The Curious Case of the Disclaimer That Didn't Bark

Author : John C.P. Goldberg

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Victor P. Goldberg, *The* MacPherson-Henningsen *Puzzle* (2017), available at SSRN.

In *The MacPherson-Henningsen Puzzle*, Victor Goldberg juxtaposes two landmark product liability cases to identify an interesting historical question about product manufacturers' ability to contract around their tort obligations. With some nice detective work, he then offers an answer to the question, in the process reminding us of the complex interrelation among legal rules, the legal profession, and social norms.

Claus Henningsen purchased from Bloomfield Motors a car manufactured by Chrysler. While Claus's wife Helen was driving, the car "took an unscheduled turn into a wall" (to borrow Marc Franklin's memorable description). In *Henningsen v. Bloomfield Motors* (1960), the New Jersey Supreme Court upheld a verdict for the plaintiffs. The court deemed automobile manufacturers implicitly to warrant their products' fitness not only to purchasers but also to certain nonpurchasers. Notably, because warranty liability was understood to sound in contract rather than tort, the decision imposed a form of strict liability on sellers of mass-produced automobiles.

Henningsen's grounding of liability in contract also raised a complication, for warranties can be disavowed, and liability for their breach limited. And, indeed, the major U.S. automobile manufacturers, including Chrysler, had long incorporated a boilerplate warranty provision into their sales contracts that, on its face, excluded liability for personal injuries. The provision proceeded in three steps. First, it expressly warranted that the manufacturer's cars would be free from defects. Second, however, it limited liability for breach of this warranty to the cost of repairing or replacing the defective automobile, and even then restricted the ability of consumers to make good on this remedy. Third, it asserted that the obligations and limited liability generated by the express warranty were "*in lieu of all other obligations or liabilities*." In sum, standardized automobile sales contracts seemed to eliminate all (civil) legal obligations owed by manufacturers to purchasers other than the obligation generated by the express warranty, with its limited remedy.

The New Jersey court thus could not be content merely to eliminate privity as a limitation on implied warranty liability. It also had to rule that the disclaimer in the contract signed by Claus was ineffective to defeat liability for personal injury. Writing for the court, Justice Francis did exactly that, disparaging the disclaimer as "a studied effort to frustrate" legal protections that traced back nearly fifty years to *Henningsen*'s most famous forerunner, *MacPherson v. Buick* (N.Y. 1916). Of course, it was *MacPherson* that—in a suit against a different automobile manufacturer—dismantled the privity limitation on *negligence* liability for personal injuries caused by dangerous products.

It's at this point Goldberg's puzzle begins to take shape. According to *Henningsen*, the standard disclaimer contained in automobile sales contracts had to be declared void to prevent manufacturers from using contract law to escape from implied warranty and negligence liability for personal injuries. Yet, *Henningsen* itself was among the first state high-court decisions to do so. (By contrast, for example, Sections 574 and 575 of the First Restatement of Contracts (1932) had deemed liability disclaimers for simple negligence enforceable outside of certain special contexts.) Given the language of the standard disclaimer, and the absence of a general commitment among courts to void such disclaimers, one might

expect that a review of judicial decisions concerning personal injury suits against automobile manufacturers in the period from 1916 to 1960 would reveal plenty of instances in which courts dismissed personal injury suits on the strength of the disclaimer. In other words, the very terms on which *Henningsen* was decided would seem to support the depressing hypothesis that Cardozo's celebrated, Herculean effort in *MacPherson* to ground liability for product-related injuries in tort was doomed to be defeated by a contractual end-run.

But here's the funny thing. According to Goldberg, a 1960 survey of reported appellate decisions (Cornelius Gillam, *Product Liability in the Automobile Industry*) found that Justice Francis was wrong insofar as he had supposed that lawyers for automobile manufacturers routinely invoked boilerplate to defeat personal injury claims. And so we arrive at the puzzle of the disclaimer that didn't bark. Why didn't defense counsel raise an obviously available argument that, if successful, would have provided a complete victory for their clients?

Goldberg's surprising but plausible answer is that the lawyers didn't invoke the disclaimer *because they didn't need to*. Prior to *Henningsen*'s removal of the privity requirement for warranty claims, only immediate purchasers were entitled to pursue a warranty-based claim for personal injuries. Already, then, a large class of potential claimants (non-purchasers) was excluded. Moreover, purchasers who could sue for breach of warranty faced other hurdles, including limitations periods for providing notice of breach. Finally, *MacPherson*'s ditching of the privity limitation on negligence liability hardly generated (nor did it purport to generate) a frictionless path to recovery. Proving fault on the part of manufacturers often remained a daunting task, and contributory negligence was a complete defense. (In *Henningsen* itself, the plaintiffs had pressed a negligence claim along with their warranty claims, but it was dismissed by the trial judge for lack of evidence of carelessness.) To be sure, none of these features of warranty or negligence law immunized manufacturers from liability. However, they did serve to contain manufacturers' liability within financially viable bounds. And that, Goldberg concludes, was more than good enough for the manufacturers and their lawyers.

Goldberg's story is fascinating, well-told, and largely convincing. It is a powerful reminder that questions of tort are always potentially bound up with questions of contract, and that close attention must be paid to the law in action. It also adds support to the contention that the emergence of strict products liability was, in part, a response to the hurdles imposed even by post-*MacPherson* negligence law on plaintiffs pursuing claims against product manufacturers.

I wonder, however, if Goldberg's proffered solution to the puzzle pulls up a bit short. It may well be that defense lawyers did not *need* to invoke contractual disclaimers to keep liability at tolerable levels. But why is "need" the relevant criterion? Presumably the manufacturers would have faced even less liability had they invoked the disclaimers. So we still need an explanation of why their lawyers didn't go for the jugular.

Moreover, it is not as if defense counsel ignored the disclaimers entirely. Indeed, as Goldberg notes, these provisions were invoked to defeat negligence liability in cases in which the plaintiff sued for a defect that had caused damage to the car itself—a result that mirrors the outcome that today would be reached under the "economic loss rule." (Probably in these cases plaintiffs sought to rely on negligence law to avoid a procedural obstacle to their obtaining repair or replacement costs under the manufacturer's warranty, or perhaps to obtain compensation for certain consequential property damage.) Instead, the lawyers seem to have been concerned that, by invoking the disclaimers in personal injury cases, they would be overplaying their hand.

Even prior to *Henningsen*, only the most incautious attorney for an automobile manufacturer would have *guaranteed* victory in a personal injury suit based on the standard disclaimer. As Holmes observed

in *The Path of the Law*, a good lawyer reads cases not just for their rules but to gain a sense of the judicial zeitgeist. *MacPherson* may not have expressly forbade manufacturer and consumer from contracting around its holding. (Query: was there a disclaimer in the contract that Donald MacPherson signed? So far as I am aware, there's no mention of one in court opinions or litigation documents.) Nonetheless, *MacPherson's* emphasis on the right of the negligently injured to redress, and its refusal to allow manufacturers to use the dealership model of distribution as a means of avoiding tort liability, suggested doubts as to the enforceability of disclaimers. This is why it's hardly shocking to find, for example, a 1939 New York trial court decision voiding a disclaimer of liability in a case involving the unfortunate deli patron who encountered a tack in his danish. *Linn v. Radio Center Delicatessen, Inc.*, 9 N.Y.S.2d 110 (N.Y. Mun. Ct. 1939).

There was also a problem of fairness as among plaintiffs. Under the traditional rules of warranty law, only purchasers were the beneficiaries of express warranties. By the same logic, it was only purchasers who were subject to disclaimers attached to those warranties. It followed that, while the disclaimers in automobile sales contracts were written so as to block negligence liability for personal injury claims *by purchasers*, they could not block negligence claims by the very non-purchasers whom *MacPherson* had rendered eligible to sue for negligence. Chrysler's brief to the New Jersey Supreme Court in *Henningsen*—we learn from Goldberg—expressly conceded this point.

The manufacturers' lawyers presumably had little appetite for arguing that, whereas (thanks to *MacPherson*) they owed a tort-based duty to take care not to injure non-purchaser drivers such as Helen Henningsen, or for that matter innocent bystanders, they owed no such duty to their actual, paying customers. Technically speaking, that argument was available, but there was a decent chance that it would backfire, causing courts to void the disclaimers and perhaps even prompting remedial legislation. The more prudent course was to include the disclaimer in the sales contract without pressing it in personal injury cases, both because the disclaimer might discourage some personal injury claimants from suing in the first place, and because it could be more safely invoked to protect the manufacturers from other kinds of claims, including claims seeking compensation for damage to the automobile itself.

If these speculations are valid, then an important moral to draw from Goldberg's story is that *MacPherson* did pretty much what it set out to do. By signaling judicial solicitude for victims of negligently inflicted personal injuries and excising the privity rule from negligence, Cardozo made it very difficult for defense lawyers to argue that courts should enforce contractual disclaimers in personal injury cases. *MacPherson*'s power stemmed not merely from its holding and tone. It became an instant landmark because, in the manner of all great common law decisions, it fed off of, and helped to crystallize, an emerging set of social norms. Rightly, as it turns out, Cardozo both divined and pronounced that his era would no longer regard contract as the sole source of the duty to take care against causing harm to life and limb. That duty, he insisted, has its source "in the law." Perhaps, then, the solution to the *MacPherson-Henningsen* puzzle is that lawyers understood the implications of *MacPherson* for disclaimers of liability for product-related personal injuries even before Justice Francis and his colleagues formally embraced them.

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