Fordham Law Review

Volume 24 | Issue 2 Article 4

1955

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Recommended Citation

Robert Martin Davis, *A Re-examination of the Doctrine of MacPherson v. Buick and Its Application and Extension in the State of New York*, 24 Fordham L. Rev. 204 (1955).
Available at: https://ir.lawnet.fordham.edu/flr/vol24/iss2/4

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A RE-EXAMINATION OF THE DOCTRINE OF MacPHERSON v. BUICK AND ITS APPLICATION AND EXTENSION IN THE STATE OF NEW YORK

*ROBERT MARTIN DAVIS**

I. INTRODUCTION

JUDICIAL recognition of the need for imposing liability on the source of fault for personal injury caused by negligently manufactured articles, despite absence of privity of contract between injured person and manufacturer, predated *MacPherson v. Buick*.[1] Manufacturers' liability to subvendees and others having no privity of contract with the original producer of a defective article was familiar doctrine to the New York Court of Appeals before Judge Cardozo's opinion in 1916. *Thomas v. Winchester*,[2] 1852, is the foundation case for this branch of liability in New York. Extract of belladonna, a deadly poison, was incorrectly labeled extract of dandelion, a harmless medicine, by its manufacturer who sold it to a druggist who in turn sold it to his customer. The customer recovered from the manufacturer for injuries suffered through the mislabeling of the poison. In *Devlin v. Smith*,[3] 1882, the court ruled that the builder of a defective scaffold was answerable in damages for the death of a workman who used the scaffold and who was employed by the person for whom the scaffold was constructed, despite the absence of privity of contract between the workman and the builder of the scaffold. ". . . [L]iability to third parties has been held to exist when the defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use."[4] The Court of Appeals in *Torgesen v. Schultz*,[5] 1908, held that the plaintiff proved a prima facie case when she gave testimony that she sustained personal injuries as the result of the explosion, due to inadequate testing by the defendant, of a siphon bottle of aerated water filled and marketed by the defendant and sold through a retailer. The plaintiff was a servant of the retail purchaser of

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1. 217 N.Y. 382, 111 N.E. 1050 (1916). The conclusions formulated in this article are based upon an examination of all the reported cases dealing with the subject under discussion.

2. 6 N.Y. 397 (1852).

3. 89 N.Y. 470 (1882).

4. Id. at 477.

5. 192 N.Y. 156, 84 N.E. 956 (1908).

the bottle. In *Statler v. Ray Mfg. Co.*,[6] 1909, the defendant was a manufacturer of coffee urns. The plaintiff was an officer of a company that purchased one of the defendant's urns from a jobber. The urn, alleged to have been defective, exploded, injuring the plaintiff. In that case the court stated:

". . . [T]his branch of the case [involves] simply the question whether a manufacturer and vendor of such an inherently dangerous appliance as this was may be made liable to a third party on the theory invoked by plaintiff, and we think that this question must be regarded as settled in the latter's favor. . . ."

". . . [A] manufacturer may become liable [to third persons] for a negligent construction which, when added to the inherent character of the appliance, makes it imminently dangerous, and causes or contributes to a resulting injury not necessarily incident to the use of such an article if properly constructed, but naturally following from a defective construction."[7]

MacPherson v. Buick proclaimed a doctrine with a basis already well established. It followed a path already traveled. Professor Bohlen evaluates the effect of *MacPherson v. Buick*. The decision, the professor writes, ". . . has had a pronounced effect in stimulating the already existing tendency to extend the previously recognized exceptions to the manufacturer's immunity which imposed liability for negligence in the manufacture of 'imminently dangerous' articles. . . ."[8]

But the courts have too frequently been inaccurate in their comprehension of the broad meaning of the doctrine of *MacPherson v. Buick*. While acknowledgment must be given to the principle that, "No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association,"[9] the principles formulated in Judge Cardozo's opinion have a wider scope than has been recognized in many subsequent decisions. And these decisions have been further in error by interpreting the doctrine as applying only in situations that were not even acknowledged, as a matter of judicial finding, to be present in *MacPherson v. Buick* itself.

This article deals with the fate of the doctrine of *MacPherson v. Buick* in the period of almost four decades since its formulation. Judicial handling of the doctrine is discussed within the framework of examination of the application and extension of the doctrine by the courts of New York State and by the federal courts when they apply the doctrine

6. 195 N.Y. 478, 88 N.E. 1063 (1909).

7. Id. at 481-482, 88 N.E. at 1064-1065.

8. Bohlen, Liability of Manufacturers to Persons other than Their Immediate Vendees, 45 L.Q. Rev. 343, 361 (1929); cf. Seavey, Mr. Justice Cardozo and the Law of Torts, 52 Harv. L. Rev. 372, 376-379 (1939).

9. Dougherty v. The Equitable Assurance Society of the United States, 266 N.Y. 71, 88, 193 N.E. 897, 902 (1934).

to causes of action arising within New York State. Cases dealing with the application of the doctrine will receive first attention. Extension of the doctrine will be manifest in a review of rulings on these questions that still remained open after the decision in *MacPherson v. Buick:* (1) liability of manufacturers for damage to property;[10] (2) liability of manufacturers of defective component parts of articles produced in completed form by other manufacturers; (3) liability of manufacturers to all persons whom they should recognize as likely to be in such close proximity to articles when they are used as to create a probability that they will be injured if the articles are defective; (4) liability of the suppliers of articles as distinguished from their manufacturers. *MacPherson v. Buick* and its precedents dealt solely with injury to person; the question of the liability of manufacturers of component parts was specifically left open in *MacPherson v. Buick;*[11] the plaintiffs in these early cases were subvendees of the manufacturer-defendants or were using the articles involved by some right derived from the subvendees; and only recently was the position of suppliers as distinguished from manufacturers clarified with respect to the application of the doctrine of *MacPherson v. Buick.*

II. The Doctrine of *MacPherson v. Buick*

The facts of *MacPherson v. Buick:* The defendant-manufacturer sold an automobile to a retail dealer. The retail dealer resold it to the plaintiff. While the plaintiff was in the automobile, it suddenly collapsed. The plaintiff was thrown out of the vehicle, and suffered personal injuries. One of the wheels of the automobile was made of defective wood, and its spokes crumbled. Although the wheel was not manufactured by the defendant, there was evidence that its defects could have been discovered by reasonable inspection and that such inspection was omitted. The plaintiff did not claim that the defendant willfully concealed the defect. The charge was strictly one of negligence, not fraud or breach of warranty. The Court of Appeals affirmed a judgment for the plaintiff.[12] The rule defined and applied by Judge Cardozo, writing for the majority of the court, is not a single statement of doctrine or policy; more analytically, it is a set of tests which demands satisfaction before liability may be imposed. These are the criteria for determining such liability:

1. "If the nature of a thing is such that it is reasonably certain to place life

10. Bohlen, op. cit. supra note 8, at 363.

11. 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916).

12. The court voted 5 to 1; Bartlett, Ch. J., dissenting; Pound, J., not voting. Cf. Johnson v. Cadillac Motor Car Co., 261 Fed. 878 (2d Cir. 1919) to same effect as MacPherson v. Buick.

and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected."[13]

2. "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."[14]

3. "Because the danger is to be foreseen, there is a duty to avoid the injury."[15]

4. "The finality of the test has a bearing on the measure of diligence owing to persons other than the purchaser. . . ."[16]

5. "There must be knowledge of a danger, not merely possible, but probable."[17]

6. "There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer."[18]

7. "But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered."[19]

8. "If danger . . . [is] to be expected as reasonably certain, there . . . [is] a duty of vigilance, and this whether you call the danger inherent or imminent."[20]

9. "The obligation to inspect must vary with the nature of the thing to be inspected. The more probability of danger, the greater the need of caution."[21]

The ruling of the Court of Appeals in *MacPherson v. Buick* imposed liability upon the manufacturer of an article which was inherently or imminently dangerous because it was negligently constructed. Many courts, as indicated in the analysis that follows, have misinterpreted this ruling by stating it as one imposing liability upon manufacturers of inherently or imminently dangerous articles when such articles are negligently constructed. The similarity of the phraseology, as distinguished from the meaning, of these two statements is the source of most of the frequent, judicial misunderstanding of the import of the doctrine. And the fact that *MacPherson v. Buick* involved an automobile has reinforced this failure to comprehend the essential element of Judge Cardozo's opinion—that liability should be imposed when manufacturers' negligence *causes* articles to be inherently or imminently dangerous. This is a very different rule of liability from that erroneously drawn from *MacPherson v. Buick* by many courts—that liability should be imposed when articles, which are inherently or imminently dangerous when properly constructed, are caused to be defective by reason of the manufacturers' negligence.

13. 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).
14. Ibid.
15. Id. at 385, 111 N.E. at 1051.
16. Id. at 386, 111 N.E. at 1052.
17. Id. at 389, 111 N.E. at 1053.
18. Ibid.
19. Id. at 390, 111 N.E. at 1053.
20. Id. at 394, 111 N.E. at 1055.
21. Id. at 395, 111 N.E. at 1055.

The importance of this distinction is brought out in high relief when this language of Judge Cardozo's opinion is considered.

". . . It is true that the court told the jury that 'an automobile is not an inherently dangerous vehicle.' The meaning, however, is made plain by the context. The meaning is that danger is not to be expected when the vehicle is well constructed. The court left it to the jury to say whether the defendant ought to have foreseen that the car, if negligently constructed, would become 'imminently dangerous.' Subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous, but the case does not turn upon these verbal niceties. If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent. In varying forms that thought was put before the jury. We do not say that the court would not have been justified in ruling as a matter of law that the car was a dangerous thing. If there was any error, it was none of which the defendant can complain."[22]

Chief Judge Bartlett's dissenting opinion in *MacPherson v. Buick* provides strong emphasis for the position that the doctrine of the majority opinion is not restricted to articles which are inherently or imminently dangerous when properly manufactured.

"The theory upon which the case was submitted to the jury . . . was that, although an automobile is not an inherently dangerous vehicle, it may become such if equipped with a weak wheel; and that if the motor car in question, when it was put upon the market was in itself inherently dangerous by reason of its being equipped with a weak wheel, the defendant was chargeable with a knowledge of the defect so far as it might be discovered by a reasonable inspection and the application of reasonable tests. This liability, it was further held, was not limited to the original vendee, but extended to a subvendee like the plaintiff, who was not a party to the original contract of sale.

"I think that these rulings . . . extend the liability of the vendor of a manufactured article further than any case which has yet received the sanction of this court. . . . The exceptions to . . . [the] general rule [denying liability without privity of contract] which have thus far been recognized in New York are cases in which the article sold was of such a character that danger to life or limb was involved in the ordinary use thereof; in other words, where the article sold was inherently dangerous."[23]

In his opinion Judge Cardozo reviews the earlier New York decisions on the subject of manufacturers' liability in the absence of privity of contract. This review is impressive in its display of the broad background of case law for such liability and, more importantly, in its clear statement that the criterion for such liability is not the inherently dangerous character of articles when properly constructed, but, rather, the inherently dangerous character of articles when negligently constructed.

"It may be that *Devlin v. Smith* and *Statler v. Ray Mfg. Co.* have extended the rule of *Thomas v. Winchester*. If so, this court is committed to the extension. The

22. Id. at 394, 111 N.E. at 1054-1055.

23. Id. at 396, 111 N.E. at 1055.

defendant argues that things imminently dangerous to life are poisons, explosives, deadly weapons—things whose normal function is to injure or destroy. But whatever the rule in *Thomas v. Winchester* may once have been, it has no longer that restricted meaning. A scaffold (*Devlin v. Smith, supra*) is not inherently a destructive instrument. It becomes destructive only if imperfectly constructed. A large coffee urn (*Statler v. Ray Mfg. Co., supra*) may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction. What is true of the coffee urn is equally true of bottles of aerated water (*Torgeson v. Schultz,* 192 N.Y. 156). We have mentioned only cases in this court. But the rule has received a like extension in our courts of intermediate appeal. . . .

"*Devlin v. Smith* was decided in 1882. A year later a very similar case came before the Court of Appeal in England (*Heaven v. Pender,* L.R. [11 Q.B.D.] 503). We find in the opinion of Brett, M. R., afterwards Lord Esher (p. 510), the same conception of a duty, irrespective of contract, imposed upon the manufacturer by the law itself: 'Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing.' . . . The right to enforce this liability is not to be confined to the immediate buyer. . . . [H]e would exclude a case . . . where the goods are of such a nature that 'a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property.' . . . His opinion has been criticized 'as requiring every man to take affirmative precautions to protect his neighbors as well as to refrain from injuring them' (Bohlen, Affirmative Obligations in the Law of Torts, 44 Am. Law Reg. [N.S.] 341). It may not be an accurate exposition of the law of England. Perhaps it may need some qualification even in our own state. Like most attempts at comprehensive definition, it may involve errors of inclusion and of exclusion. But its tests and standards, at least in their underlying principles, with whatever qualification may be called for as they are applied to varying conditions, are the tests and standards of our law."[24]

A second frequent error, often found in conjunction with the misunderstanding discussed above, is that, when plaintiffs have failed to make out prima facie cases of negligence in the manufacture of the particular articles in question, the courts, instead of dismissing the complaints for failure of proof of negligence, often go beyond the requirements of the situation presented to them, and rule that the doctrine of *MacPherson v. Buick* is not applicable to the articles involved. They confuse failure of proof of the first element of a prima facie case required to bring the doctrine of *MacPherson v. Buick* into play—negligence in the manufacture of the articles in question—with failure of proof of the second element—that the articles, if negligently manufactured, are inherently or imminently dangerous. The result of such

24. Id. at 387-389, 111 N.E. at 1052-1053.

decisions has been that certain articles have been held not to be things of danger under the doctrine of *MacPherson v. Buick* merely because plaintiffs have failed to prove that manufacturers were negligent in constructing the articles. Failure of proof of negligence in the construction of an automobile with an allegedly defective wheel in *MacPherson v. Buick* would not have meant that a negligently constructed automobile is not a thing of danger. It would have meant merely that the plaintiff failed to prove negligent manufacture, the first requirement that must be satisfied before liability without privity of contract can be fastened upon the manufacturer of the article.

A third frequent failing of the courts is omission to remember that Judge Cardozo said, "Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury."[25] Complaints are often dismissed on motion for failure to state a cause of action before trial on the ground that *MacPherson v. Buick* is not applicable to the articles in question, the courts implying that the question as to the applicability of the doctrine is always one of law and never a question of fact. And, with discouraging frequency, such ruling is supported on the premise, false because it is a foregone conclusion arrived at erroneously and unnecessarily, that *MacPherson v. Buick* does not apply because the articles involved are not inherently or imminently dangerous in and of themselves, regardless of defective construction.

III. Application of the Doctrine of *MacPherson v. Buick*

Field v. Empire Case Goods Co.[26] came before the Appellate Division, Second Department, a year after *MacPherson v. Buick*. Two justices dissented from the majority opinion which was faulty in two respects. The complaint alleged that the plaintiff in August, 1915, purchased from a retailer a bed manufactured by the defendant; that in July, 1916, the plaintiff, about to be delivered of a child, was lying on the bed when it collapsed; and that the collapse of the bed was due to negligent manufacture. The Appellate Division granted the defendant's motion for judgment on the pleadings, reversing the trial court. The court's failure to grasp the full import of the doctrine of *MacPherson v. Buick* is revealed by this language, which followed discussion of the doctrine:

> "It is clear, therefore, that an action cannot be maintained upon the facts alleged in the complaint, which do not remove the case from the general rule that an action for negligence cannot be maintained by a third person against the manufacturer of an article *not in and of itself imminently and inherently dangerous.*"[27]

25. Id. at 389, 111 N.E. at 1053.

26. 179 App. Div. 253, 166 N.Y. Supp. 509 (2d Dep't 1917); followed in Greenberg v. Advance Furniture Co., 201 App. Div. 848, 193 N.Y. Supp. 935 (1st Dep't 1922).

27. 179 App. Div. 253, 257, 166 N.Y. Supp. 509, 512 (2d Dep't 1917). (Emphasis added.)

Then the court, impressed by the obvious fact that the plaintiff would find difficulty in proving that the collapse of the bed, one year after she purchased it, was due to faulty manufacture, prejudged the issues of fact before a trial by saying:

"An ordinary wooden bed is such a common article and in such universal use, its manner of construction and method of use having remained the same for generations, that we may take judicial notice of its contruction . . . and of the fact that the strips of wood on the inner sides of side pieces which form a support for slats laid crosswise but a short distance from the floor, *sometimes give way.* The drop to the floor, however, is so slight, and the body of the occupant usually so well surrounded by protecting bedding, that bodily injuries cannot be reasonably expected to result therefrom. Such a bed is not inherently or imminently dangerous to life or limb, and it is shown in the case at bar by the fact that *this bed had been in use for nearly a year preceding the accident, without indication of weakness or defective construction.*"[28]

This plaintiff was foreclosed in two respects: firstly, by the fact that, although the court recognized that beds "sometimes give way," the plaintiff was prevented from attempting to prove that her bed gave way because of the defendant's negligence, and, secondly, by a misinterpretation of the doctrine of *MacPherson v. Buick.* The court confused *difficulty* of proof of negligence after one year's use of the bed with the fact that a negligently constructed bed probably *can* cause injury. Then the court made this flat ruling, which has been cited repeatedly as precedent:

"An ordinary bed is not an article that is reasonably certain to place life and limb in peril when negligently constructed, or which of itself, in the use to which it is intended to be put, gives any warning of dangerous consequences attending its use and the manufacturer is not charged with knowledge of danger in its contemplated use, 'not merely possible, but probable.' "[29]

This ruling, excluding an ordinary bed from the category of articles encompassed by the doctrine of *MacPherson v. Buick,* could be cited as precedent for denying recovery to a plaintiff who gave evidence that he suffered a fractured skull when his bed collapsed causing the headboard to strike his head while he was in the bed; that the collapse was due to rotted wood and the absence of proper fastening devices; that the bed was delivered by the manufacturer to the retailer and purchased by the plaintiff on the same day that the accident occurred; and that the bed collapsed the first time it was used. The broad rule of exclusion in the

28. Ibid. (Emphasis added.)

29. Ibid. Note the difference between the phraseology employed to express the criterion for imposition of liability here—"an article that is reasonably certain to place life and limb in peril when negligently constructed"—with that cited at note 27—"an action for negligence cannot be maintained by a third person against the manufacturer of an article not in and of itself imminently and inherently dangerous."

Field case was not required from an accurate, jurisprudential standpoint because the court could have reached the conclusion it sought by holding that an ordinary bed with the *particular* defect alleged in that case is not a thing of danger. Such ruling, questionable as it would have been, would not have stood as an obstacle for future plaintiffs complaining of other beds with other defects.[30]

The *Field* case was called forth as precedent to support a further misinterpretation of the doctrine of *MacPherson v. Buick* in *Jaroniec v. Haselbarth, Inc.*[31] There the plaintiff alleged that she sustained lacerations and infection when she used a mattress from which protruded sharp metal points such as are used on the carding machines which pick the filling for a mattress. She alleged that the mattress was manufactured by the defendant and purchased by her from a retailer. The Appellate Division, Third Department, granted the defendant's motion to dismiss the complaint for failure to state a cause of action, reversing the trial court. This flagrant misstatement of the meaning of *MacPherson v. Buick* was a basis for the ruling:

"In the *MacPherson Case* . . . it was held that an automobile is a thing not inherently dangerous as is an explosive, but one which is imminently dangerous when put to the uses intended. . . . [T]he holding in that case would not have been made if the thing referred to had been a horse-drawn wagon, although a horse-drawn wagon might, if negligently made, cause serious injury. . . . The Court of Appeals has uniformly sought . . . to safeguard the principle that the manufacturer is not liable to third persons irrespective of privity of contract 'where the article is not in and of itself imminently dangerous, and where the entire danger results because of some latent defect.' (*Kuelling v. Roderick Lean Mfg. Co.* . . . [88 App. Div. 309, 318, 84 N.Y.S. 622, 628.])"[32]

Then the court clearly announced its irrelevant holding that, "A mattress

30. An approach similar to that in the Field case was followed in Byers v. Flushovalve Co., — Misc. —, 160 N.Y. Supp. 1050 (Sup. Ct. 1916), aff'd without opinion, 178 App. Div. 894, 164 N.Y. Supp. 1088 (1st Dep't 1917). Plaintiff, mechanic, received injury to his hand through breaking of knob at the end of the handle of valve used to flush toilet. Complaint in negligence against manufacturer dismissed on demurrer, the court holding as a matter of law that article in question was not a thing of danger.

31. 223 App. Div. 182, 228 N.Y. Supp. 302 (3d Dep't 1928).

32. Id. at 184, 228 N.Y. Supp. at 304-305. It should be noted that, although the court writing here in 1928 refers to the Court of Appeals, the quotation from the Kuelling case is from an opinion of the Appellate Division, Fourth Department in 1903, thirteen years before MacPherson v. Buick. When the Kuelling case reached the Court of Appeals that court ruled, for reasons not relevant to this discussion, that the law of negligence was no longer involved in the case and that, "We express no opinion as the liability of the manufacturer or seller of a machine or vehicle to third parties in case of negligence, in the absence of fraud or deceit, whether the machine or vehicle be in its original state imminently dangerous to human life or made so by the subsequent act of the manufacturer or seller." 183 N.Y. 78, 83, 75 N.E. 1098, 1100 (1905).

is in no sense a thing inherently or imminently dangerous."[33] The crucial point of the doctrine of *MacPherson v. Buick*, that a test of liability is whether the *defective* mattress is a thing inherently or imminently dangerous, was lost and then, finally, masked beyond recognition by the statement that, "Unless it contains something foreign to its use or to its nature, its use threatens no danger to any one."[34]

Two justices dissented in part, and voted for reversal but with leave to the plaintiff to plead over. They found rectifiable defects in the complaint requiring reversal, but these defects are not relevant to this discussion. With respect to the possibility of alleging a cause of action, the dissenting opinion stated the proposition of law correctly.

"I disagree with the conclusion implied by a dismissal of the complaint, that no cause of action can be stated. There was a duty on the part of the defendant to use care in the manufacture of an article which in its nature might be reasonably certain to put the user in peril of injury when negligently made [citing *MacPherson v. Buick*]."[35]

There is no distinction from the standpoint of legal liability between an injury sustained by placing the body upon an object from which a sharp point unnoticeably protrudes (the mattress in the *Jaroniec* case) and an injury sustained by placing such object upon the body. But liability was imposed upon the manufacturer in the latter situation by the City Court of the City of New York in *LaFrumento v. Kotex Company*.[36] There the plaintiff alleged that she purchased from a retailer a Kotex pad manufactured by the defendant and that in using the pad she was injured by a large manifold pin concealed in it. The court denied the defendant's motion to dismiss the complaint for failure to state a cause of action. Although the result is correct, the opinion is an aberration of the doctrine of *MacPherson v. Buick* which was cited as precedent.

The court said that the *Field* case (bed) is not applicable because it did not deal with an inherently and imminently dangerous article. The court made no reference to the *Jaroniec* case (mattress). Then, ignoring the fact that the alleged thing of danger was a defective Kotex pad and not the manifold pin which was the defect in the alleged thing of danger, the court found that, "The manifold pin so placed, in an article to be used on the human body, could in all probability cause injury, and was, therefore, inherently and imminently dangerous. So that there is a clear distinction between the *Field* case and the case at bar."[37]

33. 223 App. Div. 182, 185, 228 N.Y. Supp. 302, 305 (3d Dep't 1928).
34. Ibid.
35. Id. at 186, 228 N.Y. Supp. at 306.
36. 131 Misc. 314, 226 N.Y. Supp. 750 (N.Y. City Ct. 1928).
37. Id. at 315, 226 N.Y. Supp. at 750-751.

Three times complaints in negligence in reported cases have been dismissed for failure to state a cause of action where the plaintiffs alleged that they purchased from retailers women's high-heeled shoes manufactured by the defendants and they were injured when heels of the shoes broke.[38] In each of the three opinions failure to comprehend the basis of the doctrine of *MacPherson v. Buick* is revealed by the statement that the heel of a shoe is not an article that is reasonably certain to place life and limb in peril when negligently constructed. The courts in these opinions failed to realize that they were concerned with the question as to whether the *shoe* alleged to be negligently constructed was a thing of danger, and were not concerned with the *heel* of the shoe as a thing of danger. The ruling in *MacPherson v. Buick* dealt with the negligently constructed automobile, the *entire* product of the defendant-manufacturer, as a thing of danger, and not merely with the wheel alone, the defective component *part*.

In two of these cases involving women's high-heeled shoes the plaintiffs fell down a flight of stairs at the time the heels of their shoes broke.[39] The fact that these plaintiffs would find difficulty in proving that negligent construction of their shoes rather than the fall downstairs itself was the cause of the breaking of the heels of their shoes probably, and improperly, led the courts to their ready dismissal of the complaints as a matter of law. If a customer tries on a high-heeled shoe in a retail store, falls, and sustains injuries because the heel of the shoe breaks immediately upon her taking her first step in the shoe, and it is shown that the shoe had never before been removed from its original package as delivered by the manufacturer and that the heel broke due to defective materials and construction, could it then reasonably be argued that a defective, high-heeled shoe is not reasonably certain to place life and limb in peril and, therefore, is not a thing of danger? Danger there is probable, not merely possible.

If an ordinary bed, a mattress, a heel of a shoe or a high-heeled shoe are not things of danger when negligently made, then a defective woman's dress should certainly be excluded from that category. But the Appellate Division, First Department, and the Court of Appeals by its affirm-

38. Cook v. A. Garside & Sons, Inc., 145 Misc. 577, 259 N.Y. Supp. 947 (Sup. Ct. 1932); Sherwood v. Lax & Abowitz, 145 Misc. 578, 259 N.Y. Supp. 948 (Sup. Ct. 1932), aff'd without opinion, 238 App. Div. 799, 262 N.Y. Supp. 909 (2d Dep't 1933); Timpson v. Marshall, Meadows & Stewart, 198 Misc. 1034, 101 N.Y.S. 2d 583 (Sup. Ct. 1950); cf. 7 Univ. of Cin. L. Rev. 95 (1933).

39. Sherwood v. Lax & Abowitz and Timpson v. Marshall, Meadows & Stewart, supra note 38; allegations of complaint are not set forth in opinion in Cook v. A. Garside & Sons, Inc., supra note 38.

ance without opinion in *Noone v. Fred Perlberg, Inc.*[40] did not so conclude. In that case a manufacturer was held liable for personal injuries suffered by the wearer of a dress, while attending a New Year's Eve party, when nitro-cellulose glazing used on the netted skirt of the dress burst into a sudden blaze.

"Underlying the manufacturer's liability is the danger reasonably to be foreseen from the intended use of the article. . . . Clothing is worn to cover, adorn and protect the human body.

". . . The manufacturer knew or should have known that such an evening gown would be worn to dinners and cocktail parties where large numbers of persons gather and many indulge in smoking."[41]

Contrast this holding with the dictum in the *Jaroniec* case where the court, speaking of the inapplicability of the doctrine of *MacPherson v. Buick*, said, "In itself it [a mattress] is as free from any possible danger as a suit of clothes, although that might contain a piece of a broken needle which would pierce the skin and make a port of entry for infection."[42] But the corrective influence of the decisions in the *Noone* case in 1944 and 1945 was not felt in one of the high-heeled shoe cases that was decided subsequently in 1950,[43] nor in the recent Court of Appeals opinion in *Campo v. Scofield.*[44] There the Court of Appeals used language that requires a finding that an article must be dangerous in and of itself, aside from defective construction, before the doctrine of *MacPherson v. Buick* may be applied.

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40. 268 App. Div. 149, 49 N.Y.S. 2d 460 (1st Dep't 1944), aff'd without opinion, 294 N.Y. 680, 60 N.E. 2d 839 (1945); cf. 19 St. John's L. Rev. 63 (1944).

41. 268 App. Div. 149, 153, 49 N.Y.S. 2d 460, 463 (1st Dep't 1944).

42. 223 App. Div. 182, 185, 228 N.Y. Supp. 302, 306 (3d Dep't 1928).

43. Timpson v. Marshall, Meadows & Stewart, 198 Misc. 1034, 101 N.Y.S. 2d 583 (Sup. Ct. 1950).

44. 301 N.Y. 468, 95 N.E. 2d 802 (1950). Plaintiff was feeding onions into onion topping machine on son's farm when his hands became caught in revolving steel rollers, requiring subsequent amputation. He brought suit against manufacturer of machine, alleging negligence in failure to equip machine with a guard or stopping device. Complaint dismissed for failure to state cause of action with leave to plaintiff to serve an amended complaint. Cf. O'Connell v. Westinghouse X-Ray Co., 261 App. Div. 8, 24 N.Y.S. 2d 268 (2d Dep't 1940), rev'd without opinion, 288 N.Y. 486, 41 N.E. 2d 177 (1942). Plaintiff, surgeon, sustained injuries when he exposed hands to beam of X-ray machine manufactured by defendant. He claimed negligent manufacture in failure to supply machine with guards and failure to give proper instruction in use of machine. Appellate Division reversed judgment for plaintiff on law and facts, and dismissed complaint, ruling that plaintiff was guilty of contributory negligence. Court of Appeals reversed, and granted a new trial. Cf. Hyatt v. Hyster Co., 106 F. Supp. 676 (S.D. N.Y. 1952). Plaintiff sustained personal injuries as result of overturning of crane manufactured by defendant and supplied by plaintiff's employer. Plaintiff recovered in negligence action based upon improper design of crane.

"The cases establish that the manufacturer of a machine or any other article, dangerous because of the way in which it functions, and patently so, owes to those who use it a duty merely to make it free from latent defects and concealed dangers."[45]

But the language of Judge Cardozo's opinion did not rest the liability of the negligent manufacturer upon the narrow basis that danger must exist first in the use of the article without a defect; nor, as indicated above, did Judge Cardozo view the predecessors of *MacPherson v. Buick* as imposing this requirement as a predicate to liability. Certainly, in view of Judge Cardozo's statement that the trial court's instruction to the jury that an automobile is not an inherently dangerous vehicle meant ". . . that danger is not to be expected when the vehicle is well constructed,"[46] danger, apart from defective construction, was not an element of the decision in *MacPherson v. Buick*.

In *Cleary v. Maris Co.*,[47] a suit brought on behalf of an infant plaintiff, it was alleged that the infant was poisoned by ingestion of lead through his mother's use of lead nipple shields marketed by the defendant. The shields were designed to protect the mother's nipples from soreness due to nursing. Written instructions accompanying the shields required only that the mother wipe her nipples before applying the shields, and stated specifically that they were in no way likely to be injurious to the nursing child. The shields were not manufactured by the defendant, but were marketed by the defendant through retail dealers. The court considered the defendant in the position of a manufacturer. The infant plaintiff's mother used the shields steadily for seven months, and the infant plaintiff became ill. His condition was diagnosed as lead poisoning. The Supreme Court, Kings County, dismissed the complaint on the merits.

The court gave considerable weight to evidence of the widespread use of nipple shields without harm. It considered also the possibility that the infant plaintiff may have had some idiosyncratic reaction to lead, that sucking the sides of his painted crib may have been the cause of the poisoning and that the infant plaintiff's mother may not have been sufficiently attentive to instructions as to wiping her nipples. The court ruled that, in addition to this failure to carry the burden of proof, the infant plaintiff's claim failed to meet the test of *MacPherson v. Buick* that there must be knowledge of a danger, not merely possible but probable and that liability can be imposed only where an injury occurs that

45. 301 N.Y. 468, 471, 95 N.E. 2d 802, 803 (1950). Consider language to the same effect in Galvin v. Lynch, 137 Misc. 126, 241 N.Y. Supp. 479 (N.Y. City Ct. 1930) where a vacuum cleaner was held not to be a thing of danger aside from question of negligent manufacture.

46. 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916).

47. 173 Misc. 954, 19 N.Y.S. 2d 38 (Sup. Ct. 1940).

can reasonably be foreseen and is within the compass of reasonable probability.

The court in the *Cleary* case, after a trial of the issues, limited its ruling as to the inapplicability of the doctrine of *MacPherson v. Buick* to the facts. It correctly refrained from ruling that defectively manufactured lead nipple shields are not things of danger merely because this particular plaintiff failed to prove negligence.

The application of the doctrine of *MacPherson v. Buick* to cases involving the manner in which an article is packaged presents an interesting facet of judicial handling of the doctrine.

A proper application and understanding of the doctrine is evident in *Rosebrock v. General Electric Co.*[48] where an administratrix recovered for the wrongful death of her intestate, employed by General Electric Company's vendee, Niagara Falls Power Co. General Electric Company sold transformers to the power company that were packed and shipped with wooden blocks inside the transformers to protect the coils. When the transformers were installed, the wooden blocks, not being noticed, were not removed. The presence of the blocks caused a short circuit and an explosion, killing the administratrix' intestate. Wooden blocks were not usually employed in packing and shipping transformers. The negligence here, compared with that in *MacPherson v. Buick,* was in failure to give notice of an unusual manner of packing the manufacturer's product, rather than in faulty manufacture. The court permitted recovery.

"I do not think a distinction can be drawn between a defective instrument and a perfect instrument defectively and dangerously packed if the product when it leaves the manufacturer is in a latently defective condition making it inherently dangerous to all who use it as it is intended to be used. The rule of liability attaches."[49]

In applying *MacPherson v. Buick,* the court ruled:

"The defendant's negligence in this case . . . is dependent upon those dangerous results which the defendant had reason to anticipate because of the extreme and hidden danger contained in the transformers. . . . In this case there was an inherent danger by reason of the defendant's acts which caused death to many people. Any prudent man could have anticipated such a result."[50]

A distinction was drawn by the United States District Court, Southern District of New York, between the situation in the *Rosebrock* case and that in *O'Neil v. American Radiator Co.*[51] The validity of the distinction

48. 236 N.Y. 227, 140 N.E. 571 (1923).

49. Id. at 238, 140 N.E. at 574.

50. Id. at 240-241, 140 N.E. at 575.

51. 43 F. Supp. 543 (S.D. N.Y. 1942). Cf. with respect to packaging Schfranek v. Benjamin Moore & Co., 54 F. 2d 76 (S.D. N.Y. 1931). Plaintiff alleged he sustained personal injuries through defendant-manufacturer's negligence as result of mixing powder,

is weak because it rests upon an erroneous comprehension of the doctrine of *MacPherson v. Buick*. There the defendant-manufacturers sold a water heater to one of their customers who in turn sold it to the plaintiff's employer. The plaintiff claimed that he sustained personal injuries when, in the course of moving the heater, it rolled within its packing crate and crushed his fingers. The plaintiff alleged that the defendants were negligent in failing to pack the heater in a safe and proper manner. The plaintiff based his claim for damages upon the doctrine of *MacPherson v. Buick*. The defendant-manufacturers moved to dismiss the complaint for failure to state a cause of action.

The court ruled that the doctrine of *MacPherson v. Buick* did not make the manufacturer liable for the condition of the crate since the crate was not inherently dangerous within the meaning of the doctrine and the heater was not in use. The court rejected the plaintiff's contention that the heater, packed in an improper manner, became an inherently dangerous article, holding that the accident was not caused by any use of the heater nor because of the condition of the heater in and of itself. The distinction made by the court between this situation and that in the *Rosebrock* case was based upon the premise that in the latter case the existence of the blocks made more dangerous what was otherwise dangerous to all who used the transformer as it was intended to be used. But that distinction is without significance when it is remembered that the trial court in *MacPherson v. Buick* instructed the jury that an automobile is not an inherently dangerous vehicle and that the Court of Appeals affirmed the ruling in the *Noone* case permitting recovery for injuries sustained by the plaintiff as the result of wearing a negligently manufactured dress. The dress in the *Noone* case was not dangerous without the defect which caused it to be a thing of danger. The court in the *O'Neil* case was incorrect in its reasoning that the doctrine of *MacPherson v. Buick* is applicable only where the defect in question adds new danger to danger that exists in the absence of the defect.

Smith v. Peerless Glass Co.[52] presented the Court of Appeals with another opportunity to apply the doctrine of *MacPherson v. Buick* with respect to the packaging of a commodity. There the plaintiff, a waitress at a wayside soda stand, lost the sight of one eye by the explosion of a striated soda water bottle. She brought suit in negligence against the manufacturer of the bottle and against the company that filled the bottle

purchased from retailer and used for wall decoration, which contained glass. Complaint dismissed for failure to state cause of action.

52. 259 N.Y. 292, 181 N.E. 576 (1932); see reference to this case below in § IV, Extension of the Doctrine of MacPherson v. Buick, subsection, Liability of Manufacturers of Component Parts.

with soda water and placed it on the market. The Court of Appeals applied the principles of *MacPherson v. Buick* with respect to both defendants, affirming the judgment for the plaintiff against the bottle manufacturer, and reversing the judgment for the plaintiff against the bottling company and granting a new trial on the ground of insufficient evidence. Significant for consideration with respect to other decisions examined in this article is the court's view that, "It is not pressing analogy too far to regard the bottle, when filled, as a product made up of component parts. *Its greater simplicity does not differentiate it in principle from the automobile in the MacPherson case.*"[53]

Another packaging problem arose in *Poplar v. Bourjois, Inc.*[54] There the defendant purchased boxes from a manufacturer who prepared them according to the defendant's specifications. They were made of cardboard overlaid with silk; the two cover lids were quilted, and to each was glued a thin, sharply pointed, metal star about three inches from point to point. The defendant packed its product, perfumes and cosmetics, in these boxes, stamped its name prominently on the covers and sold some of them to a Maryland department store. Mr. Poplar purchased one of these boxes and its contents from the department store as a gift for his wife. Shortly after this purchase, Mrs. Poplar pricked one of her fingers on the point of one of the metal stars attached to the box. An ensuing infection necessitated amputation of the finger. The claim of negligence made against Bourjois, Inc. was that it failed to have the injury-producing star fastened securely to the box, and there was evidence that the point of the star became slightly upturned so that it was not flush with the cover. It was claimed that the defendant's carelessness rendered the article dangerous to life and limb. The Court of Appeals treated the defendant as the manufacturer, and stated the problem before it as one involving the question as to whether the defendant owed a duty of care to anyone other than its immediate purchaser. The court affirmed the judgment of the Appellate Division, First Department, which reversed the judgment of the trial court in favor of the plaintiffs and dismissed the complaint. Although the law of Maryland was applied, since the accident occurred there, the approach of the court merits consideration.

The court found that the law of Maryland permits recovery against manufacturers for injuries caused to third persons with whom the manufacturers have no direct dealings when the articles or substances in-

53. 259 N.Y. 292, 296, 181 N.E. 576, 578 (1932) (Emphasis added.); cf. discussion of Smith v. Peerless Glass Co., in Smolen v. Grandview Dairy, Inc., 301 N.Y. 265, 93 N.E. 2d 839 (1950).

54. 298 N.Y. 62, 80 N.E. 2d 334 (1948).

volved are imminently and inherently dangerous when defectively made. But the court also found that, "Study of the few Maryland cases in point demonstrates that the term 'inherently dangerous' has been given an exceedingly restricted connotation."[55] The court referred to a Maryland case in which an infant was poisoned by noxious gas fumes which escaped from a negligently constructed heater. The Maryland court of last resort, in dismissing that action, declared that the heater could not be considered inherently dangerous when defectively made. The following language of the Court of Appeals indicates that the result of *Poplar v. Bourjois, Inc.* may have been the same if the cause of action arose in New York:

"Under such a decision, it must necessarily follow that an article which normally inspires as little expectation of disaster as a decorated cosmetics container may not be deemed an article imminently or inherently dangerous."[56]

The decision appears to be correct under the law of Maryland. But it must be confined to its limits as a decision dealing with the law of Maryland since the amount of "expectation of disaster" inspired by any particular article when properly constructed is not, under the law of New York, the test of applicability of the doctrine of *MacPherson v. Buick*, viz. the *Noone* case (dress). Further, the court would have been more accurate if it had added the words "when defectively made" at the end of the sentence quoted above.

The defective coffee urn presented for consideration in *Statler v. Ray Mfg. Co.*, discussed above as a forerunner of *MacPherson v. Buick*, was the cause of personal injury again in *Hoenig v. Central Stamping Company*.[57] In the *Statler* case the defect was in the operating mechanism of the urn, causing the urn to explode; in *Hoenig v. Central Stamping Company* one of the handles of the urn broke when the plaintiff attempted to lift the urn. Boiling coffee spilled from the urn, and burned the plaintiff. Judgment for the plaintiff against the defendant-manufacturer was affirmed without opinion in both the Appellate Division, Second Department, and Court of Appeals, the former court citing *MacPherson v. Buick* in its memorandum of affirmance. Was Chief Judge Crane, in his sole dissent in the Court of Appeals, correct when he analyzed the decision as a far-reaching application of *MacPherson v. Buick?*

"This proposed decision carries the doctrine of *MacPherson v. Buick Motor Co* (217 N.Y. 382) entirely too far.

55. Id. at 66-67, 80 N.E. 2d at 336.

56. Id. at 67, 80 N.E. 2d at 336.

57. 247 App. Div. 895, 287 N.Y. Supp. 118 (2d Dep't 1936), aff'd without opinion, 272 N.Y. 485, 6 N.E. 2d 415 (1936); cf. 14 N.Y.U.L.Q. Rev. 542 (1937).

"It would make the manufacturer of every coffee pot or dishpan liable for the consequences of a broken handle, no matter how far removed the injured person might be from the original purchaser. There must be a limit somewhere. There must be something more than a possibility of danger, at least a probability. An exploding coffee urn or glass jar or breaking wheel will almost certainly cause serious injury. The manufacturer alone can guard against such defects. Not so with handles to receptacles which may be safely used.

". . . There is nothing in the evidence to show that coffee urns of this weight were usually carried around by the handles or that the manufacturer had any reason to suppose that they would be when filled with boiling substance.

"For these reasons I do not think that the plaintiff made out a case, and that his complaint should be dismissed."[58]

If the Court of Appeals in *Smith v. Peerless Glass Co.* (striated soda water bottle) was correct in the statement that, as far as application of the doctrine of *MacPherson v. Buick* is concerned, the simplicity of an article does not differentiate it in principle from the automobile in *MacPherson v. Buick,* and if Chief Judge Crane's analysis emphasizing the broad scope of the decision in *Hoenig v. Central Stamping Company* is correct, then it is difficult to reconcile the result in *Boyd v. American Can Co.*[59] with these other decisions of the Court of Appeals. There the Appellate Division, Second Department, reversing the trial court's order, granted the defendant-manufacturer's motion to dismiss the complaint for failure to state a cause of action. The Court of Appeals affirmed without opinion. The plaintiff alleged that she sustained injuries while opening a can of coffee when the key, used to remove the metal rim sealing the can, broke. The can and key were manufactured by the defendant, and the can was filled by an impleaded party-defendant who sold it to the plaintiff's vendor. The complaint alleged negligence in manufacturing the key and failure to inspect. The Appellate Division ruled:

"Neither the can nor the key is inherently or imminently dangerous within the rule laid down in *MacPherson v. Buick Motor Co.* . . . Each is an appliance in ordinary use and not an article which, if imperfectly constructed, is reasonably certain to cause injury to a person using it. The appellant-manufacturer may not be charged with negligence where some unusual result occurs that cannot reasonably be foreseen and is not within the compass of reasonable probability. It is not enough that in the intended use injury is possible."[60]

It would have been preferable to leave the question as to the foreseeability and probability of the result of the key breaking to the jury rather than to rule as a matter of law that such key when defectively made is not a thing of danger. The "simplicity" of the key and the can

58. 273 N.Y. 485, 486, 6 N.E. 2d 415, 416 (1936).

59. 249 App. Div. 644, 291 N.Y. Supp. 205 (2d Dep't 1936), aff'd without opinion, 274 N.Y. 526, 10 N.E. 2d 532 (1937).

60. 249 App. Div. 644, 291 N.Y. Supp. 205-206 (2d Dep't 1936).

and the fact that they are articles in ordinary use should not have foreclosed the plaintiff from an opportunity to prove that the key, when defective and put to the use for which it was intended, was inherently dangerous. If "the manufacturer of every coffee pot or dishpan [is] liable for the consequences of a broken handle," the manufacturer of a defective key used for opening a can logically cannot be placed in an exempt category. Common experience in the use of sealed cans which are left with sharp edges while they are being opened with such keys dictates that it is a question of fact and not a question of law whether such key, when defective, is a thing of danger under the doctrine of *MacPherson v. Buick.*

Misunderstanding of the doctrine of *MacPherson v. Buick* resulted in one instance in the paradox of holding a manufacturer liable to a subvendee and, simultaneously, refusing to apply the principles of *MacPherson v. Buick* and its precedents. In *Henry v. Crook*[61] the Appellate Division, Third Department, avoided a ruling as to whether a toy sparkler is a thing of danger when negligently made in the sense in which that term is used in *MacPherson v. Buick,* but imposed liability upon the manufacturer for personal injuries suffered by an infant using the sparkler on the basis of the manufacturer's failure to give warning of dangers that might naturally flow from use of the article. The court rejected argument for application of *MacPherson v. Buick,* making a shallow distinction between negligence in the manufacture of an article and failure to give instructions in the use of the article, resting liability strictly on such failure. This approach was jurisprudentially unsound because application of *MacPherson v. Buick* and its precedents was the only means under New York law by which this manufacturer could have been held liable in negligence to this plaintiff. The reason for this error lies in the following statement revealing a misunderstanding of the principles of *MacPherson v. Buick:*

"These rules [of liability of manufacturers established in *MacPherson v. Buick* and its precedents] were made to apply to articles which were inherently dangerous or which were imminently dangerous when used for the purposes intended. It is not necessary for us in this case to hold, and we do not hold, that the sparkler itself was inherently or imminently dangerous. They are not more dangerous in themselves than the small fire-cracker or the ordinary match."[62]

61. 202 App. Div. 19, 195 N.Y. Supp. 642 (3d Dep't 1922). Infant plaintiff purchased from a retailer a sparkler, a small wire about 12 inches long on one end of which is a combustible substance which, upon being lighted, burns and throws off glowing particles. Wrapper claimed sparkler was perfectly harmless. Plaintiff recovered in action in negligence against manufacturer for personal injuries suffered when her dress caught fire while using sparkler.

62. Id. at 21, 195 N.Y. Supp. at 643.

It is not a necessary predicate to the application of the doctrine of *MacPherson v. Buick* to hold that the article in question in and of itself is inherently or imminently dangerous. It should be recalled that the trial court in *MacPherson v. Buick* charged the jury that an automobile is not an inherently dangerous vehicle, and that was the law of the case. The decision in *Henry v. Crook* could have been aligned readily with New York law as developed in *MacPherson v. Buick* on the basis that failure to provide adequate instructions as to use is negligence in production in the broad aspect of the entirety of the manufacturer's work. Then failure to produce a sparkler properly would cause such article to be a thing of danger. This approach is not far afield from that of the *Rosebrock* case discussed above where the Court of Appeals held that an unusual method of packing a transformer for shipment was a basis for liability under *MacPherson v. Buick* when the manufacturer failed to give notice of the danger accompanying such method.

This view was adopted by the Appellate Division, First Department, in *Crist v. Art Metal Works*,[63] affirmed without opinion by the Court of Appeals, six judges concurring, one judge not sitting. Specifically applying *MacPherson v. Buick*, the Appellate Division, two justices dissenting, held:

"Underlying the manufacturer's liability is the danger reasonably to be foreseen from the intended use of the article. The advertising matter accompanying it may induce the use in such manner as to make an otherwise harmless article a source of danger."[64]

It is of interest to note that, although the court in *Henry v. Crook* specifically rejected *MacPherson v. Buick* as applicable in that case, the court in *Crist v. Art Metal Works* held that on the basis of *Henry v. Crook* the complaint stated a cause of action, and cited *MacPherson v. Buick* as further support for its ruling.[65]

The problem of supplying adequate instructions as to the proper use of an article was considered again in *Harper v. Remington Arms Co.*[66]

63. 230 App. Div. 114, 243 N.Y. Supp. 496 (1st Dep't 1930), aff'd without opinion, 255 N.Y. 624, 175 N.E. 341 (1931). Complaint in negligence alleged that defendant, manufacturer of toy pistols, advertised them for use by children as a means of amusement and asserted that the toy was absolutely harmless, that defendant failed to warn users of possible dangers in the use of the pistols and that infant plaintiff was burned when flame emanating from pistol ignited his false whiskers which formed part of a Santa Claus costume he was wearing. Motion to dismiss complaint for failure to state cause of action denied, the court ruling that the question as to whether the pistol used by the infant plaintiff was harmless was for the jury.

64. 230 App. Div. 114, 117, 243 N.Y. Supp. 496, 499 (1st Dep't 1930).

65. Id. at 116, 243 N.Y. Supp. at 497.

66. 156 Misc. 53, 280 N.Y. Supp. 862 (Sup. Ct. 1935), aff'd without opinion, 248 App. Div. 713, 290 N.Y. Supp. 130 (1st Dep't 1936), motion for leave to appeal to Court of

The plaintiff used for hunting purposes a box of shells given to him by a friend who in turn received it from an unidentified third person. The box of shells was unopened when given to the plaintiff. The shells were of an unusually high explosive force, intended for arms testing, and sold only for testing purposes to arms manufacturers and dealers in shells. The printed designations on the box of shells were adequate to inform arms manufacturers and dealers of the extreme, explosive force of the shells, but were not adequate to convey such information to an ordinary user as the plaintiff. On firing the first of these shells, the gun barrel of the plaintiff's gun was blown out by the force of the shell, and blew off three fingers of the plaintiff's left hand. The plaintiff argued that the defendant-manufacturer was negligent in not indicating the possibility of such danger on the box of shells in such a way that an ordinary person would be put on notice of the unusually high explosive force of the shells. The complaint was dismissed by the Supreme Court, New York County, after a verdict for the plaintiff, on motions to dismiss made at the conclusion of the plaintiff's case and at the conclusion of the entire case on the ground that the plaintiff was not one of those whom the defendant could reasonably have expected to use the shells and that the shells were not put to a use which the defendant had reason to expect. The decision is of interest when evaluated in light of the guides for imposing or refusing to impose liability developed in *MacPherson v. Buick:* nature of the thing in question; knowledge on the part of the manufacturer of the fact that the article will be used without new tests; forseeability of the danger; knowledge of probable danger; proximity or remoteness of the relation between danger and use.

The courts' frequent confusion as to the meaning of the doctrine of *MacPherson v. Buick* becomes manifest from an interesting vantage point when comparisons are made between cases where a particular article with the same or a different defect is presented to the courts for consideration at different times.[67]

A distinction of doubtful validity was made by the Appellate Division, First Department, in *Cohen v. Brockway Motor Truck Corp.*,[68] one justice dissenting.

Appeals denied, 272 N.Y. 675, — N.E. 2d — (1936); cf. Sagler v. Kellogg Steamship Corporation, 155 Misc. 217, 277 N.Y. Supp. 792 (App. Term 2d Dep't 1934) to same general effect.

67. Consider, with respect to this line of inquiry, Statler v. Ray Mfg. Co., 195 N.Y 478, 88 N.E. 1063 (1909), Hoenig v. Central Stamping Company, 247 App. Div. 895, 287 N.Y. Supp. 118 (2d Dep't 1936) aff'd without opinion, 273 N.Y. 485, 6 N.E. 2d 415 (1936), dealing with defective coffee urns, and Torgesen v. Schultz, 192 N.Y. 156, 84 N.E 956 (1908), Smith v. Peerless Glass Co., 259 N.Y. 292, 181 N.E. 576 (1932), dealing with bottles of soda water, discussed above.

68. 240 App. Div. 18, 268 N.Y. Supp. 545 (1st Dep't 1934). Plaintiff, employee of

"Certain defective parts make an automobile either inherently or imminently dangerous; others do not. . . .

"The doctrine outlined in *MacPherson v. Buick Motor Co.* should not be extended. It was not intended to make a manufacturer of automobiles liable in negligence for every conceivable defect. We are inclined to the view that it must be in a part which would make an automobile 'a thing of danger.' It cannot be said that this defendant, the manufacturer, could have been charged with 'knowledge of a danger' because of a defective 'door handle.' Such a defect may make danger possible, but not probable."[69]

In support of this approach the court quoted this distinction made by Judge Cardozo in *MacPherson v. Buick:*

" 'There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury.' "[70]

But does this distinction between the probability of danger and the possibility of danger provide support for a ruling as a matter of law that an automobile with a defective door handle is not a thing of danger, although an automobile with a defective wheel, as in *MacPherson v. Buick,* is a thing of danger? At least, it is a question for the trier of facts.[71]

A more realistic view was adopted in *Brehm v. Ford Motor Company.*[72] There, in an action brought against the manufacturer of an automobile purchased from a dealer, the plaintiff alleged that she sustained personal injuries because of the negligence of the defendant in manufacturing the automobile. The complaint alleged that the defendant was negligent in constructing, examining and inspecting the right rear door, door handle, safety catch, striker plate and door post of the automobile involved, that the door could not be closed properly and that as a result of such condition the door flew open while the automobile was in motion causing the plaintiff to be thrown out of the vehicle. In affirming an order denying a motion to dismiss the complaint for failure to state a cause of action, the Appellate Division, Third Department, ruled unanimously:

"Under present traffic conditions a manufacturer is chargeable with the knowledge that an automobile door which cannot be properly closed, or which will not stay

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defendant's vendee, alleged that she was injured when she fell out of and under truck manufactured by defendant when door handle gave way and broke, causing door to open suddenly. Complaint in negligence dismissed as not stating cause of action.

69. Id. at 19, 268 N.Y. Supp. at 546.

70. Ibid.

71. Cf. dissenting opinion id. at 19-20, 268 N.Y. Supp. 546-547; 9 Notre Dame Law. 358, 360-361 (1934).

72. 277 App. Div. 826, 97 N.Y.S. 2d 111 (3d Dep't 1950).

closed, is a thing of probable danger to the occupants thereof. The complaint states all the facts essential to establish a cause of action under the principle laid down in *MacPherson v. Buick Motor Co.* (217 N.Y. 382)."[73]

The court here ruled that a defective automobile door is a thing of danger within the meaning of the doctrine of *MacPherson v. Buick.* But, from the standpoint of accuracy, did the court mean that, or did it mean that an automobile with a defective door is a thing of danger?

Cases involving tobacco and cigarettes provide another category of decisions wherein the courts are required to deal with the same general class of articles. In *Foley v. Liggett & Myers Tobacco Co.*[74] the plaintiff alleged that he sustained personal injuries as the result of smoking tobacco that contained mutilated fragments of a dead mouse. The tobacco was prepared by the defendant-manufacturer and sold under the name of "Velvet" through a retailer. The City Court of the City of New York, Kings County, on the basis of *MacPherson v. Buick,* denied the defendant-manufacturer's motion to dismiss the plaintiff's cause of action in negligence against it. The Appellate Term, Second Department, affirmed, and the Appellate Division, Second Department, in turn affirmed without opinion. The opinion of the Appellate Term indicates an accurate comprehension of the breadth of the doctrine of *MacPherson v. Buick.*

"The principle underlying this modern tendency [to enlarge the liability of manufacturers of defective articles] is not confined to articles or things 'imminently dangerous, such as poisons and explosives,' but embraces articles not inherently dangerous or destructive in character, and not such as may be deemed implements 'whose normal function is destructive.' "[75]

The Appellate Term, First Department, ruled in *Block v. Liggett & Myers Tobacco Co.*[76] that cigarettes are not within the class of articles

73. Id., 97 N.Y.S. 2d at 111-112; cf. Bird v. Ford Motor Co., 15 F. Supp. 590 (W.D. N.Y. 1936). Plaintiff alleged she was injured by the breaking of shatter-proof windshield of automobile, manufactured by defendant, in which she was a passenger at the time it was being operated by its owner and in collision with another vehicle. Complaint in negligence held to state cause of action under doctrine of MacPherson v. Buick; Ritz v. Packard Motor Car Co., 261 App. Div. 908, 25 N.Y.S. 2d 213 (2d Dep't 1941). Plaintiffs gave testimony that they were injured when automobile manufactured by defendant overturned as a result of kingpin in front left wheel assembly breaking after automobile was one month old. Order of Supreme Court dismissing complaint at close of plaintiffs' case reversed; plaintiffs held to have established a prima facie case of negligence on authority of MacPherson v. Buick.

74. 136 Misc. 468, 241 N.Y. Supp. 233 (App. Term 2d Dep't 1930), aff'd without opinion, 232 App. Div. 822, 249 N.Y. Supp. 924 (2d Dep't 1931).

75. 136 Misc. 468, 470-471, 241 N.Y. Supp. 233, 236 (App. Term 2d Dep't 1930).

76. 162 Misc. 325, 296 N.Y. Supp. 922 (App. Term 1st Dep't 1937). Judgment of Municipal Court of the City of New York in favor of plaintiff in negligence action reversed, and judgment directed for defendant.

which render their manufacturer liable to an ultimate consumer whose lip was punctured by a piece of a razor blade in the tobacco of a cigarette. Less than a year and a half later, in *Meditz v. Liggett & Myers Tobacco Co.*,[77] the same court again had negligence in the manufacture of cigarettes presented for its consideration. There the plaintiff was injured when a cigarette she was smoking exploded in her face. The Appellate Term, First Department, affirmed without opinion the ruling of the City Court of the City of New York, New York County, that a cigarette containing an explosive substance may be considered a thing of danger, and permitted recovery against the manufacturer. The trial court in its opinion referred to the *Block* case which it considered an obstacle to imposing liability upon the manufacturer of a defective cigarette. But the court overcame the obstacle by saying that the Appellate Term, First Department, when it first ruled against holding the cigarette manufacturer liable in the *Block* case, did not have *Hoenig v. Central Stamping Company* (recovery allowed for injuries sustained due to breaking of handle of coffee urn, discussed above) before it which was decided by the Court of Appeals two weeks before the Appellate Term decision in the *Block* case. The trial court viewed the *Hoenig* case as an extension of the doctrine of *MacPherson v. Buick*. Despite the approach of the trial court, the *Meditz* case cannot be considered as overruling the *Block* case because the Appellate Term, not having written an opinion in the former case, may have viewed the problem from the standpoint that an article may be a thing of danger when negligently constructed in one respect, but not a thing of danger when negligently constructed in another respect. The Appellate Term should, at least, have written an opinion in the *Meditz* case in order to clarify a confusing situation.

IV. Extension of the Doctrine of *MacPherson v. Buick*

Damage to Property

In 1931, in *Ultramares Corp. v. Touche*,[78] Judge Cardozo, referring to the question of the application of the doctrine of *MacPherson v. Buick* to claims for property damage, said, ". . . [T]he question is still open whether the potentialities of danger that will charge with liability are confined to harm to the person, or include injury to property. . . ."[79]

77. 167 Misc. 176, 3 N.Y.S. 2d 357 (N.Y. City Ct. 1938) aff'd without opinion, — Misc. —, 25 N.Y.S. 2d 315 (App. Term 1st Dep't 1938); cf. to same effect Lindner v. Liggett & Myers Tobacco Co., — Misc. —, 23 N.Y.S. 2d 923 (Sup. Ct. 1940).

78. 255 N.Y. 170, 174 N.E. 441 (1931).

79. Id. at 181, 174 N.E. at 445; cf. Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N.Y. Supp. 131 (3d Dep't 1915). Action for property damage wherein complaint alleged plaintiff's automobile, purchased from a retail dealer, was damaged when it ran

But in 1934 the doctrine of *MacPherson v. Buick* was extended, and manufacturers were charged with liability for damage to property as well as injury to person. The issue was settled in *Genesee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons, Inc.*[80] The servant of a contractor engaged by the plaintiffs' assured was applying a waterproofing preparation, manufactured and supplied to the contractor by the defendant L. Sonneborn Sons, Inc., to the interior of a water tank erected by the contractor. The preparation was known as Hydrocide No. 889, and was highly inflammable. The manufacturer-defendant failed to give notice to the contractor of the dangerous quality of the preparation. An ordinary farm lantern was used to furnish light inside the tank. The fumes from the Hydrocide No. 889 came into contact with the flame in the lantern, resulting in an explosion and damage to real and personal property. The plaintiffs, insurance companies, in subrogation of the rights of the insured owner of the property, brought suit against the contractor and the manufacturer of the preparation. The complaint against the contractor was dismissed at trial, and a judgment based upon a verdict for the plaintiffs against the manufacturer was affirmed by the Appellate Division, Fourth Department. The Court of Appeals affirmed the judgment for the plaintiffs. The court ruled that the manufacturer knew or should have known the manner in which the preparation was to be used, and that the manufacturer was under a duty to warn the contractor of the dangerous quality of the preparation.

The focus of the opinion is on the question of the manufacturer's liability for damage to property.

"The question presented has never been directly passed upon by this court. In fact, it has been expressly reserved. . . . It must now be decided. We believe that the reasoning of the court in the personal injury cases heretofore cited and in many other cases decided by this court points the way."[81]

The court saw no logic in a distinction, from the standpoint of liability, between personal injury and property damage.

"If it were reasonably presumable that the preparation would be used near a flame and result in an explosion and fire which might fairly be expected to injure the person using the material, it would also be reasonably foreseeable that the same fire would cause property damage."[82]

A unique attempt to apply simultaneously both principles of manufacturers' liability for personal injury and for property damage failed in

over embankment due to defendant-manufacturer's negligence in failing to equip vehicle with proper brakes. Demurrer to complaint overruled.

80. 263 N.Y. 463, 189 N.E. 551 (1934).

81. Id. at 470, 189 N.E. at 553.

82. Id. at 469, 189 N.E. at 553.

A. J. P. Contracting Corp. v. Brooklyn Builders Supply Co.[83] There the plaintiffs, builder and owner, purchased through the defendant-supplier building laths manufactured by the defendant-manufacturers. The plaintiffs alleged that they installed the laths in a building under construction and that subsequently they discovered that the laths failed to retain plaster applied to them, resulting in the likelihood that the plaster would fall, causing injury to persons using the premises. The plaintiffs sued for the cost of removing the material and installing other laths, alleging negligence in the manufacture of the laths. The defendant-manufacturers moved to dismiss the complaint for failure to state a cause of action against them. The Supreme Court, Kings County, granted the motion.

"The duty of the manufacturer for breach of which liability attaches runs only to those who suffer personal or property injury as a result of either using or being within the vicinity of use of the dangerous instrumentality. . . . The laths described in the complaint did not cause physical harm to the person or property of the plaintiffs. The expenditure of moneys required for their replacement is not the character of harm contemplated by the rule. Since there exists no legal basis for extending the rule to include liability for damages such as are here sought it is not necessary to determine whether building lath, under the circumstances here disclosed, constitute a dangerous instrumentality as a matter of law."[84]

In *Schuylerville Wall Paper Company v. American Manufacturing Company*[85] the plaintiff brought suit against the manufacturer of wrapping twine which it purchased from a jobber. The plaintiff's rolls of paper were damaged because of tar or some oily substance on the twine. It was claimed that the defendant-manufacturer knew the purpose for which the twine was to be used. The suit for property damage was in negligence. The defendant-manufacturer moved to dismiss the complaint. Apparently unaware of the positions taken by the Court of Appeals in *Ultramares Corp. v. Touche* and later in *Genesee County Pa-*

83. 171 Misc. 157, 11 N.Y.S. 2d 662 (Sup. Ct. 1939), aff'd without opinion, 258 App. Div. 747, 15 N.Y.S. 2d 424 (2d Dep't 1939), 283 N.Y. 692, 28 N.E. 2d 412 (1940); cf. Creedon v. Automatic Voting Machine Corp., 243 App. Div. 339, 276 N.Y. Supp. 609 (4th Dep't 1935), aff'd without opinion, 268 N.Y. 583, 198 N.E. 415 (1935). Plaintiff, candidate for public office, brought negligence action against manufacturer of voting machine to recover for expenses incurred in resorting to court to correct errors in tabulation of vote on machine which resulted in plaintiff's defeat. Complaint dismissed for failure to state cause of action.

84. 171 Misc. 157, 159, 11 N.Y.S. 2d 662, 664 (Sup. Ct. 1939).

85. 272 App. Div. 856, 70 N.Y.S. 2d 166 (3d Dep't 1947), leave to appeal to Court of Appeals denied, 272 App. Div. 980, 73 N.Y.S. 2d 830 (3d Dep't 1947); cf. Todd Shipyards Corp. v. Harbor Side Trading & Supply Co., 93 F. Supp. 601 (E.D. N.Y. 1950). Libelant alleged property damage as result of installation on vessel of defective motor auxiliary generator units purchased from supplier and manufactured by respondent. Motion to dismiss cause of action in negligence denied.

trons Fire Relief Assn. v. L. Sonneborn Sons, Inc., the Appellate Division, Third Department, held that the ruling in *MacPherson v. Buick* as to manufacturers' liability includes liability for property damage, and affirmed the order of the Supreme Court, Saratoga County, denying the defendant-manufacturer's motion. The reference to *MacPherson v. Buick* was jurisprudentially incorrect since the doctrine of that case did not encompass liability for property damage and express authority for the extension of the doctrine to property damage was available in *Genesee County Patrons Fire Relief Assn. v. L. Sonneborn Sons, Inc.*

Liability of Manufacturers of Component Parts

The liability of the manufacturer of a component part of an article produced in completed form by another manufacturer was specifically left open in *MacPherson v. Buick*. Judge Cardozo wrote:

"We are not required at this time to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in *his* duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong. . . . We leave that question open. We shall have to deal with it when it arises. The difficulty which it suggests is not present in this case."[86]

The question was clearly dealt with and resolved by imposing liability on the manufacturer of a component part of an article in *Smith v. Peerless Glass Co.*[87]

"If the filled bottle may be regarded as an assembled product of which the bottle itself was a component part, the approach to the applicable rule of law may be made by way of *MacPherson v. Buick Motor Co.* . . . By analogy, the bottler will be in the position of the defendant in that case and the maker of the bottle in that of the anonymous maker of the wheel. The liability of the bottler will then be ruled clearly enough by the law of that case and the evidence only need be considered. Not so, however, as to the maker of the bottle; for while the opinion perhaps foreshadowed his liability, the point was left open. . . . The doubt seemed to hang on the problem of causation. Whatever was shadowy then in respect to the principles both of negligence and of causation has vanished in the light of subsequent decisions (*Wanamaker v. Otis Elevator Co.*, 228 N.Y. 192; *Rosebrock v. General Electric Co.* 236 N.Y. 227; *Sider v. General Electric Co.*, 203 App. Div. 443; aff'd., 238 N.Y. 64; *Ultramares Corp. v. Touche*, 255 N.Y. 170, 181.)

"There emerges, we think, a broad rule of liability applicable to the manufacture of any chattel, whether it be a component part or an assembled entity. Stated with reference to the facts of this particular case, it is that if either defendant was negli

86. 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916).

87. 259 N.Y. 292, 181 N.E. 576 (1932); see reference to this case above in § III, Application of the Doctrine of MacPherson v. Buick.

gent in circumstances pointing to unreasonable risk of serious bodily injury to one in plaintiff's position, liability may follow though privity is lacking."[88]

Where the Plaintiffs Are Not the Defendant-Manufacturers' Subvendees or Acting under Any Right Derived from Such Subvendees

In *MacPherson v. Buick* and in all the reported cases, with one exception, dealing with manufacturers' liability in negligence despite absence of privity of contract the plaintiffs were either subvendees of the manufacturer-defendants or were using the manufactured articles by some right derived from the subvendees. *Kalinowski v. Truck Equipment Co.*,[89] is the first reported case where the plaintiff was not the defendant-manufacturer's subvendee and had absolutely no connection with the subvendee prior to the occurrence involved. In that case the defendant-truck repair company rebuilt a truck owned and operated by the defendant-construction company, the amount of the defendant-truck repair company's work on the vehicle being sufficiently extensive to permit the court to place that defendant in the position of an original manufacturer. While the truck was being operated by its owner, after being rebuilt by the defendant-truck repair company, a wheel came off, causing the vehicle to run up on a sidewalk and injure the plaintiff who was a pedestrian. The Appellate Division, Fourth Department, affirmed an order of the trial court denying the defendant-truck repair company's motion, before trial, to dismiss the complaint on the ground of failure to state a cause of action in negligence.

"The *MacPherson* and *Smith* [Smith v. Peerless Glass Co.] opinions have announced an extension of the applicability of proximate causation beyond those having contract relations with the offender to those whose use of the article causing injury is fairly to be foreseen. We are asked to go further—to say that it is a fair jury question whether this truck repairing company was bound to appreciate that a broken truck axle resulting from the company's failure to use proper material or to do proper work or to make proper inspection was reasonably likely to cause injury to lawful users of the streets, those whose presence 'in the vicinity of the proper use' of the truck was a matter of reasonable anticipation—and whether the repairer can be held liable for injuring such person 'in the vicinity.'

". . . The situations of this plaintiff and the truck were neither strange nor remote from reasonable expectation—. . . . Negligence (under the pleading) caused the truck to break down. The sequel was something unusual, but was of a type which might be expected. And that is the test."[90]

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88. 259 N.Y. 292, 294-295, 181 N.E. 576, 577 (1932).

89. 237 App. Div. 472, 261 N.Y. Supp. 657 (4th Dep't 1933); after trial the complaint as against the truck repair company was dismissed, no appeal being taken from the order of dismissal, and a judgment against the owner was affirmed, 242 App. Div. 43, 272 N.Y. Supp. 759 (4th Dep't 1934), 270 N.Y. 532, 200 N.E. 304 (1936).

90. 237 App. Div. 472, 473-474, 261 N.Y. Supp. 657, 658-659 (4th Dep't 1933).

From the standpoint of precise jurisprudence this court was correct in viewing its decision as an extension of the doctrine of *MacPherson v. Buick*. As far as possible parties plaintiff—total strangers to the manufacturers, retailers and ultimate vendees in question—seeking redress against manufacturers for personal injuries, the decision reaches the ultimate limit among those who, as plaintiffs, may be embraced by extension of the doctrine. No reported decision has been found making a parallel extension with respect to property damage. But if the tests of liability formulated in *MacPherson v. Buick* are not confined to the facts of that case, where the plaintiff was a subvendee of the defendant-manufacturer, they readily encompass the imposition of liability upon the manufacturer of a defective motor vehicle for injury sustained by a pedestrian. "Because the danger is to be foreseen, there is a duty to avoid the injury."[91] "There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer."[92]

Liability of Suppliers of Articles as Distinguished from Manufacturer.

In *LaRocca v. Farrington*[93] the plaintiff, while in the employ of a ship yard company, was injured as the result of the breaking of one link of a chain which held in place the boom of a heavy-duty tractor crane. The crane was owned by one of the two defendants in the action who rented it to the other defendant. The second defendant in turn rented the crane to the plaintiff's employer. The manufacturer of the crane was not a party to the action. There was uncontradicted expert testimony that the break was due to a crack in the link which had been present for at least two years, that the crack had probably existed as a small defect from the time of manufacture, that it had grown slowly and that its presence, although not its extent, would have been visible upon careful inspection over a period of more than two years. The plaintiff recovered against both defendants as suppliers of the crane. In its per curiam opinion, two justices dissenting, the Court of Appeals ruled that, "The principle of the *MacPherson* case . . . is no longer limited to manufacturers but has been extended to 'suppliers' as well, a designation which also covers owners and lessors. . . ."[94]

The court cited three cases with reference to this proposition: *Connor*

91. 217 N.Y. 382, 385, 111 N.E. 1050, 1051 (1916).

92. Id. at 389, 111 N.E. at 1053.

93. 301 N.Y. 247, 93 N.E. 2d 829 (1950); cf. Employers' Liability Assur. Corp., Ltd. v. Columbus McKinnon Chain Co., 13 F. 2d 128 (W.D. N.Y. 1926) to same effect regarding liability of manufacturer of chain.

94. 301 N.Y. 247, 250, 93 N.E. 2d 829, 829-830 (1950).

v. Great Northern Elevator Co.,[95] *Richards v. The Texas Company*[96] and *MacKibbin v. Wilson & English Construction Company*.[97] In each of these cases the plaintiffs recovered for personal injuries against the suppliers of defective articles, although there was no privity of contract between the parties.

In the *Connors* case the plaintiff's intestate was killed as the result of the operation of a defective steam shovel owned by the defendant. The plaintiff was employed by a company which had contracted with the defendant for the unloading of vessels carrying grain. It is of interest to note that the Court of Appeals in the *LaRocca* case grouped this case, which preceded *MacPherson v. Buick* by twelve years, with the other two citations in connection with the statement regarding extension of the doctrine of *MacPherson v. Buick* to suppliers as distinguished from manufacturers.

The plaintiff in the *Richards* case was an employee of the lessee of the defendant's gasoline equipment. The equipment was defective, and the plaintiff suffered personal injuries while using the equipment. And in the *MacKibbin* case the plaintiff was injured as the result of using a defective skid plank supplied by the defendant to a third party.

In the latter two cases the respective departments of the Appellate Division wrote only memoranda, and no statement was made that the courts considered their rulings imposing liability upon suppliers of defective articles as extensions of the doctrine of *MacPherson v. Buick*. It was only subsequent to these decisions that the Court of Appeals in the *LaRocca* case pointed out the extension of the doctrine.

This extension then imposes upon suppliers as a category the requirement that the articles they supply meet all the standards of proper construction which the doctrine of *MacPherson v. Buick* imposes upon manufacturers with respect to persons not having privity of contract with the manufacturers. No reported decision has been found making a parallel extension with respect to property damage.

V. Conclusion

The discussion in this article of the frequent inaccurate statement and consequent improper application of or failure to apply the doctrine of *MacPherson v. Buick* is independent of any considerations relieving the

95. 90 App. Div. 311, 85 N.Y. Supp. 644 (4th Dep't 1904), aff'd without opinion, 180 N.Y. 509, 72 N.E. 1140 (1904).

96. 245 App. Div. 797, 280 N.Y. Supp. 950 (3d Dep't 1935), motion for leave to appeal to Court of Appeals denied, 268 N.Y. 728 — N.E. — (1935).

97. 263 App. Div. 1014, 33 N.Y.S. 2d 974 (2d Dep't 1942), motion for leave to appeal to Court of Appeals denied, 288 N.Y. 738 — N.E. 2d — (1942).

plaintiff of the burden of proving negligence in the manufacture of the product involved. The difficulties confronting the plaintiff in attempting to prove a prima facie case of negligence in the manufacture of the product of modern assembly lines are frequently insurmountable and have provided support for arguments imposing the liability of an insurer upon the manufacturer or, at least, permitting wider application of the rule of *res ipsa loquitur* to manufactured articles. The scope of this article does not encompass these considerations which involve modification of the rules of tort liability in New York State.

However, the proper application of the doctrine formulated by Judge Cardozo in *MacPherson v. Buick* would have certain salutary effects. It would provide an additional incentive for the manufacturer to produce an article without defect. Further, the manufacturer is better able to bear the responsibility for injury caused by his negligently manufactured article, through products liability insurance, than the consumer is able to bear the losses consequent upon his injury. And the slight increase in premium rate for products liability insurance which might result from proper application of the doctrine would be a cost that the manufacturer might pass on, in whole or in part, to the consuming public as a method of distribution of the risk involved.[98] Considerations of public policy dictate more careful judicial attention to the full meaning of the doctrine with the objective of avoiding its conservative, restricted application as the result of failure to comprehend its meaning and scope.

98. Cf. Smith and Prosser, Cases and Materials on Torts, 874 N. (1st ed. 1952).