

1-1-1962

## Products Liability: The Rise and Fall of Privity

Morton R. Covitz

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### Recommended Citation

Morton R. Covitz, *Products Liability: The Rise and Fall of Privity*, 3 B.C.L. Rev. 259 (1962), <http://lawdigitalcommons.bc.edu/bclr/vol3/iss2/15>

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## PRODUCTS LIABILITY: THE RISE AND FALL OF PRIVITY

### INTRODUCTION

The story of warranty as a theory of products liability has a theme which brings to mind the typical Horatio Alger "success story." Warranty had uncertain beginnings in early English law as a tort that was not quite a tort, and as an equally dubious *assumpsit*.<sup>1</sup> Throughout its early development it was considered both a tort and an *assumpsit* and the plaintiff was allowed to declare under either form of action.<sup>2</sup> As the decades passed, the *assumpsit* form became the more prevalent and warranty emerged as a contractual concept<sup>3</sup> and privity of contract was a necessity for recovery for breach of warranty.<sup>4</sup> Thus, a person harmed by a product could recover for breach of warranty only from his immediate vendor. Although this may have been adequate during the period preceding the industrial revolution, it proved inadequate when industry expanded to a point where manufacturer and consumer, while at remote ends of a long and complex chain of distribution, were brought together as a theoretical buyer and seller by modern advertising and marketing practices. Implied warranty became an impotent theory of recovery by the unbending requirement of privity.

This comment is directed at the methods employed by many United States courts to circumvent privity requirements: the forging of exceptions, creation of legal fictions and the complete abandonment of privity, each reflecting gradual recognition of the dynamic needs of twentieth century marketing practices.

### NATURE OF IMPLIED WARRANTIES

Products liability is concerned with two types of implied warranties. These are the implied warranty of merchantability and the implied warranty of fitness.<sup>5</sup> A precise definition of merchantability is difficult. Generally, goods are of merchantable quality if they are goods of the general kind which were described when bought, or if they are reasonably suited for the ordinary purposes for which they were manufactured.<sup>6</sup> Thus, when a product is defective and the defect causes injury to the buyer, the goods are con-

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<sup>1</sup> Ames, *The History of Assumpsit*, 2 *Harv. L. Rev.* 1, 8 (1888); 1 *Williston, Sales* § 195 (rev. ed. 1948).

<sup>2</sup> *Stuart v. Wilkins*, 1 *Dougl.* 18, 99 *Eng. Rep.* 15 (1778).

<sup>3</sup> Ames, *supra* note 1, at 9.

<sup>4</sup> *Winterbottom v. Wright*, 10 *M. & W.* 109, 152 *Eng. Rep.* 402 (1848).

<sup>5</sup> The Uniform Sales Act classifies these two warranties as follows: "(1) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgement (whether he be grower or manufacturer or not), there is an implied warranty that the goods shall be fit for such purposes. (2) Where the goods are bought by description from seller who deals in goods of that description (whether he be grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality." U.S.A. § 15.

<sup>6</sup> 1 *Williston, supra* note 1, § 243.

sidered below the minimum standards of merchantability which is a breach of the implied warranty.<sup>7</sup>

The Uniform Commercial Code is more precise in its definition of an implied warranty of merchantability.<sup>8</sup> The Code refers to such concepts as "fair average quality . . . fit for ordinary purposes . . . adequately contained, packaged, and labeled . . . conform to the promises or affirmations made on the container or label."<sup>9</sup> These standards are, more or less, a codification of some of the prior case law.

An implied warranty of fitness is imposed when the goods are purchased for a particular purpose and, under the Sales Act,<sup>10</sup> when the purchaser makes the seller aware of the purpose and relies upon the seller's skill and judgment in selecting suitable goods. The Uniform Commercial Code relaxes this notice requirement of the Sales Act.<sup>11</sup> If the above requirements are met, and a defect in the goods causes injury to the purchaser, then the goods do not fit the purpose for which they were purchased and there is a breach of the implied warranty.<sup>12</sup>

Thus, implied warranties, as now codified and under the common law,<sup>13</sup> declare a public policy imposing strict liability upon a seller of goods for injuries caused by defects in his product.<sup>14</sup> However, neither the Uniform Sales Act nor the Uniform Commercial Code expressly affect the privity rule as it applies to manufacturers and consumers.

The Uniform Sales Act does not definitely require that there be privity of contract as a pre-requisite to recovery on an implied warranty,<sup>15</sup> however, it constantly refers to warranties running in favor of a "buyer." The Sales Act defines "buyer" as "a person who buys or agrees to buy goods or *any legal successor in interest of such person.*"<sup>16</sup> (Emphasis added.) Although the language "legal successor in interest" might be construed as eliminating privity of contract, no court has done so. Thus, the Sales Act has left this question to be decided by the courts of the several states.

The Uniform Commercial Code has eliminated members of the buyer's household, his family and guests from the technical privity rules.<sup>17</sup> Although Section 2-318 codifies the rule that has been prevalent in several jurisdictions,<sup>18</sup> it represents a significant upheaval in the law of a state

<sup>7</sup> Ibid.

<sup>8</sup> UCC § 2-314.

<sup>9</sup> Ibid.

<sup>10</sup> Supra note 5.

<sup>11</sup> UCC § 2-315.

<sup>12</sup> 1 Williston, supra note 1, § 235.

<sup>13</sup> Jones v. Just, [1868] 3 Q.B. 197.

<sup>14</sup> Prosser, Torts 494 (2d ed. 1955).

<sup>15</sup> U.S.A. § 15.

<sup>16</sup> U.S.A. § 76.

<sup>17</sup> UCC § 2-318 states: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

<sup>18</sup> Infra notes 30, 31 and 32.

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such as Massachusetts<sup>19</sup> where privity is retained with all its vestiges of yesteryear. However, the Commercial Code does not solve the basic problem presented by this comment. Section 2-318 has no effect at all upon the warranty liability of a manufacturer to a consumer. The official comment to Section 2-318 states:

This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties given to his buyer who resells, extend to other persons in the distribution chain.<sup>20</sup>

Thus, neither the Commercial Code nor the Sales Act have significant effect upon the most important aspect of privity in products liability. Acceptance or rejection of privity as a basis for implied warranty recovery is still a matter for the courts of the individual jurisdictions.

At least one state by statute has completely abandoned the privity requirement in warranty actions against the manufacturer. The Georgia legislature has imposed a warranty of fitness and merchantability upon a manufacturer when his product is sold as new to a consumer.<sup>21</sup> They have relieved the Georgia courts of the struggle now being waged in so many jurisdictions of the United States.

### PRIVITY

The concept of privity of contract has plagued the field of products liability for over a century. In 1848 Lord Abinger said in a case involving an alleged breach of warranty by the manufacturer of a coach subsequently leased to the plaintiff's employer:

Unless we confine the operation of such contracts as to the parties who entered them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.<sup>22</sup>

In 1916, after a long period of application of the rule to actions in both warranty and negligence,<sup>23</sup> Justice Cardozo retaliated, at least in the latter action:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. 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.<sup>24</sup>

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<sup>19</sup> The Uniform Commercial Code has been effective in Massachusetts since October, 1958.

<sup>20</sup> UCC § 2-318.

<sup>21</sup> Ga. Code Ann. § 96-307 (1958).

<sup>22</sup> *Winterbottom v. Wright*, supra note 4, 152 Eng. Rep. at 405.

<sup>23</sup> *Husct v. J. I. Case Threshing Machine Co.*, 120 Fed. 865 (8th Cir. 1903).

<sup>24</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 391, 111 N.E. 1050, 1053 (1916).

While the majority of courts have followed Cardozo's lead in negligence cases,<sup>25</sup> they long refused to yield in breach of warranty actions in spite of the difficult problem of proving that a manufacturer was negligent.<sup>26</sup> The prevailing view in the United States is that privity of contract is still necessary in implied warranty actions.<sup>27</sup> The theory behind this strict privity requirement dates back to the contractual nature of a warranty as declared in *Winterbottom v. Wright*.<sup>28</sup>

#### WHEN IS THE PRIVACY REQUIREMENT SATISFIED?

There are, of course, instances where several courts which generally follow the privity rule have allowed recovery on an implied warranty without direct privity. In these cases the existence of a special relationship extends privity to reach third parties. Thus, privity of contract has been established where the party to the contract of sale is the agent of the injured party;<sup>29</sup> where a guest was injured by a product purchased by his host;<sup>30</sup>

<sup>25</sup> Prosser, *supra* note 14, at 500. The *MacPherson* doctrine has even been accepted in Massachusetts where privity has enjoyed many years of reverence. *Carter v. Yardley & Co.*, 319 Mass. 92, 64 N.E.2d 693 (1946).

<sup>26</sup> Proof of negligence in products liability cases is a very difficult problem. Since it is virtually impossible for the plaintiff to obtain and present direct evidence of negligence, the manufacturer's negligence must be proved by employing the doctrine of *res ipsa loquitur*. In order to apply this doctrine certain preliminary findings must be made. Among these findings are that the accident must be of the type where the negligence of someone is usually the cause. Also, the causing agency or instrumentality must be within the exclusive control of the defendant. Prosser, *supra* note 14, at 207. In addition, the prevailing view is that *res ipsa loquitur* merely creates an inference of negligence. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 Minn. L. Rev. 241 (1936).

<sup>27</sup> *Sterchi Bros. Stores v. Castleberry*, 28 Ala. App. 281, 182 So. 471 (1937), *rev'd on other grounds*, 236 Ala. 349, 182 So. 474 (1938); *Crystal Coca Cola Bottling Co. v. Cathey*, 83 Ariz. 163, 317 P.2d 1094 (1957); *Collum v. Pope & Talbot, Inc.*, 135 Cal. App. 2d 653, 288 P.2d 75 (1955); *Borucki v. Mackenzie Bros. Co.*, 125 Conn. 92, 3 A.2d 224 (1938); *Berni v. Kutner*, 76 A.2d 801 (Del. 1950); *Studebaker Corp. v. Nail*, 82 Ga. App. 779, 62 S.E.2d 198 (1950); *Abercrombie v. Union Portland Cement Co.*, 35 Idaho 231, 205 Pac. 1118 (1922); *Paul Harris Furniture Co. v. Morse*, 10 Ill.2d 28, 139 N.E.2d 75 (1956) (express warranty); *Caplinger v. Werner*, 311 S.W.2d 201 (Ky. 1958); *Strother v. Villere Coal Co.*, 15 So.2d 383 (La. 1943); *Pelletier v. Dupont*, 124 Me. 269, 128 Atl. 186 (1925); *Kennedy v. Brockelman Brothers, Inc.*, 334 Mass. 225, 134 N.E.2d 747 (1956); *Pease & Dwyer Co. v. Somera Planting Co.*, 130 Miss. 147, 93 So. 673 (1922) (express warranty); *Finks v. Viking Refrigerators*, 235 Mo. App. 679, 147 S.W.2d 124 (1940); *Pearlman v. Garrod Shoe Co.*, 276 N.Y. 172, 11 N.E.2d 718 (1937); *Marler v. Pearlman's R.R. Salvage Co.*, 230 N.C. 121, 52 S.E.2d 3 (1949); *Wood v. Advance Rumley Thresher Co.*, 60 N.D. 284, 234 N.W. 517 (1931); *Miller v. Hand Ford Sales, Inc.*, 340 P.2d 181 (Ore. 1959); *Lombardi v. California Packing Sales Co.*, 83 R.I. 51, 112 A.2d 701 (1955); *Odom v. Ford Motor Co.*, 230 S.C. 320, 95 S.E.2d 601 (1956); *Brown v. Howard*, 285 S.W.2d 752 (Tex. 1955); *H. M. Gleason & Co. v. International Harvester Co.*, 197 Va. 255, 88 S.E.2d 904 (1955); *Williams v. S. H. Kress & Co.*, 48 Wash.2d 88, 291 P.2d 662 (1955); *Cohan v. Associated Fur Farms*, 261 Wis. 584, 53 N.W.2d 788 (1952).

<sup>28</sup> *Supra* note 4.

<sup>29</sup> *Jaquot v. William Filene's Sons Co.*, 337 Mass. 312, 149 N.E.2d 635 (1959); *Brussels v. Grand Union Co.*, 14 N.J. Misc. 751, 187 Atl. 582 (1936).

<sup>30</sup> *Conklin v. Waldorf Astoria Corp.*, 5 Misc.2d 496, 161 N.Y.S.2d 205 (1957); see UCC § 2-318.

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where a wife acted as her husband's agent in purchasing the goods in question;<sup>31</sup> where there is a parent-child relationship;<sup>32</sup> and where an employee is injured by a product purchased for him by his employer.<sup>33</sup>

### RELAXATION OF PRIVACY—LEGAL FICTIONS

Attempts have been made by several courts to soften the blow that privity has dealt to the injured consumer by a series of legal fictions. One writer has listed no less than twenty-nine of these fictions built up through the years ranging from theories of agency and third party beneficiary to construction of the Uniform Sales Act.<sup>34</sup> Notable among these are that the retailer is the consumer's agent to buy or the manufacturer's agent to sell; that a warranty "runs with the goods" from the manufacturer to the consumer; and that the manufacturer's warranty to the retailer "inures to the consumer's benefit." But the exertions employed by the courts to arrive at these fictions actually do not solve the basic problem but merely bring a particular fact situation within the bounds of privity.<sup>35</sup>

### EXCEPTIONS TO THE PRIVACY RULE

Some courts have abandoned, for the most part, the use of legal fictions to avoid the harsh operation of the privity rule. They have established instead various public policy exceptions to its application. Perhaps the most frequent exception is in the case of injury due to impure food. A significant number of courts have imposed strict liability upon the manufacturer of the "deleterious and unwholesome" foodstuffs on the basis of an implied warranty.<sup>36</sup> In the leading case of *Jacob E. Decker & Sons, Inc. v. Capps*,<sup>37</sup> the Texas court voiced the rule that the non-negligent manufacturer who processes and sells food to a retailer for resale for human consumption is

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<sup>31</sup> *Young v. Great Atlantic and Pacific Tea Co.*, 15 F. Supp. 1018 (D.C. Pa. 1936).

<sup>32</sup> *Vaccarino v. Cozzubo*, 181 Md. 614, 31 A.2d 316 (1943).

<sup>33</sup> *Peterson v. Lamb Rubber Co.*, 353 P.2d 575 (Cal. 1960).

<sup>34</sup> Gillam, *Products Liability in a Nutshell*, 37 Ore. L. Rev. 119, 153 (1958).

<sup>35</sup> There is nothing wrong with fictions, if they work. The test is purely pragmatic. Any one of these approaches might work, but none of them is pre-eminent or logically unassailable, and none of them squarely faces the real issue: as a matter of economic policy, should the manufacturer be liable without fault to the consumer? . . . The policy decision should be faced and made, and, if absolute liability is found to be called for, it should be imposed directly, without fiction or analogy.

*Id.* at 155.

<sup>36</sup> *Crystal Coca Cola Bottling Co. v. Cathey*, 83 Ariz. 163, 317 P.2d 1094 (1957); *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041 (1954); *Tiffin v. Great Atlantic & Pacific Tea Co.*, 18 Ill.2d 48, 162 N.E.2d 406 (1959); *Anderson v. Tyler*, 223 Iowa 1033, 274 N.W. 48 (1937); *Cernes v. Pittsburgh Coca Cola Bottling Co.*, 183 Kan. 758, 332 P.2d 258 (1958); *Miller v. Louisiana Coca Cola Bottling Co.*, 70 So.2d 409 (La. App. 1954); *Armour & Co. v. McMillain*, 171 Miss. 199, 155 So. 218 (1934); *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547 (Mo. 1959); *Ada Coca Cola Bottling Co. v. Asbury*, 206 Okla. 269, 242 P.2d 417 (1952); *Nock v. Coca Cola Bottling Works*, 102 Pa. Super. 515, 156 Atl. 537 (1931); *Campbell Soup Co. v. Ryan*, 328 S.W.2d 821 (Tex. Civ. App. 1959); *La Hue v. Coca Cola Bottling Co.*, 50 Wash.2d 645, 314 P.2d 421 (1957).

<sup>37</sup> 139 Tex. 609, 164 S.W.2d 828 (1942).

liable to the consumer for injuries resulting from eating the food. Liability was based upon an implied warranty. The court reasoned:

Liability in such case is not based on negligence, not on breach of the usual implied contractual warranty, but on the broad principle of public policy to protect human health and life. It is a well known fact that articles of food are manufactured and placed in the channels of commerce, with the intention that they shall pass from hand to hand until they are finally used by some remote consumer. It is usually impracticable, if not impossible, for the ultimate consumer to analyze the food and ascertain whether or not it is suitable for human consumption. . . . It seems to be the rule that where food products sold for human consumption are unfit for that purpose there is such an utter failure of the purpose for which the food is sold, and the consequences of eating unsound food are so disastrous to human health and life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.<sup>38</sup>

It is questionable, however, whether this public policy consideration, and the reasoning behind it, can validly be restricted to impure foodstuffs. Public policy can also support recovery for defective mechanical instruments which also can cause dire injury to the consumer. If the criteria is degree of harm caused by the defective product, it is submitted that many mechanical and utilitarian products are on a parallel with foodstuffs.<sup>39</sup> Although the *Decker* rationale is an important breakthrough in the law of products liability, it has yet to affect the view of the courts in die-hard privity states.<sup>40</sup>

Another rather limited exception is where injury to the consumer is caused by a defect in the container holding the food.<sup>41</sup> The theory behind this exception is directly related to that of impure foods liability and, indeed, the two are close. The Uniform Commercial Code, while not establishing this container test as an exception to the privity rule, does make a sound container one of the minimum standards of merchantability.<sup>42</sup> In

<sup>38</sup> Id. at 612, 164 S.W.2d at 829.

<sup>39</sup> This never has been, I repeat, and is not now, a question of food and drink. It is a question of commodities, moderately or greatly standardized, put out for and upon consumers who have not the skill to judge them, *save in use*. It is significant of our over-case-lawing and neglect of basic trends that we can produce articles and books on "Food" which do not perceive that belladonna-for-dandelion means wheels, guns, breaking ropes, untested safety valves, unsafe charged bottles, quite as well as trichinae in pork, tacks in cake, or legally established mice or cigar-butts in some popular soft drink. Only when the responsibility of an auto manufacturer is placed beside that of the canner of peas or of the baking company whose Mother's Pie ornaments the billboards, will this general problem become clear, in either meaning or solution. And the distributing machinery will then come in for legal overhauling, in the teeth of "contract".

Lewellyn, *On Warranty of Quality, and Society II*, 37 Colum. L. Rev. 341, 408 (1937).

<sup>40</sup> *Karger v. Armour & Co.*, 19 F. Supp. 484 (D.C. Mass. 1936); *Chysky v. Drake Bros.*, 235 N.Y. 468, 139 N.E. 576 (1923).

<sup>41</sup> *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953).

<sup>42</sup> UCC § 2-314 (2)(e).

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the light of this criteria, it follows that injury due to a defective container is a breach of an implied warranty of merchantability.<sup>43</sup> Usually someone other than the immediate seller has supplied the container. A further extension of the impure food exception is the imposition of liability without privity in the case of injury due to contaminated animal food.<sup>44</sup> Thus, in certain areas the cow has reached a higher rung on the ladder of products liability than has the injured motorist.

### REJECTION OF THE PRIVACY REQUIREMENT

In recent years the trend has been towards a complete departure from privity. This trend represents a major upheaval in present-day products liability theory. It recognizes that a sale of goods in 1961 differs from a corresponding sale in 1861. It imposes strict liability upon a manufacturer because the manufacturer, through intensive advertising, has represented to the consumer that its product is pure or harmless. Thus, if the consumer relies on these advertisements, purchases the product from a third party, and while using it is injured, the manufacturer has been held liable on an *express warranty*.<sup>45</sup> In 1958, Justice Skeel of the Supreme Court of Ohio enunciated this theory in the now famous case of *Rogers v. Toni Home Permanent Co.*<sup>46</sup> where the court, in an exhaustive opinion which reviewed the history of products liability and the role that warranty plays in today's high pressure distributive processes, held the manufacturer liable on an express warranty because of the representations of the defendant in its advertisements extolling the safety features of its hair waving preparation. As Justice Skeel reasoned:

The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumer, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.<sup>47</sup>

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<sup>43</sup> *Quaere* whether the manufacturer should be liable for injury due to a defective container after he has relinquished control of this container and it has passed through the hands of a retailer?

<sup>44</sup> *McAfee v. Cargill, Inc.*, 121 F. Supp. 5 (D.C. Cal. 1954).

<sup>45</sup> The Uniform Sales Act § 12 defines an express warranty as:

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

The Uniform Commercial Code, while changing the wording of the Sales Act, retains its basic theme in § 2-313.

<sup>46</sup> 167 Ohio St. 244, 147 N.E.2d 612, 75 A.L.R.2d 103 (1958).

<sup>47</sup> *Id.* at 249, 147 N.E.2d at 615, 75 A.L.R.2d at 108. UCC § 2-314(f) also sets down as a requirement for merchantability that the product conform to the promises or affirmations on the *labels*. This can have significant impact on the law of products liability. In jurisdictions where privity is no longer required, manufacturers will put claims on their packages at the risk of absolute liability for untruthfulness.



The holding in the *Rogers* case had a significant impact on products liability in Ohio. Shortly thereafter, its principle was even further extended to include implied warranties of fitness.<sup>48</sup> The Court of Appeals for the Second Circuit has recognized the *Rogers* case as representing the total rejection of the privity requirement in both express and implied warranty cases.<sup>49</sup> It viewed *Rogers* not as a mere exception to the privity rule, but rather as a new theory of products liability which should not be confined to its facts.

Several courts have found both express warranty liability based on the defendant's advertisements and implied warranty liability in the same case. Thus, as recently as October of 1961, the Connecticut Supreme Court of Errors, in *Hamon v. Digliani*,<sup>50</sup> abandoned the requirement of privity of contract and held a manufacturer of a household detergent liable for injuries incurred by a consumer using the product. In reference to the express warranty the court said:

Where the manufacturer or producer makes representations in his advertisements or by the labels on his products as inducement to the ultimate purchaser, the manufacturer or producer should be held to strict accountability to any person who buys the product in reliance on the representations and later suffers injury because the product fails to conform to them. . . . Lack of privity is not a bar to suit under these circumstances.<sup>51</sup>

In imposing liability on an implied warranty the court stated that:

The manufacturer or producer who puts a commodity for personal use on the market in a sealed package or other closed container should be held to have impliedly warranted to the ultimate consumer that the product is reasonably fit for the purpose intended and that it does not contain any harmful and deleterious ingredients of which due and ample warning has not been given.<sup>52</sup>

This is implied warranty of fitness language. Thus, the Connecticut court is readily finding liability under either of the two warranties. After a charge based on the above language a jury would have little difficulty in finding some basis for the defendant's liability.

A rather startling example of how far a court will go in extending this advertising liability is presented in the recent case of *Pritchard v. Liggett & Myers Tobacco Company*<sup>53</sup> where the plaintiff sued the defendant cigarette manufacturer for negligence and breach of warranty. The plaintiff claimed that cancer of his right lung was caused by smoking Chesterfield cigarettes. Reversing a directed verdict for the defendant, the Court of Appeals held that due to the extensive advertising of the defendant as to the safety of

<sup>48</sup> *Markovitch v. McKesson & Robbins, Inc.*, 106 Ohio App. 265, 149 N.E.2d 181 (1958).

<sup>49</sup> *Arfons v. E. I. Du Pont de Nemours & Co.*, 261 F.2d 434 (2d Cir. 1958).

<sup>50</sup> 174 A.2d 294 (Conn. 1961).

<sup>51</sup> *Id.* at 297-98.

<sup>52</sup> *Id.* at 297.

<sup>53</sup> 295 F.2d 292 (3rd Cir. 1961).

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Chesterfields,<sup>54</sup> a jury could have found that there was a breach of an express warranty by the defendant as well as breach of implied warranties of fitness and merchantability. However, Judge Goodrich, in a concurring opinion, was unwilling to expand this unique fact situation to implied warranty liability. He limited the liability to an express warranty based upon advertising of the defendant, noting the peculiar type of product involved and making an analogy to the unlikelihood of imposing implied warranty liability upon a whiskey producer for injury to an over-indulging consumer.<sup>55</sup>

The current trend towards total rejection of privity in warranty is similar to the early effect of the *MacPherson* case in negligence cases. Four recent cases involve liability due to defects in an automobile. In Pennsylvania, *Jarnot v. Ford Motor Company*<sup>56</sup> held a truck manufacturer liable on an implied warranty for damage caused by a defective kingpin, without any privity between the parties. Later, New Jersey followed suit in *Henningsen v. Bloomfield Motors, Inc.*<sup>57</sup> where the court, in an exhaustive and comprehensive opinion, rejected privity as a requirement for recovery on an implied warranty and permitted the plaintiff to recover from an automobile manufacturer for injuries resulting from defects in the automobile. The court delved extensively into modern marketing practices replete with pressure advertising and concluded that privity of contract is unsuitable to those conditions and is merely a vestige of a bygone era<sup>58</sup> of direct channels of distribution where the vendee had ample opportunity to check the validity of a manufacturer's claims.<sup>59</sup>

The recent case of *State Farm Mutual Automobile Insurance Company v. Anderson-Weber, Inc.*<sup>60</sup> adopts the rule of *Henningsen*, and also refers to the Tennessee case of *General Motors Corporation v. Dodson*<sup>61</sup> which brought that state into the allegedly enlightened fold.

As in *MacPherson*, the rule is not limited to automobiles but neither is it restricted to a negligence cause of action. Kansas seems also to have

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<sup>54</sup> A good cigarette can cause no ills and cure no ailments . . . but it gives you a lot of pleasure, peace of mind and comfort. . . . Nose, throat and accessory organs not adversely affected by smoking Chesterfield.

Id. at 297.

<sup>55</sup> Id. at 302 (concurring opinion).

<sup>56</sup> 191 Pa. Super. 422, 156 A.2d 568 (1959); and see *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961).

<sup>57</sup> 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960). Cf. *Kaspirowitz v. Schering Corp.*, 175 A.2d 658 (N.J. Super. 1961).

<sup>58</sup> For an interesting article in which the author considers today's practice of imposing strict liability upon the manufacturer a revival of medieval ecclesiastical law, see Murphy, *Medieval Theory and Products Liability*, 3 B.C. Ind. and Comm. L. Rev. 29 (1961).

<sup>59</sup> Under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.

*Henningsen v. Bloomfield Motors, Inc.*, supra note 57, at 84, 75 A.L.R.2d at 20.

<sup>60</sup> 110 N.W.2d 449 (Iowa 1961).

<sup>61</sup> 338 S.W.2d 655 (Tenn. App. 1960).

repudiated the privity rule in light of *Graham v. Bottenfeld's, Inc.*<sup>62</sup> where plaintiff recovered for injuries from defendant distributor of hair preparations on a breach of warranty theory even though there was no privity between the parties. The language in this case refers to a "public policy exception" to the privity rule. However, *B. F. Goodrich v. Hammond*<sup>63</sup> explicitly states that privity is no longer a requirement in Kansas since implied warranty is based on public policy.

In imposing these implied warranties of merchantability and fitness, courts very often do not make a distinction between the two but apply them both to a given case.<sup>64</sup> Often this is due to confusion as to the requirements of each; however, there are certain circumstances where both warranties of fitness and merchantability can be applied.<sup>65</sup> It is entirely conceivable that goods which are not fit for a given purpose may also fail to conform to the minimum standards of merchantability. In such a case, both theories of recovery may overlap each other. This overlapping liability is candidly illustrated in the *Pritchard* case where the defendant was held accountable under both implied warranties and an express warranty.

#### CONCLUSION

The preceding cases illustrate how a growing number of jurisdictions have accepted the challenge presented by present-day marketing and advertising procedures and have abandoned the shackles of stare decisis. Privity of contract is no longer suitable in our expanded economy. Modern advertisements tell the consumer that he is buying a perfect product, free from defects and dangers. Impossible claims are made by the "ad men" without any thought as to the consequences. This situation should be rectified. If it means that a manufacturer is to be held as an insurer of its product, then so it must be. These half truths and vague statements are a fraud upon the American consumer and if the consumer relies on them and is thereby injured, recovery should come from the party actually responsible, not the retailer who had no control over the ingredients of a product in a sealed package but the one who made it and induced its sale. Thus, the poor soul with a mouthful of tooth decay should be able to recover from the toothpaste manufacturer who tells him that he need brush only once a day. And a person dying of lung cancer should be able to hold the cigarette manufacturer liable for his condition when this manufacturer tells him not to worry about such things.

With the high incidence of lung cancer in this country among cigarette smokers, many "cancer cases" can be expected in the future. The plaintiffs will rely heavily on the *Pritchard* holding. However, it is likely that the defendants will stress Judge Goodrich's concurring opinion in an attempt to narrow the impact of this case as much as possible.

<sup>62</sup> 176 Kan. 68, 269 P.2d 413 (1954).

<sup>63</sup> 269 F.2d 501 (10th Cir. 1959); see Note, 1 B.C. Ind. and Comm. L. Rev. 268 (1960).

<sup>64</sup> *Pritchard v. Liggett & Myers Tobacco Co.*, supra note 53; *Hamon v. Digliani*, supra note 50.

<sup>65</sup> 1 Williston, supra note 1, § 235.

*STUDENT COMMENTS*

With the abandonment of privity, products liability is embarking upon a new era. The courts now will succeed where the regulatory agencies have failed. Madison Avenue will no longer have a free hand but will make these representations at their peril. The American consumer will finally be recognized as a person who deserves the full protection of the law. And the manufacturer will no longer be permitted to find shelter from responsibility under ancient doctrines such as privity of contract and caveat emptor.

MORTON R. COVITZ