The Development of Privity of Contract as the Common Law Standard for Product Liability: An Analysis of Winterbottom v. Wright, Thomas v. Winchester, and Industrialization

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This article explores the development of standards of product liability during the Market Revolution, arguing that jurists adopted the standard of privity of contract to protect manufacturers from the legal consequences of industrialization. This article surveys the history of product liability prior to the Market Revolution, and then it describes how Winterbottom v. Wright and Thomas v. Winchester radically departed from this tradition. This article then analyzes how judges specifically feared the increased volume of liability cases under a strict liability framework that would have arisen from a depersonalized and mechanized economy. The article concludes with parallels between questions surrounding product liability in the Market Revolution and the present day.

I. Introduction

James McGreevey, former Governor of New Jersey, once said, "the arc of American history almost inevitably moves toward greater individual legal rights."[435] Since the 1930s, his statement applies to much of American history, but

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[435] James McGreevey, *James McGreevey Quotes*, BrainyQuote.com, https://www.brainyquote.com/quotes/james_mcgreevey_468732.https://www.brainyquote.com/quotes/james_mcgreevey_468732.

there have also been long periods where legislatures and courts restricted individual rights. For example, American courts dismantled a series of 17th and 18th-century legal privileges during the Market Revolution (1815-1855). This was a period of unprecedented economic growth, industrialization, and corporatization in the rapidly maturing republic. During these years, the courts particularly targeted product liability, a "condition of being bound to respond because a wrong has occurred… with reference to property, proceeds[, or] yield."[436] Under the colonial standard of strict liability, average consumers could have successfully sued for injuries caused by a manufacturer "when neither care nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save [the] defendant."[437]

Winterbottom v. Wright (1842) and *Thomas v. Winchester* (1852), two court cases decided within a decade of each other, overturned strict liability and replaced it with a standard of privity of contract. Jurists define this concept as "that connection or relationship which exists between two or more contracting parties."[438] In other words, these two cases limited a manufacturer's duty of care strictly to consumers with whom a contract was agreed. This sudden shift in jurisprudence left scholars of American legal history perplexed as to what caused this departure from precedent. This article argues that judges established privity of contracts to protect manufacturers from the potential legal ramifications of industrialization. This article provides background on the strict liability era, and the two cases that overturned it. It will also connect the factual background of the cases with the two trends, the emergence of

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[436] Henry Campbell Black, *Black's Law Dictionary*, 1060, 1374 (4th ed. 1968), https://heimatundrecht.de/sites/default/files/dokumente/Black%27sLaw4th.pdf.
[437] Black, *supra* note 436 at 1591.
[438] *Id.* at 1362.

a "faceless economy" and dangerous industrial technology, that led judges to legally insulate manufacturers. Lastly, the article will establish broader connections between late 19th century product liability standards and modern tort jurisprudence.

II. Background

Prior to *Winterbottom v. Wright,* product liability was an obscure field of the law that had hardly changed since its inception. Historians have determined that early Roman law includes the first mention of product liability as a legal concept.[439] Laws, such as the Twelve Tables of 450 BC, presumed that goods purchased by consumers at a fair price should be of a fair quality, and therefore, the manufacturer was liable for any injury the purchaser suffered as a result of the manufacturer's negligence.[440] When Rome conquered Britain in 43 AD, Roman law strongly influenced English common law and continued to prove fundamental long after the fall of the Western Roman Empire.

In his *Summa Theologica*, St. Thomas Aquinas — among the foremost Western philosophers — defended the virtue of strict liability on the basis that selling a product with a known liability was a sin according to scripture.[441] Scholars agree that his endorsement contributed to strict liability's survival throughout the Medieval Era.[442] English colonists imported English common law to the New World, including its understanding of product liability, and it remained foundational into the Antebellum Period.[443] Until 1842, American courts

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[439] David G. Owen, *The Evolution of Products Liability Law*, 26 Rev. Litig. 955, 956 (2007).
[440] John C. Reitz, *A History of Cutoff Rules as a Form of Caveat Emptor: Part II-From Roman Law to the Modern Civil and Common Law*, 37 Am. J. Comp. Law 247, 249 (1989).
[441] Owen, *supra* note 439 at 958.
[442] *Id.* at 958–959.
[443] *Id.* at 959–960.

upheld this standard of product liability which remained virtually unchanged since antiquity.[444]

It was in *Winterbottom v. Wright* that courts took the first step to dismantle the ancient standard of strict liability. Winterbottom, a stagecoach driver, was severely injured when his stagecoach broke down on August 8, 1840.[445] An investigation revealed that the carriage broke down because Wright, a stagecoach repairman and builder, did not properly maintain it.[446] Consequently, Winterbottom sued Wright for damages, and the case went all the way to the Court of Exchequer, which ultimately ruled in favor of the respondent.[447] The court reasoned that Wright acted negligently but was not liable for Winterbottom's injuries because Wright owed Winterbottom no duty of care.[448]

The court ruled that a manufacturer could only owe a consumer a duty of care within privity of contract; that is, only a well-established contract between parties could, in case of breach, give rise to damages.[449] Winterbottom and Wright did not have a contractual relationship due to the absence of privity between them as consumer and servicer.[450] Winterbottom worked as a driver for the Postmaster-General, and the Postmaster-General was, in turn, employed by Nathaniel Atkinson, a wealthy aristocrat.[451] Atkinson also employed

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[444] *Id.* at 960.
[445] Winterbottom v. Wright, 110–116, https://sites.la.utexas.edu/judpro/files/2016/02/Winterbottom-v.pdf.
[446] *Id.*
[447] *Id*; the Court of Exchequer was one of the four major courts of England prior to the reorganization of the English court system during the late 19th century. The court heard common and natural law cases, especially those relating to financial matters and equity.
[448] Black, *supra* note 436 at 267.
[449] Winterbottom v. Wright, *supra* note 445 at 110–116.
[450] *Id.*
[451] *Id.* at 109.

Wright to maintain his fleet of carriages.[452] Hence, Wright had no contractual obligations to Winterbottom because they did not sign a contract to formally establish any duty of care.[453] Wright vanished from the historical record after this case, but Winterbottom remained handicapped for the rest of his life and did not receive compensation for his injuries.[454]

Ten years later, *Thomas v. Winchester* affirmed the legality of *Winterbottom v. Wright*'s precedent, with certain exceptions. The facts of the case are as follows: Mrs. Mary Ann Thomas became ill in 1849.[455] After visiting the doctor, Mrs. Thomas received a prescription for dandelion extract.[456] Her husband picked up a dose from Dr. Foord's drug store, but immediately after Mrs. Thomas took the medication, she fell almost fatally ill.[457] An investigation discovered that the jar was mislabeled and contained belladonna, a poison that resembles dandelion extract. Mr. Thomas sued the labeler, an employee of Winchester named A. Gilbert. Gilbert sold the mislabeled belladonna to a distributor named Aspinwall, who then sold it to Dr. Foord.[458]

The case eventually reached the New York Court of Appeals in 1852 and the court ruled in favor of Thomas.[459] The court upheld the legality of privity of contract, but it ruled that the danger and blatancy of Winchester's negligence made it almost tantamount to manslaughter.[460] Justice Ruggles made this argument by first defining manslaughter as "[when]

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[452] *Id.*
[453] *Id.* at 110–116.
[454] Daniel Breen, *The Role of the Judge in Formulating Legal Rules*, (2021).
[455] *Id.*
[456] Thomas v. Winchester, https://www.nycourts.gov/reporter/archives/thomas_winchester.htm (last visited Dec 3, 2023).
[457] *Id.*
[458] *Id.;* Daniel Breen, *supra* note 454.
[459] *Id.*
[460] Thomas v. Winchester, *supra* note 456.

culpable negligence, [an individual] causes the death of another, although without intent to kill."[461] He then included several examples of case law where a court found a pharmacist or chemist guilty of manslaughter due to mislabeling by an employee, improper mixing of chemicals, or any other such act of negligence.[462] Mrs. Thomas' survival of the poisoning shielded him from criminal prosecution, but the court found "no doubt of his liability in a civil action" according to their understanding of equity.[463] Thus, *Thomas v. Winchester* crystalised the precedent of *Winterbottom v. Wright* that a manufacturer could only be liable for damages within the privity rule, except in cases where products were "imminently dangerous to human life."[464]

III. Connections from the Case to the Argument

This article primarily relies upon two sources of information. The first is a set of legal opinions from the Market Revolution, *Winterbottom v. Wright* and *Thomas v. Winchester*. These legal decisions offer the fact patterns or the key facts of a particular legal case, and the court's reasoning behind each decision. Second, this article utilizes scholarly articles that trace the development of Anglo-American product liability law, and provide invaluable context and an overview of broad American legal and historical trends. Articles written by Donald G. Gifford, a Professor of tort law at the Francis King Carey School of Law, and David G. Owen, a professor emeritus at the Joseph F. Rice School of Law support my argument that courts established the privity of contract standard to protect nascent industry from legal repercussions. These articles provide invaluable contextualization and overviews of

[461] *Id.*
[462] *Id.*
[463] *Id.*
[464] *Id.;* Daniel Breen, *supra* note 454.

broad legal and historical trends that will help understand the development standards of product liability. Thus, these two types of sources create a robust explanation for the switch in standards of product liability.

The establishment of the privity rule had a profound impact on American society because it facilitated American industrialization during the second half of the 19th century. To this effect, Owen writes, "the privity requirement was an effective instrument of social policy for a nation bent on promoting the development of its infant industries."[465] In other words, American manufacturers were left uninhibited by the fear of product liability litigation.[466] This allowed manufacturers to expand in size, develop new technologies, and take risks that contributed to the US's unparalleled economic supremacy by the beginning of the 20th century.[467] Gifford best summarizes this development:

> "[t]he liability exposure of businesses [that] heavily invested in new technologies was almost assuredly substantially reduced. As a result, railroads, mines, and factories flourished. In effect, the change from a strict liability to a negligence-based regime created a 'subsidy' for railroads and other newly emerging industries."[468]

The decision to establish the privity of contract standard represented a massive departure from the tradition of formalism in American jurisprudence.[469] Formalist political and

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[465] Owen, *supra* note 439 at 963.
[466] *Id.*
[467] Donald G. Gifford, *Technological Triggers to Tort Revolutions: Steam Locomotives, Autonomous Vehicles, and Accident Compensation*, 30 (2017), https://digitalcommons.law.umaryland.edu/fac_pubs/1590.
[468] *Id.* at 30–31.
[469] Michael Willrich, *The Making of the U.S. Constitution, Part II*, (2022).

legal theorists of the Early Republic, such as Alexander Hamilton and other Federalists (and later Whigs), maintained that judges "[had] no active resolution whatsoever."[470] Law, in the formalist tradition, evolves by applying a precedent to different fact patterns, which leads to the gradual "discovery of new law."[471] However, as American historian Morton Horowitz writes, the Market Revolution (the period of economic, technological, and political growth during the Antebellum Period) "reflected the overthrow of eighteenth-century pre-commercial and anti-developmental common law values."[472] This included the anachronistic judicial paradigm of formalism. In replacement of formalism, legal instrumentalism, which advanced that the law could be directed toward a collective social good, began to dominate American courts, including the NY Court of Appeals.[473]

According to accredited sources, any discussion about American product liability, privity of contract, and *Thomas v. Winchester* would be fundamentally incomplete without discussing *Winterbottom v. Wright* at length.[474] Although the case was adjudicated under English law, applying the principles of *Winterbottom v. Wright* to American jurisprudence is essential because the NY Court of Appeals adopted the Court of Exchequer's approach, exemplifying the concurrent socioeconomic and legal challenges Great Britain and the US faced as a consequence of industrialization and economic expansion.

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[470] Alexander Hamilton, *No. 78*, *in* The Federalist 401, 409 (by Alexander Hamilton ed. et al. eds., Gideon ed. 2001).
[471] *Id.*
[472] Morton J. Horwitz, *The Rise of Legal Formalism*, 19 Am. J. Leg. Hist. 251, 251 (1975).
[473] Michael Willrich, *supra* note 469.
[474] Daniel Breen, *supra* note 454; Gifford, *supra* note 467 at 50; Owen, *supra* note 439 at 960.

IV. Analysis

A. The Technology-Expansion Fear

Judges also feared that strict liability left manufacturers vulnerable to litigation resulting from the expansion of the market of manufactured goods.[475] The Market Revolution and industrialization increased the overall efficiency of production and distribution which dramatically lowered prices for consumers.[476] The lower cost of finished products allowed more consumers to engage in the market and created a middle class of high-paid workers and managers who could now afford these products.[477] Because they were part of the emerging consumer class themselves, judges keenly realized that the combination of these factors would produce more injuries inflicted by defective products.[478] Other businesses also constituted a large share of the manufactured goods market, and the amount of product liability lawsuits coming from the private sector dramatically rose in the decades prior to 1842.[479] Faulty machinery caused 63 percent of injuries in the textile industry—among the largest aspects of American industry—and many of these injured people successfully sued the manufacturers.[480] Judges understood that, in the words of Gifford, the "darker side to this unprecedented expansion of technology and industry," would engulf American industry if strict liability was not modified or replaced.[481]

Even more, judges feared the consequences of an expanding market with increasingly dangerous products and

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[475] Gifford, *supra* note 467 at 17.
[476] Michael Willrich, *Legal Instrumentalism in the Age of the Market Revolution*, (2022).
[477] Michael Willrich, *supra* note 469.
[478] Gifford, *supra* note 467 at 31.
[479] *Id.* at 19.
[480] *Id.* at 18.
[481] *Id.*

machinery. Lewis Mumford, a foremost American historian and sociologist of the 20th century, described the Industrial Revolution as "a transition from the 'ecotechnic' era, characterized by wood, water, and handicrafts, to a new 'paleotechnic' world of steam, iron, and factories."[482] Essentially, the Industrial Revolution represented a shift in both the materials and methods of manufacturing, moving away from craftsmanship toward industrialization. The industrial machines that dominated this new paleotechnic era provided "much greater [power] than that supplied during the pre-industrial era by humans and animals and, as a result, the severity of the injury was likely to be much greater."[483] Market Revolution judges presumed that the increased severity of injuries caused by paleotechnic technology would increase the likelihood that a consumer would seek legal action against a negligent manufacturer.[484] A trend in tort law vindicated this belief because, before 1842, mechanized transportation (railroads and steamships) generated a disproportionate amount of litigation, and the severity of the injuries incentivized victims to sue tortfeasors.[485] Judges found the idea of mechanized transportation companies being litigated to bankruptcy especially likely, and disturbing, because of their risk, profitability, and economic importance.[486] Chief Justice Lemuel Shaw, in the Massachusetts Supreme Court's ruling on *Farwell v. Boston & Worcester Railroad Company* (1842), wrote that the protection of the nascent railroad industry "is an action of new impression in our courts, and involves a principle of great importance."[487] In that case, a railroad engineer sued

[482] *Id.*
[483] *Id.*
[484] *Id.* at 19.
[485] Gifford, "Technological Triggers," 10.
[486] Michael Willrich, *supra* note 469.
[487] Farwell v. Boston & W. R. R. Corp, 55, https://advance.lexis.com/api/document?collection=cases&id=urn:contentIt

his employer for damages he suffered from the negligence of a fellow employee.[488] Shaw understood that affirming the plaintiff's suit would set a precedent that transportation and heavy industry must assume the financial risk associated with the dangers of their business, so Shaw elected to err on the side of business and pen his infamous "assumption of risk" doctrine.[489] Judges, compelled by concerns about severity and frequency, decided to act decisively in favor of installing privity of contract.

The ruling in *Winterbottom v. Wright* illustrates the fear of judges at a time when technology, specifically mechanized transportation, was expanding and becoming more innovative. Justice Byles provided, in his dissent, the example of a recent railroad accident in France to support his argument:

> "For example, every one of the sufferers by such an accident as that which recently happened on the Versailles railway, might have his action against the manufacturer of the defective axle. So…every person affected, either in person or property, by the accident, might have an action against the manufacturer, and perhaps against every seller also of the iron."[490]

He embedded the key presumption of unreasonableness in this example to illuminate the absurdity of Winterbottom's case.[491] His usage of the phrase "every one" suggests that the railroad accident resulted in broad and severe damages.[492] Paying remedies for so many severe injuries would have bankrupted

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[488] Michael Willrich, *supra* note 469.

[489] *Id.*

[490] Winterbottom v. Wright, *supra* note 445 at 111.

[491] *Id.*

[492] *Id.*

the manufacturer of the defective axle. He warned that "alarming consequences" would have followed for the economy if the court ruled for Winterbottom and defended strict liability.[493]

The opinion in *Thomas v. Winchester* voices a concern for unfamiliar products, and this illustrates the issues of the technology expansion theory.[494] Ruggles wrote that belladonna and extract of dandelion " may on careful examination be distinguished the one from the other by those who are well acquainted with these articles."[495] In a pre-industrial world, someone consuming either belladonna or dandelion extract would likely not have possessed the expertise necessary to differentiate between the two substances themselves or immediate access to expert supervision. Here, Ruggles recognized that consumers buying and using unfamiliar products was an inevitable consequence of consumerism's upsurge.[496] Prior to industrialization, consumer expertise was a final safeguard against injuries, but the court reaffirmed the privity of contract to reduce manufacturer liability from consumer unfamiliarity.

However, Ruggles somewhat accounted for the severity of injuries caused by modern technology through the "imminent danger" exception. Pre-industrial pharmacists could not make enough of a drug, with sufficient concentrations of chemicals, to accidentally kill a consumer through their negligence.[497] However, new machinery allowed pharmacists to increase the quantity and quality of their products, so they faced increased legal risk through producing better drugs.[498] Even though the court decided to penalize Winchester, the

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[493] *Id.*
[494] Thomas v. Winchester, *supra* note 456.
[495] *Id.*
[496] *Id.*
[497] Daniel Breen, *supra* note 454.
[498] *Id.*

exception of "imminent danger" leaves ample space for manufacturers of possibly hazardous products to defend themselves from product liability lawsuits.[499]

B. The Faceless Economy Theory

Through analysis of the relevant literature and sources, it became evident that judges worried that depersonalizing the relationship between the consumer and the manufacturer would create additional product liability lawsuits. For the purposes of clarity, I shall refer to the aforementioned process as the faceless economy theory. Before 1820, Gifford concluded that few product liability lawsuits were argued because most consumers personally knew the artisan who made their product; they were often relatives, friends, or personally connected.[500] This connection further disincentivized the consumer from filing a product liability lawsuit.[501] Litigation remains an inherently acrimonious and arduous process that destroys any personal relationship between the parties. Industrialization fundamentally depersonalized the relationship between the manufacturer and the consumer, who started to see manufacturers as "anonymous…large industrial enterprises that had access to significant resources to pay for the costs of the accidental injuries they had inflicted."[502] Judges sensed the change in public opinion toward manufacturers and the subsequent increased prosperity to sue them for negligence. The privity standard theoretically remedied this issue by rehumanizing litigation because an injured party could only sue a manufacturer with whom he shared a contract. This implies a certain familiarity between both parties, and therefore a desire to avoid any acrid litigation.

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[499] *Id.*
[500] Gifford, *supra* note 467 at 9, 11.
[501] *Id.* at 11.
[502] *Id.*

The opinion in *Winterbottom v. Wright* demonstrates the Court of Exchequer's conviction in the faceless economy theory. Lord James Scarlett Abinger, who wrote the main opinion for the court, maligns that "if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action."[503] He foresaw that ruling in favor of Winterbottom, based on the old standard of strict liability, would have "le[t] in …an infinity of actions."[504] Abinger's language implies that any individual with the slightest injury from the accident would try to sue Wright, a man they likely had no personal connection with. The subsequent "infinity of actions" would financially ruin Wright's business and swamp the courts with seemingly frivolous litigation.[505] Therefore, the court would prevent these opportunistic litigants by ruling for Winterbottom.

The NYSC's decision in *Thomas v. Winchester* demonstrates the faceless economy theory because it ruled in favor of the plaintiff and against privity of contract, based on the exception of "imminent danger."[506] Chief Justice Charles Ruggles, the author of the court's unanimous opinion, upheld the legality of the decision on *Wright v. Winterbottom*. However, he stated that the court ruled against the defendant because "the case …stand[s] on a different ground."[507] Unlike the negligence of a repairman failing to maintain a carriage or a "horse be[ing] defectively shod by a smith[,] … [t]he death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label."[508]

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[503] Winterbottom v. Wright, *supra* note 445 at 112.
[504] *Id.*
[505] *Id.*
[506] Daniel Breen, *supra* note 454.
[507] Thomas v. Winchester, *supra* note 456.
[508] *Id.*

The court ruled in favor of the plaintiff for "considerations of public policy or safety."[509] Otherwise, manufacturers would have faced no civil legal liability for virtual manslaughter. This decision held manufacturers more culpable for injuries arising from their negligence.[510] However, it established such a high threshold for the "imminent danger" exception that it shielded manufacturers from the opportunistic litigants that judges feared.[511]

IV. Conclusion

Judges stimulated industrial growth during the Market Revolution by reducing manufacturers' legal liability to consumers. The NYSC overturned its previous ruling on *Thomas v. Winchester* with its 1916 decision on *MacPherson v. Buick Motor Company*, and legal scholars view this as the beginning of modern product liability law; the case established the standard of reasonability, but a series of product liability cases further reestablished the ancient standard of strict liability.[512] Justice Benjamin Cardozo of the NY Court of Appeals astutely realized that the economy had become so industrialized and integrated by the early 20th century that consumers almost exclusively purchased products from manufacturers they did not know personally.[513] The distribution of burden that privity of contract placed on consumers by that point was so unacceptable that even conservative formalists, like Carodozo, knew that the faceless economy theory outlived its utility.[514] In a broader context, the analysis of the shift in product liability standards assesses the distribution of risk

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[509] *Id.*
[510] Daniel Breen, *supra* note 454.
[511] *Id.*
[512] Daniel Breen, *Old Rules in Modern Settings: How the Rule of Law Provides for Change, Even as It Strives for Consistency*, (2021).
[513] *Id.*
[514] *Id.*

associated with technological progress. New forms of industries and products unavoidably generate accidents and injuries, so the legal system ought to establish order and assign blame accordingly.[515] Keeping pace with a rapidly globalizing and digitizing world will continue to bedevil contemporary jurists, as questions of industrialization frustrated them during the Industrial Revolution.[516]

[515] Michael Willrich, *supra* note 469.
[516] Gifford, *supra* note 467 at 5.