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Statutes of Limitations: Their Selection and Application in Products Liability Cases

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I. INTRODUCTION

The development of products liability law has followed an arduous course, especially during the past 70 years.[1] Many serious problems have arisen out of consumer attempts to obtain redress from manufacturers of defective products. Many of these problems have been resolved, but the problem of selecting and applying the appropriate statute of limitations persists, causing confusion among jurists, legislators, and practitioners and yielding inconsistent and inequitable results. A hypothetical will illustrate the problem and provide a factual context within which the problem may be discussed.

In 1970, Plaintiff is injured and his home destroyed when a gas water heater explodes. The heater was installed when the house was built in 1966. Plaintiff institutes suit against Defendant, the manufacturer of the heater, in 1971. Plaintiff seeks damages for personal injury and property damage, alleging alternatively these causes of action: negligence; breach of implied warranty; breach of sales warranties provided in the Uniform Commercial Code; and strict liability in tort. The court must decide which statute of limitations—tort, oral contract, or Uniform Commercial Code—should be applied to each cause of action and then select the time at which the statute began to run. These two choices, the appropriate statute and the date on which it begins to run, are the topic of this Note. As situations similar to the hypothetical have confronted the courts with increasing frequency during the past decade, courts and legislatures have taken distinctive approaches and have reached different results in attempting to find solutions to the statute of limitations problems. This Note analyzes in historical perspective the different decisions which have been reached, thus providing a context within which conclusions can be drawn and suggested solutions presented.

A. Products Liability: The Theories

Products liability actions, suits to recover for personal injury or property damage attributable to a product which has been sold, have been based on three fundamental theories—negligence, implied

1. For a comprehensive review of products liability law in historical perspective, see Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099 (1960); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

warranty, and strict tort liability. Each of these theories has distinctive qualities which necessitate different approaches to the selection of an appropriate statute of limitations. In addition, each theory has certain advantages and/or disadvantages in terms of burdens of proof and essential elements of the cause of action which may enhance or restrict its application as a possible remedy. Thus, plaintiff's attorney is confronted with the problem of selecting the cause of action with the highest potential for success on the merits,[2] while at the same time giving consideration to the possibility that this cause of action may be time-barred.

1. *Negligence.*—In early attempts to hold sellers of chattels liable for injury to ultimate consumers, courts ruled that there could be no recovery, in tort or contract, without privity of contract.[3] Since privity was almost always absent in such cases, courts seldom allowed the consumer to obtain relief from the manufacturer. To alleviate this situation, courts began to seek a duty running from the manufacturer to the consumer. If such a duty could be found, the court could give relief in tort for injuries resulting from a breach of that duty. The duty was first provided by holding that the manufacturer had a duty of disclosure concerning any dangerous characteristics of his product.[4] Thus, injury traceable to the manufacturer's failure to disclose would sustain a cause of action in tort, an action similar to that available for deceit. Soon, a series of exceptions to the privity requirement was developed. These exceptions grew most rapidly in the area of articles made for the protection, preservation, or destruction of human life. This category included food, drugs, and other items taken into or brought in contact with the body.[5] Eventually, in the landmark decision

2. *Compare* Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965) *with* Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (for considerations of the problem of damages).

3. Professor Prosser suggests that this rule results from a misinterpretation of the court's holding in Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842). W. PROSSER, TORTS § 96, at 658-59 (3d ed. 1964). Two reasons for giving protection in the form of the privity requirement have been presented: the original seller did not anticipate harm to any but the immediate contracting party and the original seller would be burdened too heavily if he were held responsible to unknown parties several transactions removed. *See generally* Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903). Both of these theories have been subsequently discredited. Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L.Q. REV. 343 (1929).

4. *E.g.*, Huset v. J.I. Case Threshing Mach. Co., 120 F. 865 (8th Cir. 1903).

5. *Id.*; Pillars v. R.J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918) (chewing tobacco); Tomlinson v. Armour & Co., 75 N.J.L. 748, 70 A. 314 (1908) (food); Thomas v. Winchester, 6 N.Y. 397 (1852) (drugs); Boyd v. Coca Cola Bottling Works, 132 Tenn. 23, 177 S.W. 80 (1915) (drink).

MacPherson v. Buick Motor Co.,[6] the exceptions to the privity requirement swallowed up the rule. Although the holding of that case may be narrower, the reasoning was to the effect that the manufacturer had a duty implied by law to avoid negligent acts which may cause injury to ultimate consumers.[7] Since this decision, the right of recovery in negligence has been open to the consumer, but recovery itself has often been difficult due to problems of proof. Because direct evidence of the manufacturer's negligence is generally unavailable, circumstantial evidence must be utilized. Despite the employment of *res ipsa loquitur* and negligence per se,[8] plaintiffs have consistently found it difficult to demonstrate the manufacturer's failure to act as a reasonable and prudent man would have acted under the same or similar circumstances.

2. *Implied Warranty.*—Seeking to avoid the proof problems inherent in negligence actions, plaintiffs' attorneys devised theories under which the manufacturer could be held liable regardless of his negligence or lack thereof.[9] Implied warranty was one such theory. Although warranty had its origins in tort,[10] it early became associated with contract actions. This association stemmed from the common lawyer's desire to circumvent the pleading problems attendant to actions in tort.[11] As a result of this contract background, warranty was burdened with many contract features; for example, privity of contract was required, and the cause of action was deemed to accrue at the date of sale rather than the date of injury.[12] The privity requirement was

6. 217 N.Y. 382, 111 N.E. 1050 (1916) (defective automobile wheel).

7. *Id.* at 390, 111 N.E. at 1053. The duty has been justified on the theory that by placing an article in the stream of commerce and accepting the benefits of sales, the manufacturer assumed responsibility for harm to consumers resulting from negligence in the manufacture of the product.

8. *See* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.03(4)(i) (1968); Wade, *Supra* note 1, at 8-9.

9. The public also agitated for curbs on the marketing of defective food. *See* Ragier, *The Struggle for Federal Food and Drugs Legislation*, 1 LAW & CONTEMP. PROB. 3 (1933).

10. 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 389-91 (1906); 1 S. WILLISTON, SALES § 195 (rev. ed. 1948); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888). As these sources indicate, breach of warranty was originally similar to deceit. In fact, contract actions were not recognized until 1778. Stuart v. Wilkins, 99 Eng. Rep. 15 (K.B. 1778).

11. Early, express warranties were deemed to be part of the sales contract arising out of the warrantor's consent. Later, the law implied warranties of merchantability and fitness without regard for the warrantor's consent. *See generally* Corman, *Implied Sales Warranty of Fitness for Particular Purpose*, 1958 WIS. L. REV. 219; Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

12. Other problems arising from the contractual history of warranty actions are treated in Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 801 (1966), and Prosser, The *Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1127-34 (1960).

discarded in *Henningsen v. Bloomfield Motors, Inc.*,[13] but the accrual feature remains in several jurisdictions.[14]

Implied warranty was originally applied as a remedy against food and drug manufacturers. The justification for the establishment of this liability without privity has taken several forms. Among the reasons presented are the following: the threat of consumer suits encourages the manufacturer to expend additional effort to insure the quality of his product;[15] judicial recognition of a duty to consumers parallels the increasing recognition of such a duty on the part of manufacturers as evidenced by their growing inclination to stand behind their products;[16] the manufacturer is in the best position to absorb and distribute the cost of injuries resulting from the use of his products;[17] public policy requires that human life and health be given maximum protection; the manufacturer represents his product as nondefective when he places it in the stream of commerce and therefore he should bear the responsibility for resulting injuries;[18] and the imposition of liability directly on the manufacturer eliminates multiplicity of suits.[19] In implementing these policies, courts have created many theories to establish the consumer's right to bring suit.[20] These theories have flourished so that at the present time warranty actions have been successfully litigated against manufacturers of all types of consumer products.[21] In fact, the Uniform Commercial Code, adopted in 49 states,[22] has included implied warranty relief in its Sales Article.[23] In

13. 32 N.J. 358, 161 A.2d 69 (1960).

14. *See* note 56 *infra* and accompanying text.

15. *Contra*, Plant, *Strict Liability of Manufacturers For Injuries Caused By Defects In Products—An Opposing View*, 24 TENN. L. REV. 938, 945 (1957).

16. *See* Bogert & Fink, *Business Practice Regarding Warranties In The Sale Of Goods*, 25 ILL. L. REV. 400 (1930). Note, however, that manufacturers' guarantees usually extend only to the replacement or repair of the defective product and not to resulting injuries.

17. *See* Patterson, *The Apportionment Of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 357-59 (1924). *Contra*, Plant, *supra* note 15, at 945-48.

18. For extensive discussion and case citations, see W. PROSSER, TORTS § 97 (3d ed. 1964). *See also* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

19. *See, e.g.*, Kasler & Cohen v. Slavouski, 1 K.B. 78 (1928) (a series of 5 recoveries with the manufacturer ultimately paying for the loss plus the costs of the litigation).

20. *E.g.*, Grinnell v. Carbide & Carbon Chem. Corp., 282 Mich. 509, 276 N.W. 535 (1937) (agency); Madouros v. Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936) (assignment of warranty); Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928) (third party beneficiary contract). *See generally* Gillam, *Judicial Legislation, Legal Fictions, And Products Liability: The Agency Theory*, 37 ORE. L. REV. 217 (1958). For a list of 29 theories, see Gillam, *Products Liability In A Nutshell*, 37 ORE. L. REV. 119, 153-55 (1958).

21. For compilation, see W. PROSSER, TORTS § 97, at 677-78 (3d ed. 1964).

22. Louisiana is the only state which has not adopted the Code.

23. UNIFORM COMMERCIAL CODE §§ 2-314, -315.

addition, although several states have rejected the Code warranty and its applicable statute of limitations[24] as inappropriate for products liability actions,[25] at least one state has selected the Code relief in an implied warranty suit.[26]

3. *Strict Tort Liability.*—Although negligence and implied warranty have developed almost to the point of liability without fault, it has been suggested by Professor Prosser that courts should discard the fictions and obstacles associated with the implementation of these theories[27] and impose strict liability in tort as a matter of public policy.[28] An analagous approach had been taken earlier in *Escola v. Coca Cola Bottling Co.*[29] Justice Traynor, in a concurring opinion, urged that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market . . . proves to have a defect that causes injury to human beings."[30] In 1962 strict tort liability reached fruition in *Greenman v. Yuba Power Products, Inc.*[31] Now writing for the court, Justice Traynor reiterated his contention that manufacturers should be held strictly liable in tort without resort to the fictions that formed a necessary part of recovery in negligence and warranty.[32] In this case, the court held the manufacturer of a power tool liable to the consumer for injuries resulting from the defective nature of the product. Traynor stated that the innocent consumer who was in no position to protect himself against defective products should not be forced to bear the costs of injuries resulting from the normal use of a manufacturer's product.[33]

The liability imposed in *Greenman* has been adopted by the American Law Institute in the Second Restatement of Torts[34] and by

24. *Id.* § 2-725.

25. *See* note 63 *infra.*

26. *See* notes 64 & 65 *infra* and accompanying text.

27. *See* notes 11 & 12 *supra* and accompanying text.

28. Prosser, *The Assault Upon the Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1134 (1960).

29. 24 Cal. 2d 453, 150 P.2d 436 (1944).

30. *Id.* at 461, 150 P.2d at 440.

31. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

32. *See* notes 11 & 12 *supra* and accompanying text.

33. 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

34. "(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

courts in other jurisdictions.[35] Because strict liability in tort avoids the fictions required to support relief under other theories, and because this theory alleviates many of the proof and privity obstacles which accompany actions in negligence and warranty, it has been acclaimed by Professor Prosser as "the theory of the immediate and distant future."[36]

B. The Statutes

Statutes of limitations are designed to provide specific periods within which causes of action must be brought. The purpose of this delineation of time is the prevention of suits based on stale claims and the provision of a method whereby a party's liability may be terminated.[37] Without such statutes, defendants could be confronted with actions based on events occurring in the distant past and involving witnesses and evidence no longer available for presentation in court. Generally, there are four different periods of limitation that may be applied in products liability litigation. These are the statutes governing actions based on personal injury, property damage, oral contract, and written contract.[38] In addition, there are some jurisdictions that have applied other statutes, including the period provided by the Uniform Commercial Code[39] and statutory periods specifically designed for implied warranty cases.[40]

When a products liability suit is instituted, two distinct statutes of limitations problems arise. First, the appropriate statute must be selected, and then the date on which the statute begins to run must be determined. In resolving these problems, courts have taken several approaches depending on the cause of action stated and the type of injury involved. As a result, the selection of the proper statute has become a confusing and perplexing problem that may be determinative of the entire cause of action.

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relation with the seller." RESTATEMENT (SECOND) OF TORTS § 402A (1965). For a criticism of this section, see Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965).

35. *E.g.*, O.S. Stapely Co. v. Miller, 430 P.2d 701 (Ariz. App. 1967); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967).

36. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 804 (1966).

37. Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968).

38. The relevant statutes are collected in 1 CCH PROD. LIAB. RPTR. ¶¶ 3420, 3440 (1968).

39. *See* note 64 *infra* and accompanying text.

40. *See* note 55 *infra* and accompanying text.

II. THE CURRENT LAW

A. Negligence

In every American jurisdiction, products liability actions brought in negligence are subject to either the personal injury or property damage statute of limitations depending upon the injury involved.[41] In the overwhelming majority of cases, courts have held that the statute begins to run on the date of the injury. For example, in *Howard v. United Fuel Gas Co.*,[42] plaintiffs brought suit seeking to recover for personal injuries and property damage resulting from the explosion of a gas line installed by defendants. The gas line was installed in 1953, and the explosion occurred in 1963. The plaintiffs' suit was filed in 1964 within two years of the date of the explosion. Since the contract statute began to run on the date of sale, the court dismissed as time-barred the plaintiffs' cause of action founded on breach of implied warranty. On the other hand, the court sustained plaintiffs' cause based on negligence. The court reasoned that the appropriate statute of limitations could not begin to run until plaintiffs had a cause of action. Since a cause of action for negligence could not accrue until damages were sustained, plaintiffs' right to sue in negligence was not time-barred.

Nevertheless, in at least one jurisdiction, the courts have held that the statute governing negligence actions begins to run on the date of the sale of the product. Thus, in *Thurston Motor Lines, Inc. v. General Motors Corp.*,[43] plaintiff brought suit alleging that the manufacturer was negligent in failing to warn consumers of the dangerous qualities of its product. The suit was instituted on September 8, 1958. Plaintiff sought to recover for damages caused by a fire in the truck on September 9, 1955. Defendant interposed the three-year statute of limitations, claiming that the period began to run in June, 1955, the date of the sale, rather than in September, 1955, the date of the injury. The court held for the defendant, stating that the period began to run as soon as plaintiff's cause of action accrued. Since plaintiff suffered technical damage on the date of the sale, the court found the action time-barred. The court intimated, however, that in a case where no damage could be found on the date of the sale, the statutory period would not begin until an injury occurred. Thus, when suit is instituted

41. *E.g.*, Rodibaugh v. Caterpillar Tractor Co., 225 Cal. App. 2d 570, 37 Cal. Rptr. 646 (1964); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953).

42. 248 F. Supp. 527 (S.D.W. Va. 1965). *See also* Kitchener v. Williams, 171 Kan. 540, 236 P.2d 64 (1951); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949).

43. 258 N.C. 323, 128 S.E.2d 413 (1962).

in negligence seeking recovery for personal injury or property damage, there is little confusion as to the appropriate statute and the proper date on which the period begins to run.

B. Implied Warranty

The cases yielding the greatest difficulty in the selection and application of statutes of limitations are those involving the assertion of a breach of implied warranty. The courts are generally inconsistent in their treatment of the remedy with the result that the statute of limitations problem is compounded. For example, several states use implied warranty to impose strict liability, liability without privity on manufacturers.[44] Such an application is inconsistent with warranty theory since it allows recovery in an action sounding in contract without the requisite privity ordinarily present in contract actions.[45] On the other hand, other states limit the applicability of the remedy by requiring privity.[46] Between these two extremes are states allowing recovery without privity with respect to certain consumer products[47] and states requiring advertising from which a warranty can be implied.[48] Under any of these approaches, the basis of the problem is the hybrid character of the remedy—that is, the origin in tort and the development in contract. By placing its emphasis on one of the facets of this hybrid nature, the courts have come to two general positions.

By exalting the contract background of the remedy, one group of courts reason that the suit is one for breach of contract. This being the case, the oral contract statute of limitations is selected. The consequences of this approach are that the manufacturer has a definite time, running from the date of sales, during which he is subject to suits based on implied warranty. Once that period has elapsed, he may destroy records and adjust reserves and insurance coverage to reflect the decrease in his potential liability. This approach, however, may work a hardship on the consumer since his cause of action may be time-barred before any injury is sustained. For example, in *Mendel v. Pittsburgh Plate Glass Co.*,[49] a shopper, injured in 1965 by a door

44. The first state to take this step was Mississippi, Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927). Eleven jurisdictions now recognize strict liability in warranty. 1 CCH PROD. LIAB. RPTR. ¶ 4060, at 4026-27 (1968).

45. Mendel v. Pittsburgh Plate Glass Co., 253 N.E.2d 207, 211 (N.Y. 1969).

46. 1 CCH PROD. LIAB. RPTR. ¶ 4060, at 4026-27 (1968).

47. *Id.*

48. *Id.*

49. 25 N.Y.2d 340, 253 N.E.2d 207 (1969).

installed by the defendant in 1958, was held to have no cause of action against the manufacturer for breach of implied warranty because the six year statute of limitations had expired. Under this decision, the consumer could still bring suit in negligence, although she apparently was unable to meet the burden of proof. Thus, with one remedy time-barred before the injury occurred and the other unavailable due to the lack of proof, the consumer bears the cost of the manufacturer's defective product unless recovery can be secured from the department store in which the door was installed. It should be noted that if relief is sought in this manner, the manufacturer may eventually bear the economic loss.[50]

A second group of courts have chosen to look to the nature of the injury when faced with the implied warranty-statute of limitations dilemma,[51] selecting either the personal or property damage statute or one of the contract statutes. Thus, in *Chavez v. Kitsch*,[52] plaintiff instituted suit within four years, but more than three years after the date on which his cause of action accrued. The court held that his suit for personal injuries resulting from a defect in heating equipment manufactured by the defendant was barred by the three-year personal injury statute of limitations. The court concluded that the statute requiring all actions based on personal injury be brought within three years applied regardless of the cause of action stated by the plaintiff. On the other hand, if the suit is essentially an attempt to recover contract damages, economic loss or loss of bargain, then either the oral or written contract statute will be applied. While some jurisdictions have adopted this gist-of-action approach judicially,[53] others have enacted statutes stating that if the gist of the action is the recovery for personal injury or property damage, the relevant statute of limitations will be applied regardless of the cause of action alleged.[54] In addition to the approaches taken by the two major groups of states, a third approach should be mentioned. Several states have statutes of limitations specifically designed to govern implied warranty cases.[55] In these jurisdictions, the choice of statute poses no problem.

50. *See* note 19 *supra*.

51. *E.g.*, Finck v. Albers Super Mkts., Inc., 136 F.2d 191 (6th Cir. 1943) (applying Kentucky law); Tomle v. New York Cent. Ry., 234 F. Supp. 101 (N.D. Ohio 1964); Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962).

52. 70 N.M. 439, 374 P.2d 497 (1962).

53. *E.g.*, Finck v. Albers Super Mkts., Inc., 136 F.2d 191 (6th Cir. 1943); Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962).

54. *E.g.*, IOWA CODE ANN. § 614.1 (Supp. 1970).

55. GA. CODE ANN. § 3-706 (1962); KAN. STAT. ANN. § 60-512 (1964).

Once the court has decided which statute, tort or contract, it will apply, it must then decide when the statutory period began to run. The courts applying the contract statute generally hold that the cause of action accrued, and therefore the statute began to run, on the date of the sale or installation of the product.[56] This approach conforms with contract theory. On the other hand, those courts chosing to apply tort statutes are divided as to the time when the statute begins to run. In *Jackson v. General Motors Corp.*,[57] the Tennessee Supreme Court held that a consumer's cause of action alleging breach of implied warranty was barred by the one-year statute of limitations applicable to personal injury actions. In that case, plaintiff purchased a car manufactured by the defendant in 1963. In 1965 plaintiff's wife was injured when the car's parking brake failed. Suit was instituted in 1966, within one year of the date of injury. The court concluded however, that the statute began to run on the date of sale rather than the date of injury. In reaching this result, the court stated:

> While hardships may arise in particular cases by reason of this ruling, a contrary ruling would be inimical to the repose of society and promote litigation of a character too uncertain and too speculative to be encouraged.[58]

As plaintiff argued on rehearing, this ruling is clearly inequitable, for the plaintiff is deprived of any remedy for his injury. Recognizing the harshness of the decision, the Tennessee Legislature swiftly reacted by passing a statute governing the situation encountered in *Jackson*.[59]

On the other hand, there are cases holding that the tort statute applies and that the period begins to run on the date of the injury.[60] *Rodibaugh v. Caterpillar Tractor Co.*[61] is exemplary of this approach. There, plaintiff purchased a bulldozer manufactured by defendant on August 31, 1957. On February 13, 1961, plaintiff lost an eye as the result of an alleged defect in the product. He instituted suit on February 9, 1962, stating causes of action in breach of warranty and negligence. Defendant pleaded the two year oral contract statute of limitations. In reversing the lower court,[62] the court ruled that the

56. Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207 (1969). *See generally* 3 L. FRUMAN & M. FRIEDMAN, *supra* note 8, § 40.01(2).

57. 441 S.W.2d 482 (Tenn. 1969).

58. *Id.* at 483, *quoting* Albert v. Sherman, 167 Tenn. 133, 139, 67 S.W.2d 140, 142 (1934).

59. The legislature amended the statute so that products liability actions seeking recovery for personal injury would be subject to the personal injury statute and the statute would begin to run on the date of the injury. TENN. CODE ANN. § 28-304 (Supp. 1969).

60. *E.g.*, Howe v. Pioneer Mfg. Co., 262 Cal. App. 2d 330, 68 Cal. Rptr. 617 (1968).

61. 225 Cal. App. 2d 570, 37 Cal. Rptr. 646 (1964).

62. The opinion of the Superior Court of the City and County of San Francisco is unreported.

legislature intended the personal injury statute to govern all suits in which personal injury was the gravamen regardless of the cause of action asserted. The court held that the personal injury statutory period began to run on the date of the injury because prior to that date no suit seeking damages for personal injury could have been sustained.

In addition to the approaches taken by the two major groups of states, there are several interesting and unique approaches worthy of comment. For example, although most jurisdictions have not applied the statute of limitations provided in the Uniform Commercial Code to products liability suits and while some states have specifically rejected the Code's use in this context,[63] Pennsylvania has chosen to adopt the Code's provision. In *Gardiner v. Philadelphia Gas Works*,[64] the Pennsylvania Supreme Court held that the Uniform Commercial Code had effectively repealed the previous law under which the personal injury statute was applied in all personal injury suits regardless of the cause of action. Thus, plaintiff's suit charging breach of implied warranty and seeking damages for personal injuries suffered when a gas main installed by the defendant exploded was not barred by the two-year statute of limitations applicable to personal injury actions when brought within four years of the date of the installation. Although this litigation did not specifically hold that the date of sale or installation was the proper date on which to initiate the statutory period, subsequent actions have indicated that the cause of action accrues and therefore the statute begins to run no later than the date of delivery.[65] Such decisions are consistent with the date adopted by the Code.[66]

A second interesting approach is that taken by Virginia in *Caudill v. Wise Rambler, Inc.*[67] Plaintiff, a passenger in an automobile manufactured by the defendant and purchased on June 2, 1964, was injured in an accident precipitated by the failure of the car's steering mechanism. The accident occurred on January 22, 1967, and the suit was filed on April 15 of that year. The suit, charging a breach of implied warranty, sought relief for personal injury and property damage. As to the personal injury count, the court followed the gist-

63. *E.g.*, Abate v. Barkers of Wallingford, Inc., 27 Conn. Supp. 46 (C.P. New Haven 1967); Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968). *See also* RESTATEMENT (SECOND) OF TORTS § 402A, comment m (1965).

64. 413 Pa. 415, 197 A.2d 612 (1964). *See generally* Rapson, *Products Liability under Parallel Doctrines: Contrasts between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965).

65. Rufo v. Bastian-Blessing Co., 417 Pa. 107, 207 A.2d 823 (1965).

66. UNIFORM COMMERCIAL CODE § 2-725(2).

67. 210 Va. 11, 168 S.E.2d 257 (1969).

of-the-action approach, applying the two-year personal injury statute and ruling that the period began to run only after injury was suffered. As to the property damage count, the court concluded that the contract statute was appropriate and that the limitation period began to run on the date of the sale. Thus, the court distinguished between warranty actions seeking recovery for personal injury and those asking compensation for property damage. This distinction illustrates the court's willingness to extend protection in the area of personal health and welfare, while at the same time narrowly construing the manufacturer's liability for property damage.

A third minority approach distinguishes between causes of action for personal injury brought in negligence and actions for the same injury founded on breach of implied warranty.[68] By drawing this distinction, courts may apply different statutes of limitations depending on the cause of action asserted. In those jurisdictions where the statute requires all actions to recover for personal injury to be brought within a certain period, the distinction based on cause of action seems artificial. On the other hand, the courts may utilize the distinction in such a way as to reach equitable results in the greatest number of cases.

Finally, the case law in New York exemplifies the confused state of the law in the implied warranty-statute of limitations context. In *Blessington v. McCrory Stores Corp.*,[69] the New York Court of Appeals held that the six-year contract statute of limitations was the appropriate period in an action for personal injury based on the breach of an implied warranty. In that case, the parents of a deceased infant brought suit to recover damages suffered by their child when a cowboy suit caught fire. The parents charged the manufacturer with negligence in the production and advertising of the item and alleged breach of the implied warranty of fitness against the retail store. The court ruled that the three-year personal injury statute barred the negligence action against the manufacturer; however, the court sustained the warranty action against the store finding that although personal injury was the gravamen, implied warranty is independent of the personal injury statute. A similar rationale has been followed in subsequent actions.[70] Nevertheless, the Court of Appeals has recognized that strict liability in tort is available to consumers, although there is some disagreement as to the interpretation to be given the court's remarks in *Goldberg v. Kollsman Instrument Corp.*[71] In *Kollsman*, the administratrix of an

68. *E.g.*, Howard v. United Fuel Gas Co., 248 F. Supp. 527 (S.D.W. Va. 1965).
69. 305 N.Y. 140, 111 N.E.2d 421 (1953).
70. *E.g.*, Kakargo v. Grange Silo Co., 11 App. Div. 2d 796, 204 N.Y.S.2d 1010 (1960).
71. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). For different views of the

airline passenger killed in a crash brought suit against the manufacturer of an allegedly faulty altimeter. The court stated that breach of warranty was not only a violation of a contract, but also a tortious wrong suable by a noncontracting party within the contemplation of the manufacturer. The dissent, on the other hand, was careful to distinguish between breach of implied warranty and strict liability in tort.[72]

Following the dictum in *Kollsman*, which cited *Greenman* favorably,[73] a lower court has adopted strict liability in tort and applied the tort statute of limitations. In *Wilsey v. Sam Mulkey Co.*,[74] plaintiff instituted suit in February, 1965, seeking damages for personal injuries sustained in November of 1963 when a hay elevator collapsed. The elevator was manufactured by the defendant and sold prior to May, 1956. The court held that plaintiff's cause of action in negligence was properly brought within three years of the injury; however, the plaintiff was apparently unable to meet the negligence burden of proof. The court found the count charging breach of implied warranty barred by the six-year contract statute of limitations which began to run on the date of sale. Finally, the court allowed recovery based on strict liability in tort, applying the three-year personal injury statute and beginning the period on the date of the injury.

C. *Strict Tort Liability*

Presently, nearly half the states recognize strict liability in tort.[75] Some jurisdictions have based their approach specifically on the *Restatement*,[76] while others have simply followed the reasoning of the *Greenman* decision. In all these states, the personal injury or property damage statute is applied with the period beginning to run on the date of the injury.[77] This cause of action seems to be as simple to handle in terms of the statute of limitations as actions grounded in negligence.[78]

court's dictum regarding strict tort liability, see both opinions in Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 253 N.E.2d 207 (1969).

72. 12 N.Y.2d at 440, 191 N.E.2d at 85, 240 N.Y.S.2d at 597.

73. *Id.* at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.

74. Wilsey v. Sam Mulkey Co., 56 Misc. 2d 480, 289 N.Y.S.2d 307 (Sup. Ct. 1968).

75. Prosser lists 24 states which have adopted strict tort liability either by statute or decision. Prosser, *The Fall Of The Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 795-96 (1966). On the other hand, more recent material suggests that only 20 states have adopted this approach. 1 CCH PROD. LIAB. RPTR. ¶ 4060, at 4026-27 (1968).

76. *E.g.*, Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Bailey v. Montgomery Ward & Co., 6 Ariz. App. 213, 431 P.2d 108 (1967); Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 227 A.2d 418 (1967).

77. *Id.*

78. *See* notes 41-43 *supra* and accompanying text.

Inasmuch as Professor Prosser and the case law both indicate that this remedy is the theory of the future, it could be said that the confusion in the statute of limitations area will cure itself. Yet, a recent decision by the New Jersey Supreme Court indicates that there is need for further investigation.

In *Rosenau v. City of New Brunswick*,[79] the court disassociated itself from the implied warranty language of *Henningsen*[80] by holding that the tort statute of limitations applied to a cause of action seeking recovery for property damage caused by defective water meters. The water meters, installed in 1950, burst in 1964 causing property damage. The plaintiff's case was stated in two counts, the first alleging negligence and the second calling for the imposition of liability without regard to negligence or privity. The court ruled that the six-year statute of limitations applicable to tort injuries to personal property was the appropriate statute and that the statutory period began to run on the date of the injury. The result was that the manufacturer was held liable for a defective product without proof of negligence although the injury occurred fourteen years after installation and 22 years after the date of sale.[81] It seems unreasonable that a manufacturer may be successfully sued ten or twenty years after the sale of an article without the consumer having the burden of proving negligence. While it is true that the mere passage of time affords some protection to the manufacturer in the form of a more difficult burden of proof,[82] there should be some date on which his liability is put to rest.[83]

III. CONCLUSIONS

As indicated above, if the strict liability in tort doctrine is adopted and applied in all jurisdictions, the confusion in selecting and applying statutes of limitations in products liability actions will be largely eliminated. The considerations relevant in terminating the confusion, however, may dictate against this resolution of the problem. For whether the statute of limitations problem is attacked by courts or legislatures, an attempt should be made to balance the need for consumer protection against the need for a reasonable period of manufacturer liability. The reasons for protecting the consumer have

79. 51 N.J. 130, 238 A.2d 169 (1968).
80. *See* note 13 *supra*.
81. 51 N.J. at 144, 238 A.2d at 176.
82. Mendel v. Pittsburgh Plate Glass Co., 253 N.E.2d 207, 213-14 (N.Y. 1969).
83. Rosenau v. City of New Brunswick, 51 N.J. 130, 136-37, 238 A.2d 169, 172 (1968).

been discussed,[84] but the arguments for limiting the liability period of the manufacturer have not been considered. In this regard, two general arguments seem appropriate. First, if the manufacturer is exposed to suits asserting liability for products sold many years in the past, he is forced to maintain a close watch over his records dealing with these items. While negligence is not a part of the plaintiff's cause of action, the plaintiff must prove that the defective article has not undergone substantial change since it left the manufacturer's control. Thus, although production records would be of little importance, service and maintenance records may be crucial in a products liability case. This argument is weakened by the fact that the plaintiff's case becomes more difficult to prove with the passage of time.[85]

Secondly, by extending the manufacturer's liability indefinitely, the courts compel the manufacturer to maintain reserves or secure insurance sufficient to meet possible judgments. Again, the passage of time tends to decrease the probability of successful litigation; however, it seems unreasonable to expose the manufacturer to the possibility of liability for an indefinite period. Finally, it is not essential to the adequate protection of the consumer to hold the manufacturer open to suits indefinitely. A specified and limited period approximating the period provided for actions on written contracts would afford almost the same protection to consumers while restricting the length of manufacturers' vulnerability to suit. In any event, until strict liability is adopted, severe problems remain in those states applying implied warranty theory.[86]

There are at least three possible solutions to the implied warranty-statute of limitations problem. Courts could adopt the gist-of-action approach. Such an approach is consistent with a literal reading of most of the statutes of limitations.[87] This device also provides the predictability of result needed by manufacturer and consumer alike. On the other hand, this approach could produce the type of indefinite liability which concerned the dissent in *Mendel*.[88] A second possible solution is the adoption of the Uniform Commercial Code limitation. As the court in *Gardiner* indicated, section 10-103 of the Code repeals

84. *See* notes 15-20 *supra* and accompanying text.

85. Mendel v. Pittsburgh Plate Glass Co., 253 N.E.2d 207, 213-14 (N.Y. 1969).

86. *See* notes 44-55 *supra* and accompanying text.

87. Present statutes generally require all suits to recover damages for injury to person or property be brought within a specified time.

88. 253 N.E.2d 207, 210 (N.Y. 1969).

all existing statutes inconsistent with the Code.[89] If this section is given a broad interpretation, the warranty sections of the Code and their relevant statute of limitations may be utilized. This approach would also produce predictability of result, while providing protection for both consumer and manufacturer. It would, however, be contrary to the *Restatement* and the existing case law. Although, a liberal interpretation of the warranty provisions might mitigate the problems, the sales requirement of the Code could cause some problems. Finally, since the likelihood of judicial resolution of the confused state of the law is slight and since some courts have indicated the need for statutory authority in the area,[90] legislation should be considered. Several states have enacted special statutes to ease the confusion in the medical malpractice-statute of limitations area.[91] Other states have provided special statutes stating the appropriate statute of limitations for implied warranty cases.[92] Thus, the idea of special legislation is not novel. Furthermore, these examples indicate that the legislatures are aware of the statute of limitations problems and are willing to act to alleviate the confusion. If legislation is to be employed, however, it must be designed to yield equitable decisions, while providing predictability of result and simplicity of application.

The Connecticut personal injury statute of limitations may serve as a pattern which can be adapted to products liability areas. This statute provides for suits based on personal injury to be brought within one year of the date of the injury, but no later than three years after the act which caused the injury.[93] A similar statute adapted to products liability and altered as to the time periods[94] might read as follows:

> No action to recover damages for injury to the person or to real or personal property caused by the use or consumption of a defective product shall be brought except within one year of the date when the injury is sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than five years from the date of the sale or installation of the product by the party sought to be held.

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89. 413 Pa. 415, 418, 197 A.2d 612, 613 (1964).

90. The need for legislative action was observed by the court in Holifield v. Setco Indus. Inc., 42 Wis. 2d 750, 758, 168 N.W.2d 177, 181 (1969). In addition, the Tennessee Legislature acted swiftly to correct the inequities of *Jackson*. *See* note 59 *supra*.

91. ALA. CODE ANN. tit. 7, § 25(1) (Supp. 1967); CONN. GEN. STAT. ANN. § 52-584 (1968); NEB. REV. STAT. § 25-208 (1964); N.Y. CIV. PRAC. § 214 (McKinney 1963); N.D. CENT. CODE § 28-01-18 (Supp. 1969); OHIO REV. CODE ANN. § 2305.11 (Baldwin, 1964); ORE REV. STAT. § 12.110 (1967); S.D. CODE § 15-2-15 (Supp. 1967).

92. *See* note 55 *supra*.

93. CONN. GEN. STAT. ANN. § 52-584 (1968).

94. The times in the suggested statute are changed to reflect the current statutes of limitation on contract and tort. *See* 1 CCH PROD. LIAB. RPTR. ¶ ¶ 3420, 3440 (1968).

This statute attempts to attain a balance between the necessity of providing the consumer with adequate time within which to discover a defect and institute an action and the need to provide the manufacturer with a definite period of liability and a date at which his susceptibility to suit terminates. The enactment of such a statute would resolve the confusion in the area and furnish consumers, manufacturers, and the legal profession with a predictable, workable, and understandable standard on which to base the selection and application of statutes of limitations in products liability actions.

In summary, the law of products liability is currently in a confused state due to the problem of selecting and applying the appropriate statute of limitations. The problem is traceable to the historical development and judicial evolution of the products liability remedy. Manufacturers, consumers and courts will be compelled to make choices and decisions based on confusion rather than an orderly, predictable, and equitable standard until strict liability in tort is adopted, the Uniform Commercial Code is accepted as appropriate, or statutes are enacted specifying the proper limitation.

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