PRODUCTS LIABILITY IN INDIANA: CAN THE BYSTANDER RECOVER?

I. Introduction

Recently a federal court in Indiana was faced with the issue of bystander recovery in a products liability case.[1] The non-purchaser plaintiff had been injured when a piece of metal, thrown from a power lawnmower, struck him. The plaintiff alleged that the manufacturer's lawnmower was defective in that a safety deflector plate was missing and maintained that the manufacturer was strictly liable for his injuries. The defendant moved to dismiss the suit for lack of privity between him and the plaintiff.

The court, bound by Indiana law,[2] could find no Indiana precedent allowing such recovery. Section 402A[3] of the *Restatement (Second) of Torts,* which imposes strict liability on a manufacturer of defective products which injure a user or purchaser, takes no position on the question of bystander recovery.[4] Nevertheless, the federal court concluded that the same policy arguments which protect the purchaser should also protect all innocent third parties who are injured by defective products. The motion to dismiss was denied.

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[1]Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969).

[2]Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Jurisdiction in *Sills* was invoked on the basis of diversity of citizenship.

[3]Restatement (Second) of Torts § 402A (1965) provides:

> Special Liability of Seller of Product for Physical Harm to User or Consumer. (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[4]*Id.* Comment *m.*

In the products liability area, consumer protection has seen great expansion in recent years. The doctrine of caveat emptor has generally been abandoned in favor of a strong public policy calling for safe and merchantable items in the stream of commerce. Increasing litigation marks a trend toward holding a manufacturer of defective goods strictly accountable for any injury that the goods cause. The injured user may pursue the manufacturer through three theories—negligence, breach of warranty, or strict liability in tort. The purpose of this discussion is to focus upon the mercantile defendant's liability when one other than the user is injured by defective products.

II. Escape from the Privity Nemesis

Several decades ago, an English court disdainfully rejected the argument that a maker of chattels could be held liable to someone other than his immediate buyer for personal injuries caused by defective goods.[5] Winterbottom, a coach passenger, was injured when a defective wheel collapsed causing the coach to overturn. The court foresaw impending doom if the law suit were allowed for "every passenger, or even any person passing along the road, who was [likewise injured], might bring a similar action."[6]

Thus, *Winterbottom* was interpreted to mean that no action in contract or in tort would lie when "privity" was lacking.[7] The privity rule was supported by the flimsy rationale that the manufacturer of a product could not be held to anticipate the use of that product by nonpurchasers. Therefore, the manufacturer was insulated from liability when an unforeseen user was injured.[8]

The privity rule arrived in Indiana in 1883.[9] Should the privity bar be lifted, the courts feared that an endless stream of litigation would ensue. Recovery was consistently denied whenever the privity chain was broken, often leaving the nonpurchaser plaintiff without an effective remedy. One shocking result of stare decisis is reflected in an early Indiana case[10] denying recovery when a brick wall fell on the plaintiff's daughter and killed her. Because the

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[5]Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).

[6]*Id.* at 405.

[7]Earl v. Lubbock, [1905] 1 K.B. 253.

[8]*Id.*

[9]State *ex rel.* Travelers Ins. Co. v. Harris, 89 Ind. 363 (1883). *See also* Hoosier Stone Co. v. Louisville, N.A. & C. Ry., 131 Ind. 575, 31 N.E. 365 (1892).

[10]Daugherty v. Herzog, 145 Ind. 255, 44 N.E. 457 (1896).

defendant-contractor had completed construction and ownership had passed to the nonparty buyer, the contractor was insulated from liability for the admittedly defective construction. He owed no duty to the pedestrian who happened to be on the sidewalk when the wall collapsed.

The early common law decisions denying recovery when privity was lacking have received just criticism.[11] However, these cases should be examined in light of their historical setting. The common law manufacturer was not in a better bargaining position than his buyer. Buyers and manufacturers dealt on a face-to-face basis within the community. The manufacturer depended heavily upon his good reputation, and fair dealing insured future business from his neighbors. To impose liability upon him was considered a hardship in that the loss could not be passed on to consumers generally.

As early as 1910, the Indiana courts began to formulate exceptions in order to avoid the harsh inequities of the privity rule.[12] Misrepresentation by the seller took the case out of the *Winterbottom* rule.[13] In addition, following the lead of a New York case,[14] the Indiana Appellate Court held that privity did not apply to the manufacture of inherently dangerous products.[15] Even so, Justice Cardozo's landmark decision in *MacPherson v. Buick Motor Co.*[16] had no immediate effect in Indiana. Cardozo's unimpeachable reasoning that any product can be hazardous if defectively made was completely ignored by the Indiana Supreme Court when *Winterbottom* was reaffirmed as law in 1919.[17] Twenty years passed before *MacPherson* was cited with approval by Indiana courts.[18]

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[11]*See* Stewart, *Products Liability: Privity of Contract—Birth, Life, and Death in Indiana*, 9 RES GESTAE, Feb. 1965, at 11.

[12]Laudeman v. Russell & Co., 46 Ind. App. 32, 91 N.E. 822 (1910).

[13]*Id.*

[14]Thomas v. Winchester, 6 N.Y. 397 (1852) (sale of poison).

[15]Laudeman v. Russell & Co., 46 Ind. App. 32, 91 N.E. 822 (1910). The dissenting opinion presents a good discussion of the difficulties of classifying a product as an inherently dangerous object.

[16]217 N.Y. 382, 111 N.E. 1050 (1916). Cardozo reasoned that a manufacturer was under a duty to everyone to make his product with care or not to market it at all. This duty accrued upon purchase by the consumer.

[17]Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1 (1919). Plaintiff's decedent was killed when a county bridge collapsed. The court held that at the moment the county accepted the structure from the defendant-contractor, privity was broken as to the plaintiff. Recovery was denied.

[18]Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 14 N.E.2d 339 (1938). *See also* Coca-Cola Bottling Works, Inc. v. Williams, 111 Ind. App. 502, 37 N.E.2d 702 (1941).

Privity in negligence actions was not struck down until 1964 in *J. I. Case Co. v. Sandefur.*[19] *Sandefur* was a negligence action against a remote manufacturer brought by a nonpurchaser plaintiff. Voluminous precedent would not sanction such a law suit, but the supreme court rejected the defense of lack of privity and expressly adopted *MacPherson* as Indiana law. In a well reasoned opinion, the court held that a manufacturer can be held liable to *any* person for marketing a product that can reasonably be foreseen to cause injury if defectively made. By striking down privity as a necessary element of the negligence action, *Sandefur* put Indiana law more in line with the atmosphere of today's marketplace. The manufacturer is not aware of which individuals will purchase or use his product. It is for this reason that he should be held to foresee that any person could be injured by his negligence.

Unfortunately, the death of privity in negligence has not destroyed the *Winterbottom* doctrine under all theories of liability. When the bystander plaintiff is seeking to recover under a contract action based upon breach of warranty, his remedy is governed by the Uniform Commercial Code.[20] Privity remains a viable concept under the Code. Under Indiana law, the privity of contract bar is lifted only so far as to encompass members of the purchaser's household or his guests who may be injured by breach of warranty.[21]

Notwithstanding the restrictive statutory language, early Indiana case law indicated that an action for breach of implied warranty might sound in tort.[22] Later the Indiana Supreme Court expressly adopted this position in *Wright Bachman, Inc. v. Hodnett.*[23] In *Hodnett* the court held that an action for breach of

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[19]245 Ind. 213, 197 N.E.2d 519 (1964).

[20]IND. CODE § 26-1-1-101 *et seq.* (1971) [hereinafter cited as UCC].

[21]UCC § 2-318. Official Comment 2 of UCC § 2-313 states that "the warranty sections . . . are not designed to disturb those parallel lines of case law growth which have recognized that warranties need not be confined to sales contract or to the direct parties to such a contract." But the persuasion of this authority may be somewhat limited by the fact that Indiana did not adopt the Official Comments when the statute was enacted.

[22]Heise v. Gillette, 83 Ind. App. 551, 149 N.E. 182 (1925). Plaintiff was poisoned by a rancid chicken sandwich and sought recovery against the seller. The defendant contended that to recover the plaintiff must show negligence. The court rejected defendant's argument and held that in the sale of food for human consumption, an implied warranty of fitness arose which ran in favor of the buyer.

[23]235 Ind. 307, 133 N.E.2d 713 (1956). This was an action for personal injuries brought against a ladder manufacturer. The case represents a de-

implied warranty may sound in tort or contract as determined by the pleadings.

The federal courts sitting in Indiana have seized *Hodnett* and have interpreted it to stand for the proposition that privity is not a requirement when the plaintiff grounds his warranty action in tort.[24] This pronouncement has broad ramifications. If the plaintiff is basing his breach of warranty suit on a tort theory, the necessity for showing a "sale" of the product disappears. If a product carries with it an implied warranty of fitness imposed by law,[25] then that warranty runs in favor of those who come in contact with the item, regardless of whether they purchased it. Once the requirement of a sale within the meaning of the Uniform Commercial Code is obviated, privity no longer presents any conceptual problem to the innocent bystander. His standing to sue is based upon a tort theory, and his connection with the manufacturer is an implied warranty running with the goods. The policy considerations postulated in *Sandefur* should apply to him as they do to consumers generally.

It has been held that the relationship of employer-buyer establishes a sufficient privity connection for an employee to recover under a theory of breach of implied warranty—the court assumed,

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parture from the then accepted theory that warranty actions must sound in contract. The plaintiff recovered under a tort theory, but the court regarded privity as an essential element.

[24]Dagley v. Armstrong Rubber Co., 344 F.2d 245 (7th Cir. 1965) (truck accident caused by a defective tire manufactured by defendant—privity not required).

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> There seems to be some confusion in understanding the nature of implied warranty liability. In the first place, concepts of negligence and fault, as defined by negligence standards, have no place in warranty recovery cases. Proof of negligence is unnecessary to liability for breach of implied warranty and lack of it is immaterial to defense thereof. Since the warranty is *implied*, either in fact or in law, no express representations or agreements by the manufacturer are needed. Implied warranty recovery is based upon two factors: (a) the product or article in question has been transferred from the manufacturer's possession while in a "defective" state, more specifically, the product fails either to be "reasonably fit for the particular purpose intended" or of "merchantable quality," as these two terms, separate but often overlapping, are defined by law; and (b) as a result of being "defective," the product causes personal injury or property damage.

Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919, 922 (D.C. Mun. App. 1962).

"without deciding, that Indiana adheres to the privity rule."[26] It is arguable that an employee is encompassed by the employer's privity in this situation, but if privity has no application to this action it seems a short step to include the bystander as a legitimate plaintiff.

Recovery for the bystander has been further reinforced by *Filler v. Rayex Corp.*[27] Plaintiff, a high school baseball player, sued a maufacturer who advertised his product as "baseball sunglasses." The lenses shattered when struck by a baseball and severly injured the player's eyes. The flip-down glasses had been purchased by the coach to be used by the team members. In sustaining the plaintiff's recovery under a warranty theory, the court drew an appropriate analogy to the injured employee situation in other cases. An equally persuasive analogy can be drawn in favor of the injured bystander.

When liability is based upon warranties arising out of the sale of goods under contract theory, privity has retained vitality.[28] Here the rule has been justified on the theory that a warranty is a benefit of the bargain intended to run only to the purchaser who paid for this protection. Thus, the manufacturer or seller owes no duty to an outsider who has not bargained for the benefit. This position may have been sustainable prior to the industrial age, but today consumers are no longer on an equal footing with industry. Such an idea of "personal warranties" is inconsistent with our modern commercial trade practices. Marketing methods give the consumer meager opportunity to dicker for terms of a guarantee. Except in rare cases, manufacturers do not know the individuals with whom their retailers will deal. More consistent with today's business atmosphere is the policy argument that each member of society should reap the rewards of warranty protection. The person most able to protect against defective products is the manufacturer, and his warranties should be given to consumers generally and not to customers individually.

III. Strict Liability in Tort

Whereas warranty liability arises out of concepts applicable to commercial transactions, strict tort liability is imposed by law almost solely for reasons of public policy. It is under a theory of

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[26]Hart v. Goodyear Tire & Rubber Co., 214 F. Supp. 817, 820 (N.D. Ind. 1963).

[27]435 F.2d 336 (7th Cir. 1970).

[28]Withers v. Sterling Drug, Inc., 319 F. Supp. 878 (S.D. Ind. 1970).

strict liability that an injured bystander is most likely to succeed against a manufacturer of defective products. This theory breaks the confines of negligence and warranty by escaping the privity nemesis.

The injured bystander faces a true dichotomy with his law suit in Indiana courts. The Indiana Supreme Court has not spoken with approval of the strict liability theory, yet the federal courts, sitting in Indiana, have applauded the concept and have expanded it to broad application.

The doctrine arrived in Indiana via *Greeno v. Clark Equipment Co.*[29] An employee brought an action against a forklift tractor manufacturer for injuries sustained while operating the machine. The forklift had been leased by the plaintiff's employer from a leasing company which was not a party to the suit. The defendant moved to dismiss the complaint which was based on a strict liability theory.

The *Greeno* court preliminarily decided that the complaint did meet the requirements of section 402A. The real question was whether the complaint met the requirements of the substantive law of the state. The court cited *Sandefur* for the proposition that a trend was developing in Indiana to permit a strict liability action because *Sandefur* allowed recovery from a remote manufacturer

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[29]237 F. Supp. 427 (N.D. Ind. 1965). The first state jurisdiction to accept the strict liability theory was California in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). The case is often cited for the cogent analysis of Justice Traynor:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being . . . . Although . . . strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which such liability is imposed.

59 Cal. 2d at 63-64, 377 P.2d at 900, 27 Cal. Rptr. at 701.

based upon the policy of consumer protection.[30] Therefore, the court accepted the *Restatement* position as Indiana law.[31] Both the federal district courts and the Seventh Circuit Court of Appeals have applied *Greeno* as Indiana law to products liability cases.[32]

Under a strict liability theory, negligence on the part of the user is not a defense for the manufacturer.[33] Privity of contract is not a bar because liability is not imposed through a sale of the goods, but is imposed for reasons of public policy.

The first state court in Indiana to apply the theory of strict liability was the court of appeals in *Cornette v. Searjeant Metal Products, Inc.*[34] The court expressly adopted section 402A as Indiana law and cited with apparent approval the federal cases applying the rule. However, bystander recovery was not an issue in *Cornette*, and the opinion contained disturbing dictum that the *Restatement* section "should be strictly construed and narrowly applied."[35] But it may be significant that the court declined the opportunity to overrule the federal cases which had preceded *Cornette*.

In *Perfection Paint & Color Co. v. Konduris*[36] the theory of strict liability was broadened. In this case the plaintiff's decedent had been burned when paint lacquer, furnished at no charge by the defendant, caught fire. The defendant contended that since there was no sale of a product, strict liability did not apply. The court answered that strict liability is imposed not because of a sale of goods, but because of the introduction of defective articles into the stream of commerce. The critical inquiry is whether a defective product is put on the market.

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[30]It is interesting to note that three years after the *Greeno* decision the Indiana Court of Appeals refused to accept such a broad reading of *Sandefur*. Blunk v. Allis-Chalmers Mfg. Co., 143 Ind. App. 631, 242 N.E.2d 122 (1968).

[31]The court in *Greeno* admitted that the "precise question involved has never been presented to Indiana courts, and state guidelines are not easily ascertainable in this rapidly developing field of the law . . . ." 237 F. Supp. at 428.

[32]Posey v. Clark Equip. Co., 409 F.2d 560 (7th Cir. 1969); Illnicki v. Montgomery Ward Co., 371 F.2d 195 (7th Cir. 1966); Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969).

[33]Downey v. Moore's Time-Saving Equip. Co., 432 F.2d 1088 (7th Cir. 1970) (recovery denied—misuse of the product).

[34]147 Ind. App. 46, 258 N.E.2d 652 (1970).

[35]*Id.* at 53, 258 N.E.2d at 657.

[36]147 Ind. App. 106, 258 N.E.2d 681 (1970).

Both *Cornette* and *Perfection Paint* reflect the Indiana trend, first noted by the *Greeno* court, toward protecting innocent persons who are injured by defective goods. The real question is whether this trend encompasses the bystander. It would certainly seem that he falls within the class of persons to be protected upon policy grounds. Perhaps an even stronger argument can be made in favor of the bystander's recovery in that the purchaser normally has an opportunity to inspect before he buys and to reject goods with an apparent defect. The innocent bystander has no such protection. Therefore, this is further justification to sanction the injured third party's recovery.[37]

Strict liability as a theory of recovery in products liability cases has found wide acceptance throughout the country.[38] In those jurisdictions subscribing to the theory, the bystander has met uni-

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[37]As stated by the Supreme Court of California in Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969):

> Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured . . . and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders.

Id. at 586, 451 P.2d at 89, 75 Cal. Rptr. at 658.

[38]The first state to face bystander recovery was Michigan in Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965). Plaintiff was injured when his brother fired a shotgun which exploded as the firing pin struck the shell. Recovery was allowed the bystander whose action was grounded in tort under a theory of breach of implied warranty of fitness. The Michigan Supreme Court rejected the contention that recovery should be denied under the privity of contract ban. The court emphasized that all vestiges of *Winterbottom* should be laid to rest.

Under much the same rationale, Connecticut sanctioned bystander recovery in Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (1965), applying section 402A to overcome the manufacturer's defense of lack of privity. The plaintiff's decedent had been killed when a car, left in park gear, rolled onto a golf course, and crushed him. The court declared that no effective argument could be made by the manufacturer of the automobile to preclude recovery by the innocent bystander. Once the defect in the transmission had been shown, the defendant was rightly called upon to account for resulting injury. The outrageous escape through lack of privity should be of no avail to him.

After a rehearing of the original case, Arizona extended coverage to the bystander in Caruth v. Mariana, 11 Ariz. App. 188, 463 P.2d 83 (1970). The appellate court correctly analyzed the argument in favor of the bystander when it concluded that the proper public policy is to protect "injured persons" and not just "users and consumers."

versal success in his law suit, notwithstanding the noncommital language of the *Restatement*.[39] One court correctly analyzed the argument in favor of the bystander when it concluded that "the public policy is to protect 'injured persons' and not just 'users and consumers.' "[40]

A strong indorsement for the Indiana bystander came recently from the Illinois Supreme Court.[41] The court was presented with an action for bystander recovery arising from an accident which occurred in Indiana. After establishing that Indiana law would govern, the court cited *Cornette* as an indication that Indiana would allow bystander recovery in a proper case.

The products liability cases from outside Indiana undeniably reflect the judicial trend toward recognizing the injured third party's right to proceed against a maker of defective goods. The rationale behind the various opinions is that no logical argument can be made for excluding the bystander as a party protected under a strict liability theory. The central purpose of the tort is to make industry responsible for defective goods placed in the stream of commerce. The position that the bystander is not within the class of persons to whom the manufacturer is trying to market his product is a tenuous one. All members of the public are entitled to the protection of strict liability, and, in turn, the losses incurred

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The Wisconsin Supreme Court, after adopting the doctrine of strict liability in Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), extended section 402A to include the bystander in Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972). The court cited *Sills* as a correct application of the policy protecting innocent third parties.

California, after pioneering the area in *Greenman*, has accepted the bystander as within the scope of strict liability. New Jersey, after giving birth to the leading warranty case, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), has applied the *Henningsen* rationale to allow the third party bystander to recover in Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971).

In short, all jurisdictions which have followed the doctrine of strict liability have applied it to include the bystander when the facts presented themselves.

[39]For a good analysis of the *Restatement* position on bystander recovery, see Note, *Blood Transfusions and Human Transplants: A Problem of Proof and Causation*, 4 IND. LEGAL F. 518 (1971). This student work concerns the liability of a manufacturer-supplier of blood transfusion equipment and plasma when a patient contracts hepatitis.

[40]Caruth v. Mariana, 11 Ariz. App. 188, 191, 463 P.2d 83, 86 (1970).

[41]Lewis v. Stran Steel Corp., 285 N.E.2d 631 (Ill. 1972). Recovery was denied here because misuse of the product was found to be a good defense.

by the industry can ultimately be distributed to the public in general.[42]

IV. The Case Against Bystander Recovery

An appreciation of the fact that a decision from the Indiana Supreme Court could reverse the trend of the federal cases on the subject of bystander recovery, makes it necessary to examine critically the bystander's position as plaintiff. Voluminous policy arguments, outlined above, can be advanced in favor of the innocent third party's right to recover against a maker of defective goods. But policy, at least until judicially sanctioned, has little effect as law. A convenient escape for a court faced with a policy argument is to charge the legislature with the responsibility of changing the law. Indeed, judicial legislation is almost uniformly abhorred. Therefore, it is important to inquire into the status of the bystander under existing state law.

The bystander-plaintiff pursuing a manufacturer of defective goods under a negligence theory must overcome a formidable hurdle of proof. Once establishing a lack of ordinary care on the part of the defendant, the injured party faces the problem of causation. Proximate cause, the link between the negligence and the injury,[43] may be extremely difficult for the bystander to establish. He must show that no intervening cause interrupted the causation chain prior to his injury.[44] Therefore, if the product user is negligent

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[42]The manufacturer is in a position to adequately cover his loss through liability insurance. The expense of this coverage can be passed on to the consumer via increased product prices. This fact is noted in Comment *c* to section 402A:

> On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

[43]McGahan v. Indianapolis Natural Gas Co., 140 Ind. 335, 37 N.E. 601 (1894).

[44]Louisville & Jefferson Ferry Co. v. Nolan, 135 Ind. 60, 34 N.E. 710 (1893).

and his negligence is the source of the ensuing accident, the bystander has no good cause of action against the manufacturer. Of course, in this case, plaintiff may have a good claim against the user and is, therefore, not without a remedy.

Recognition of a tort action based upon breach of implied warranty should run in favor of the bystander-plaintiff.[45] Here recovery does not depend upon proof of negligence, and concepts of foreseeability should not apply.[46] Recovery depends upon proof of a breach which caused injury.

On the other hand, if the plaintiff is seeking to place liability on the manufacturer based upon a "sale" of the product, the bystander is obviously not included as a protected party under the Uniform Commercial Code. A broad reading of contract principles suggests that the bystander might enforce a warranty under a third party beneficiary theory, but Indiana law is explicit in naming the persons protected in sales transactions.[47]

Strict liability is a codification of the breach of implied warranty action grounded in tort. It is clear that the user of a defective product can recover by showing a defect which caused injury.[48] However, it is equally clear that the *Restatement,* if narrowly read, does not expressly sanction recovery for the bystander. Additionally, the appellate court cases of *Cornette* and *Perfection Paint* did not encompass the issue of bystander recovery. Without detracting from the well reasoned opinion in *Sills v. Massey-Ferguson, Inc.,*[49] it is accurate to say that the federal courts have "guessed" at Indiana law.[50] Likewise, the cases outside Indiana are mere persuasive authority for our supreme court.

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[45]Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776 (N.D. Ind. 1969).

[46]Filler v. Rayex Corp., 435 F.2d 336 (7th Cir. 1970).

[47]UCC § 2-318.

[48]Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970).

[49]296 F. Supp. 776 (N.D. Ind. 1969).

[50]The federal court in *Greeno* put it aptly:

> The question is now squarely before this court and must be decided. It is perhaps fortuitous that the Indiana Supreme Court has not yet passed on this issue, but doubtlessly that forward-looking court would embrace the Restatement (Second), Torts sec. 402A, and the many recent cases and authors who have done likewise, as eminently just and as the law of Indiana today.

237 F. Supp. at 433.

V. Summary

The facts calling for decision on bystander recovery have not as yet been presented to the Indiana Supreme Court. Past decisions of the court have impliedly given the bystander-plaintiff an action in negligence[51] with its associated difficulties of proof. Sound policy arguments call for a broadened application of the strict liability theory in order to adequately protect all persons.

Federal courts, sitting in Indiana, have indicated their approval of putting the risk of personal injury upon the manufacturer of defective products. State courts outside Indiana have applauded the public policy considerations and have afforded protection to the injured bystander. The Court of Appeals of Indiana has impliedly approved the same policy considerations in adopting strict liability as Indiana law, but so far has restricted its applicability to the injured user. The trend across the country is well established. Through mounting litigation, manufacturers have been forewarned that they must market their products with the safety of the public foremost in mind. There is little doubt as to the position of the federal courts, sitting in Indiana, as to bystander recovery. Hopefully, the Indiana state courts will adopt the same position when the facts are presented.

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[51] J. I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964).