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The *MacPherson-Henningsen* Puzzle

Victor Goldberg

Most first-year law students run into *MacPherson v. Buick*,¹ “one of the most influential [decisions] in our common law,”² early on in their Torts class. At Columbia a substantial fraction of them get the case even sooner in the two-week boot camp known as Legal Methods. Cardozo held way back in 1916 that since Buick had been negligent, it was liable for MacPherson’s injuries notwithstanding the fact that there was no contractual relationship between the owner and manufacturer. Then, later in the semester, when I get the students in Contracts, they read *Henningsen v. Bloomfield Motors*,³ a case decided 44 years later. Ms. Henningsen was injured when the steering mechanism of her new Plymouth failed. Plymouth had included language in its contract limiting its liability to repair or replacement. According to the court, Chrysler (Plymouth’s parent) argued that the language precluded it being held liable for her physical injuries.⁴ The disclaimer, Judge Francis suggested, was a deliberate industry ploy to avoid liability: “The judicial process has recognized a right to recover damages for personal injuries arising from a breach of that warranty. The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a *studied effort to frustrate that protection*.”⁵ After much anguished reasoning, he concluded that the damage limitation was against public policy and therefore void.

Given the judge’s struggles to reach this conclusion, it seemed reasonable to conclude that the judge was confronted with a body of precedent favoring Chrysler. So, here’s the puzzle. If it turns out that it was easy to contract out of liability and if auto companies (and other manufacturers) routinely did so, did *MacPherson* accomplish anything? In the intervening 44 years did *MacPherson* catch only those injurers whose counsel had failed to include routine liability limitations in their standard forms? At least on its face it would appear that *MacPherson*’s impact would have been minimal for four decades. Or, perhaps, did doctrine distinguish between instances in which the manufacturer was negligent (*MacPherson*) and those in which it was not (*Henningsen*)? Or did courts use some other device to avoid contractual damage limitations?

It’s all moot now. *Henningsen* appeared right before the start of the product liability revolution.⁶ That, coupled with 2-719(3),⁷ of the UCC meant that auto companies could no

¹ *MacPherson v. Buick*, 217 N.Y. 382 (1916).

² Walter Probert, *Applied Jurisprudence: A Case Study of Interpretive Reasoning in MacPherson v. Buick and Its Precedents*, 21 U.C. Davis L. Rev. 789 (1987-88). It is Cardozo’s most-cited opinion.

³ *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358 (1960). Farnsworth refers to the case as a “landmark” decision. §4.26.

⁴ The Henningsens also sued the dealer, Bloomfield Motors. MacPherson, however, did not sue the dealer, Close Brothers. (MacPherson Brief, p. 22)

⁵ At 404. (emphasis added)

⁶ *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d. 57 (1963) was decided 2 ½ years after Henningsen (May 1960-January 1963).

⁷ “Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.”

longer contract out of liability for personal injury. Still, it would be nice to know how (or if) *MacPherson* remained relevant in the decades preceding the revolution if manufacturers could limit their liability contractually.

It turns out that it did remain relevant—there were lots of personal injury cases against the automobile companies. In a study of product liability in the automobile industry that appeared just before the *Henningsen* decision came down, Professor Cornelius Gillam collected all the automobile product liability cases.⁸ The list is long—11 pages.⁹ Why, or how, did these plaintiffs manage to avoid the disclaimer?

One possible hypothesis is that the disclaimer was of recent origin. That turns out to be false. The repair and replace limitation appeared in contracts even before *MacPherson* was decided.

From the start, most automakers included broad clauses requiring dealers to maintain repair facilities, but they soon added two clauses restricting their liability. One concerned the limited nature of their warranties. Ford led the way: Its 1904 agreement reprinted the industry trade association's standard warranty (adopted in 1902). The company would replace defective parts only for the first sixty days after the car buyer received the vehicle.¹⁰

In 1929 two law professors had their students collect warranties from a variety of industries, including automobile distributors and manufacturers.¹¹ The standard automobile warranty remedy they found was limited to repair and replace.¹² The authors' interpretation was that there would be no recovery for physical injury:

Thus, to put an extreme case, if one purchases an automobile under the standard warranty, and while driving it in a normal way within ninety days after delivery, an axle breaks and the buyer is killed, his representative may be limited to a return of the broken axle to the factory at his own expense and the obtaining of a new

⁸ Cornelius Gillam, *Product Liability in the Automobile Industry*, University of Minnesota Press (1960). While the copyright is 1960, the Preface is dated June 1959. *Henningsen* was argued December 7, 1959 and decided May 9, 1960.

⁹ Most, but not all, of the cases involved personal injury.

¹⁰ Sally H. Clark, *Unmanageable Risks: Macpherson v. Buick and the Emergence of a Mass Consumer Market*, 23 *Law & Hist. Rev.* 1, 25 (2005). The contract in *Ford Motor Co. v. Osburn*, 140 Ill.App. 633 (1908) included a damage limitation, "this warranty being limited to the replacement in our factory of all parts giving out under normal service in consequence of defect of material or of workmanship." (At 635) Ford had sold the car directly to the customer so there was not a privity issue.

¹¹ George G. Bogert and Eli E. Fink, *Business Practice Regarding Warranties in the Sale of Goods*, 25 *Ill. L. Rev.* 400 (1930-31).

¹² "Warrant each new motor vehicle manufactured by us, whether passenger car or commercial vehicle, to be free from defects in material and workmanship under normal use and service, our obligation under this warranty being limited to making good at our factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser, be returned to us with transportation charges prepaid, and which our examination shall disclose to our satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied and of all other obligations or liabilities on our part, and we neither assume nor authorize any other person to assume for us any other liability in connection with the sale of our vehicles." (p. 409)

axle. There can be no recovery for the destruction of the remainder of the car or for the death of the buyer, although both were obviously proximately caused by the breach of warranty that the axle was of sound materials and good workmanship.¹³

That would seem to doom the plaintiff's case. However, Gillam noted "one utterly amazing fact:"

[T]he automobile manufacturers have vigorously resisted plaintiffs' attempts to charge them with tort liability for dangerous defects in their vehicles, *but they never have invoked the standard warranty in defense of an action for personal injury*. Whether this is due to charity, oversight, or fear of the ultimate consequences of carrying the disclaimer too far, it is impossible to say.

But it does result in a legal windfall to the consumer. What the standard warranty says, in plain English, is that the manufacturer is not liable for *anything* beyond discretionary replacement of parts within the warranty period.¹⁴

He continued: "But the consumer *does* sue in tort, and successfully. The disclaimer simply isn't mentioned by either party, and the case is decided on straight *MacPherson* principles."¹⁵

Actually, in one significant case cited in *Henningsen*, the warranty limitation was used successfully against an injured buyer, but by the dealer not the manufacturer. Ironically, the manufacturer's loss was due to its lack of privity. In *Baxter v. Ford Motor Co.*,¹⁶ the driver was injured when a pebble struck the car's windshield dislodging a sliver of glass which struck the driver who lost an eye. Baxter sued for breach of warranty, but did not sue for negligence. Ford and the dealer had both included the repair and replace warranty and the court upheld the dealer's limitation. However, the court held that the Ford warranty limitation did not apply because Ford had not been in a contractual relationship with Baxter. Instead, the court identified an express warranty in Ford's claims that the glass was shatterproof. "We hold that the catalogues and printed matter furnished by respondent Ford Motor Company for distribution and assistance in sales . . . were improperly excluded from evidence, because they set forth representations by the manufacturer that the windshield of the car which appellant bought contained Triplex nonshatterable glass which would not fly or shatter."¹⁷ The case was remanded to the jury to admit Baxter's evidence on his reliance on the representation and whether the failure to install shatterproof glass was the proximate cause of the injury. The jury found in Baxter's favor.¹⁸

Because the decision was based on the express warranty that the glass was nonshatterable, the questions of whether Ford had been negligent or whether the automobile or

¹³ At 413.

¹⁴ At 192. (emphasis in original)

¹⁵ At 193.

¹⁶ 168 Wash. 456, 12 P.2d 409, *aff'd*, 168 Wash. 456, 15 P.2d 1118 (1932).

¹⁷ At 463.

¹⁸ *Baxter v. Ford Motor Co.*, 179 Wash. 123, 35 P.2d 1090 (1934) ("The case was retried on June 27 and 28, 1933. The jury returned a verdict in favor of the present respondent upon which, after a denial of motions for judgment non obstante veredicto, or for a new trial, judgment was entered.")

the windshield were “inherently dangerous” were irrelevant. Ford had some pretty good arguments on those grounds. Ford argued that the windshield hadn’t shattered, invoking the dictionary definition: “To break at once into pieces; to dash, burst, or part violently into fragments; to rend into splinters, as an explosion shatters a rock; an oak shattering by lightning.”¹⁹ The windshield had not shattered; a few tiny pieces had been dislodged and one happened to hit Baxter’s eye. The windshield design, Ford claimed, was not negligent because there was no superior shatterproof windshield on the market. And, it continued, Baxter had not relied on the statements since, Ford claimed, he would have bought the car anyway. Astonishingly, the Baxters had continued to drive the car without replacing the windshield for another 14,000 miles up until the date of the trial—the windshield was finally removed only for the purpose of placing it into evidence!²⁰

In response to Baxter’s argument that the windshield was inherently dangerous²¹ Ford said that the windshield was “not per se a dangerous instrumentality. The cases cited by counsel on this question are cases where automobiles became dangerous instrumentalities, intrinsically and inherently dangerous by reason of some latent, hidden defect in workmanship or in material such as rotten spokes in a wheel . . . or other defects rendering the machine intrinsically and inherently dangerous so that injury to person and property is almost certain to occur when used in way in which it is intended to be used.”²² The rotten spokes were, of course, the basis for liability in *MacPherson*. So, Ford conceded that it could have been held liable under *MacPherson* if the defect had rendered the windshield or automobile inherently dangerous. But the court did not say whether the defendant could have limited its liability for negligence with an express warranty limitation. The trial court suggested that it could not:

“No attempt was made to prove any cause of action founded upon negligence in permitting a defective pane of glass to be sold, and this fact was commented upon by the trial judge when he said: ‘Gentleman, I think the contention made on the part of the defendant is well taken. If you had alleged a defect in the manufacture of the glass itself, I would be inclined to hold for the plaintiff. There is no allegation in here that the glass was not properly manufactured. If it was not properly manufactured it would come within the rule laid down in those cases like the faulty wheel.’”²³

This seems to suggest that the repair and replace warranty would work if there were no negligence, but it would not had there been negligence. But that is not clear. In a contemporary decision, *Doughnut Mach. Corp. v. Bibbey*,²⁴ the court found liability holding that the language fell “far short of being a plain agreement that the lessees should assume liability for personal injury.”²⁵ This does suggest that some alternative language would have shielded the defendant from liability. The Restatement (First) Contracts did not bar such liability disclaimers: “A bargain for exemption from liability for the consequences of negligence not falling greatly below

¹⁹ Ford brief, p. 78.

²⁰ Ford brief, pp. 35-36.

²¹ Baxter Brief, p. 41-45.

²² Ford brief, pp. 101-102.

²³ Quoted in St. John Motors Brief, p.7.

²⁴ 65 F.2d 634 (1933)

²⁵ At 637.

the standard established by law for the protection of others against unreasonable risk of harm, is legal except in the cases stated in § 575.” The exceptions in the later section did not include injuries from products. So, while there does not appear to have been a legal barrier to invoking a properly designed damage limitation even when the defendant was negligent, there was, as Gillam had noted, a strong presumption against doing so.

Just because the automobile companies did not invoke the disclaimer in personal injury cases, we should not conclude that the disclaimer was merely superfluous language with no legal effect. The disclaimer was invoked successfully in cases in which the damage was to the vehicle, cases that did not involve personal injury. For example, one of the decisions cited in *Henningsen, Shafer v. Reo Motors, Inc.*,²⁶ recognized the repair and replace remedy for breach of the express warranty when the defect caused a fire that destroyed the vehicle. And there were plenty more.²⁷

This gives us at least a partial answer to the puzzle. The two doctrines coexisted because the auto manufacturers were content to invoke the disclaimer only for claims regarding the car itself, not for personal injury. The answer is only partial because it does not identify which of Gillam’s possible motives (if any) would explain the difference. Gillam’s summary of the case law suggests one possible rationale. The manufacturers’ defenses in personal injury cases at that time were sufficient to successfully defend against most personal injury claims. Proving negligence or reliance on a particular warranty was not easy. Defendants could also invoke privity, contributory negligence, owner’s duty to inspect, and other doctrines to avoid liability. Gillam provides numerous examples of cases demonstrating the difficulties faced by plaintiffs and spanning the full range of possible defects, including defective designs²⁸ steering,²⁹ brakes,³⁰ wheels,³¹ roofs,³² and doors.³³ Whatever the reason for the manufacturer’s reluctance, we now

²⁶ 205 F.2d 685 (1953).

²⁷ See *Hummer v. Carmalt*, 295 F. 978, 981 (D.C. Cir. 1924) (“Not only did the parties agree that there should be no understandings or representations of any kind, other than those contained in the contract, but the express warranty contained the provision that it was ‘in lieu of all other warranties, expressed or implied. In addition, the scope of this standard warranty was sufficiently broad to preclude the plaintiff from recovering under an implied warranty’”); *Oldfield v. Int’l Motor Co.*, 138 Md. 35, 113 A. 632, 636 (1921) (“The plaintiff’s first prayer was properly rejected because the defendant did not guarantee that the truck was fit or suitable for the work for which it was purchased, and the contract expressly provided: ‘No guarantee express or implied other than herein stated is made by the company.’”); and *Knecht v. Universal Motor Co.*, 113 N.W.2d 688, 694 (N.D. 1962) (“In this case the buyer’s written order excluded all warranties, express or implied, other than the dealer’s warranty that was printed on the back of the buyer’s order. The same warranty also appeared on the service policy furnished to the plaintiff. It stated that it was expressly in lieu of all warranties express or implied. The plaintiff testified that he knew what the dealer’s warranty provided. It is clear that at the time the sale was made implied warranties were negated and disclaimed. Under the weight of authority, including prior decisions of this court, such a disclaimer is valid and effective.”).

²⁷ See *Goullon v. Ford Motor Co.*, 44 F.2d 310 (C.C.A. 6 Ky., 1930) and *Zahn v. Ford Motor Co.*, 164 F. Supp. 936 (D.C.Minn. 1958)

²⁸ See *Goullon v. Ford Motor Co.*, 44 F.2d 310 (C.C.A. 6 Ky., 1930) and *Zahn v. Ford Motor Co.*, 164 F. Supp. 936 (D.C.Minn. 1958)

²⁹ See *Hirst v. Chevrolet Motor Co.*, 261 Mass. 155 (1927) and *Hupp Motor Car Co. v. Wadsworth*, 113 F.2d 827 (C.C.A. 6, 1940).

³⁰ See *Rotche v. Buick Motor Co.*, 358 Ill. 507, 193 N.E. 529 (1934), reversing 267 Ill. App. 68 (1932).

³¹ See *Martin v. Studebaker Corp.*, 102 N.J.L. 612 (1926) and *Hooper v. General Motors Corp.*, 123 Utah 515 (1953).

³² See *Murphy v. Plymouth Motor Corp.*, 3 Wash.2d 180 (1940).

know why in the 44 years following *MacPherson* the plaintiffs in personal injury cases were not hindered by the manufacturer's disclaimers.

* * *

Which brings us to *Henningsen*. There was neither negligence (*MacPherson*) nor an express warranty (*Baxter*). The claim was that there was an implied warranty of merchantability from both the dealer, Bloomfield, and the manufacturer, Chrysler. Ten days after the purchase of a new Plymouth, Ms. Henningsen was injured in an accident when the steering wheel spun and the car veered sharply off the road and into a wall. The front end of the car was so badly damaged that it was "impossible to determine if any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident."³⁴ The trial judge concluded that there was insufficient evidence to find negligence against either Chrysler or the dealer. The dealer contract included the standard express warranty limiting its responsibility to repair and replace. Chrysler had the same warranty language, but it argued that it was not in privity with the Henningsens, unless the judge or jury found that its relationship with the dealer was an agency relationship; that would have contradicted the express language of the sales agreement between Chrysler and Bloomfield.³⁵

The trial judge charged the jury as follows; "A provision in a purchase order for an automobile that an express warranty shall exclude all implied warranties will not be given effect so as to defeat an implied warranty that the machine shall not be fit for purposes for which it was intended unless its inclusion in the contract was fairly procured or obtained."³⁶ He further instructed the jury: "As I understand the issue here, it means that when the defendant Chrysler Corporation manufactured the Plymouth car which the plaintiffs bought, it would be for you to say whether or not there was an implied warranty to the plaintiffs that the automobile was reasonably suited for ordinary use. In fact, that is what they warranted. When they made the car, they said 'That car is reasonably suited for ordinary use.'"³⁷ The jury found for the plaintiff.

In its brief to the Supreme Court Bloomfield argued that it was free to contract out of liability, even for negligence:

It should be unquestionably clear that defendant, Bloomfield Motors Inc. has the absolute right to limit its liability based on warranty since warranty, under the Uniform Sales Act, is in the nature of a contractual obligation. The Court's attention is specifically directed to the case of *Shafer v. Reo Motors, Inc.* . . . The contract for purchase agreement contained a 90 day-4,000 mile proviso with a disclaimer appearing to be identical to that of Bloomfield Motors, Inc. The Court held: "There is no rule of public policy which invalidates provisions limiting liability for negligence, or otherwise, as between the buyer and the seller. The buyer is under no compulsion to buy from the seller and, if the buyer desires to buy from the seller, the buyer has the choice of accepting the seller's terms or

³³ See *Amason v. Ford Motor Co.*, 80 F.2d 265 (C.C.A. 5, Ga., 1935) and *Miles v. Chrysler Corp.*, 238 Ala. 359 (1939).

³⁴ At 369.

³⁵ Henningsen brief, p. 10. ("The franchise agreement itself disclaims any intention to create the relationship of principal and agent.")

³⁶ Bloomfield brief, p. 11.

³⁷ Chrysler brief, p. 13.

going elsewhere. . . . It is my judgment that the provision of the “Standard Warranty” expressly releasing the defendant from “all other obligations or liabilities on our part” is all inclusive, embracing any claims which might arise either for breach of warranty or breach of duty based on negligence.’³⁸

Chrysler’s position was a bit trickier; it argued that the contract between Bloomfield and the Henningsens should effectively bar a claim on express or implied warranty for both the manufacturer and the dealer. Alternatively, the bar should be effective only for the dealer, but that in that case the manufacturer would not be liable because there was no privity and that the absence of privity eliminated any implied warranty. “That is not a warranty of Chrysler. This is a warranty by Bloomfield Motors paraphrasing the standard warranty that the automobile manufacturers’ association has but which has not been extended by Chrysler Corporation to either Mr. or Mrs. Henningsen, and there is no proof of any extension of any express warranty along the lines of these two papers.”³⁹ This does suggest another puzzle, one which I won’t resolve. Why, if a manufacturer believes that a contractual limitation of liability would be enforceable, would it structure its dealings so that it could avoid privity with the end user?

Chrysler conceded that it would be liable for fault (although, unlike Bloomfield, it said nothing about whether it could limit its liability by contract):

I am not saying that Chrysler does not have an obligation. I admit that Chrysler has an obligation to the world, not only to Ms. Henningsen, but to everybody in the world. If somebody were standing on a street corner and a car came along and the person standing on the street corner got hurt as a result of some failure on the part of Chrysler to perform its obligation, Chrysler would be held liable, but the obligation is this: To exercise reasonable care in the performance of the manufacturing process to produce a product that is reasonably fit for the purpose intended.⁴⁰

However, it argued against liability without fault: “The bald substantive question . . . is whether a manufacturer is absolutely liable to one who is injured because there was a defect in the item when it was sold by the retailer.”⁴¹ The plaintiffs’ claim, Chrysler asserted, was based on recent legal scholarship, not the law of New Jersey:

The plaintiff’s suggestion boils down to the thought thrown out by Dean Prosser and Professors Harper and James that perhaps a manufacturer should be the “guarantor of his product, even though he had exercised all reasonable care.”

The concept of absolute liability has never been applied in this state even with respect to matters which are inherently dangerous.⁴²

Henningsen made explicit what had been implicit in the 44 years since *MacPherson*. Contractual limitations of liability for personal injury would not be enforced. *Henningsen* went

³⁸ Bloomfield Brief, pp. 14-17. Citing *Shafer v. Reo Motors, Inc.*, 108 F. Supp. 659, 661 (W.D. Pa. 1952), *aff’d*, 205 F.2d 685 (3d Cir. 1953); *Shafer* did not involve personal injury.

³⁹ Appendix to Defendant’s Brief, 213a.

⁴⁰ Appendix to Defendant’s Brief, 215a.

⁴¹ Chrysler brief, p. 13.

⁴² Chrysler brief, p. 37.

further, endorsing the “thoughts thrown out by Dean Prosser and Professors Harper and James,” albeit only in the context of automobile accidents.

Francis’s holding that the warranty was not enforceable amounted to finding strict liability for defects *for automobiles*. His opinion emphasized the specific features of the automobile market that led to his conclusion. One set of factors involved the nature of the standard form. The warranty limitation was on the back of the form in six-point type, while the bulk of the contract was in twelve-point type; the language did not clearly convey to a purchaser that the limitation would be applicable to physical injury. A second set of factors involved the nature of the automobile industry itself. “The status of the automobile industry is unique. Manufacturers are few in number and strong in bargaining position.”⁴³

The form warranty is not only standard with Chrysler but . . . it is the uniform warranty of the Automobile Manufacturers Association. Members of the Association are: General Motors, Inc., Ford, Chrysler, Studebaker-Packard, American Motors, (Rambler), Willys Motors, Checker Motors Corp., and International Harvester Company. . . . Of these companies, the ‘Big Three’ (General Motors, Ford, and Chrysler) represented 93.5% Of the passenger-car production for 1958 and the independents 6.5. . . And for the same year the ‘Big Three’ had 86.72% of the total passenger vehicle registrations.⁴⁴

Would Judge Francis have reached the same result had that contract language been in big print and clearly explained to the Henningsens and if the industry were relatively unconcentrated and firms competed on warranty terms? Today, the industry is much less concentrated and there is competition on warranty terms. Had that been the case in 1955, when the Henningsens bought the car, Judge Francis would have been hard-pressed to make his unconscionability argument. That does not mean that the Henningsens would have lost. Rather, I suspect that the judge would have ignored contract questions, rejected Chrysler’s primary argument—no privity—and instead have confronted the tort question directly moving toward adopting strict liability for defects for personal injuries. Perhaps.

Henningsen might have hastened the adoption of strict product liability. On the eve of the decision, Gillam wrote presciently:

Doubtless the first case in which the standard warranty is offered as a defense to an action for damages for personal injuries will mark the entrance of automobile products liability law upon a new and different phase, in which either the old doctrine of *caveat emptor* will be fully restored in the guise of freedom of contract, or, more probably, legislative consideration of the pros and cons of liability without fault will bring the developing law of products liability to the ultimate end toward which its logic points so compellingly.⁴⁵

As it turned out, legislative consideration was unnecessary.

Returning to the puzzle, my inference was wrong. The automobile companies did not use the warranty limitation to marginalize *MacPherson*. But it was not my fault. Judge Francis

⁴³ At 403

⁴⁴ At 390-391.

⁴⁵ At 176.

fooled me—and everybody else. The disclaimer was not, as he claimed, a devious device deployed by powerful manufacturers on helpless, and misled, customers to deprive them of their right to sue for personal injuries. Chrysler, and the rest, had been successful in containing their exposure by a strategy of no negligence, no privity.