.* at 506, 37 N.E.2d at 706.
49. Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 12 (1896).
50. See, *e.g.,* Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914); Boyd v. Coca-Cola Bottling Co., 132 Tenn. 23, 177 S.W. 80 (1915).
51. 19 F. Supp. 289 (S.D. Ill. 1948).
52. Gahimer v. Virginia-Carolina Chem. Corp. 241 F.2d 836 (7th Cir. 1957).

Coca Cola Bottling Works v. Williams, cases which are thought to hold that privity of contract is not an essential element in negligence actions. Such denial was assumed by the court to have stamped the tacit approval of the Indiana Supreme Court on the *MacPherson* rule; thereby expressing the Indiana law on the subject in an indirect but controlling manner.

The fact that the Indiana Supreme Court denied a petition to transfer in these two cases is not authority for the conclusion that the *MacPherson* rule is the law in Indiana regarding manufacturer's product liability. Although some early cases indicated that a denial of a petition to transfer under Burns section, 4-215[53] was an approval of the conclusion reached by the appellate court,[54] the Indiana Supreme Court has qualified and retreated from this broad statement. The first limitation was drawn in *Harter v. Board of Commr's*[55] where it was pointed out that the denial of transfer cannot be regarded as an approval of all that was said "arguendo" or by way of dicta. A similar cautionary note was injected in *Fardy v. Mayerstein,*[56] where, after stating that transfer would be refused if it would not produce a different result, the court said:

> Denial of a petition to transfer does not indicate our approval of all language of the opinion under consideration. Dicta must be read in relation to the decision. It would be an unnecessary duplication of effort for us to take over every case containing loose or even erroneous statements, which when read in the light of the facts with which the Appellate Court was dealing, are not likely to mislead courts and lawyers in the future disposition of cases.[57]

Another difficulty with accepting a denial of a petition to transfer as a blanket approval of the appellate court's opinion is that while there may be one or more errors in the opinion, the petition to transfer may seek a transfer on some other ground which has no merit. Therefore, the particular point relied upon as precedent in later cases may not have been presented to the court for determination.

In view of the language in *Fardy v. Mayerstein,* reliance upon denial of petitions to transfer in *Holland Furnace* and *Coca Cola Bottling Works* as an acceptance by the Supreme Court of a doctrine which they unequivocally rejected only twenty years previously is tenuous. This

53. IND. ANN. STAT. § 4-215 (Burns 1946).
54. See, *e.g.,* Smith v. State, 169 Ind. 260, 82 N.E. 450 (1907); Indianapolis Traction Co. v. Isgrig, 181 Ind. 211, 104 N.E. 60 (1914).
55. 186 Ind. 301, 116 N.E. 304 (1917).
56. 221 Ind. 339, 47 N.E.2d 315 (1943).
57. *Id.* at 347, 47 N.E.2d at 320.

is particularly true since the *Holland* case dealt with contractors and not manufacturers, a distinction recognized by nearly every jurisdiction,[58] and clearly commanded by the opinion in *Travis v. Rochester Bridge,* the very decision the Seventh Circuit hold is no longer law in Indiana. Reinforcing this conclusion is the *Coca Cola Bottling Works* case where the Court cited *MacPherson* with approval, but reached their decision by excepting bottled beverages from the privity requirement; a proposition of law that had been accepted in Indiana for some fifty years.[59]

Conclusion

Even though the Court of Appeals for the Seventh Circuit has interpreted the law of Indiana as accepting the doctrine of *MacPherson v. Buick* in eliminating the defense of privity of contract in a negligence action against a manufacturer for injuries sustained through the use of a defective product, the applicable Indiana decisions indicate the contrary. The few cases that have arisen involving products that have allowed recovery fall within an exception to the *Winterbottom* rule that has been recognized since 1852. Moreover, although Indiana law clearly indicates that a contractor may now be held liable for negligence to persons other than the vendee or owner of the structure without privity, in view of the fact that for so many years the courts of this state and other jurisdictions have made a distinction between structures on real property and personal property, it is questionable whether an analogy may now be drawn between these two types of defendants. Particularly is this true when the premise of the opinion in the instant case is built on so slender a reed as a denial of a petition to transfer by the Indiana Supreme Court. In addition to the analytical weakness of the decision, its propriety is also open to question since it is inevitable that future plaintiffs in *MacPherson* type situations will seek the federal courts for redress whenever diversity of citizenship makes this avenue possible, rather than take a chance in the state courts that the Indiana law is what the federal court says it is.

EUGENIC STERILIZATION IN INDIANA

In the early 1900's the advocates of sterilization for eugenic purposes began to encourage state legislatures to enact compulsory sterilization statutes. They contended that through the use of sterilization, the surgical

58. See text following n. 31.
59. Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 12 (1896).