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Torts -- Implied Warranty -- Privity

Comann P. Craver Jr.

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passing. If, in view of the growth of large interstate corporations and the basic structure of the American economy, a federal corporations law would be advantageous or desirable,⁴⁰ then it is for Congress to so provide.

THOMAS C. WETTACH

Torts—Implied Warranty—Privy

The overwhelming majority of jurisdictions reject the requirement of privity of contract between the consumer of a product and the manufacturer in an action on an implied warranty.¹ In *Terry v. Double Cola Bottling Co.*,² North Carolina retained its rule requiring privity. The court there affirmed a compulsory nonsuit in an action against the manufacturer where the plaintiff's evidence showed that she had purchased from a lunchroom, an intermediate seller, a bottled drink allegedly containing a green fly.³ However, Justice Sharp, in a thorough concurring opinion,⁴ attacked the food manufacturers' fortress of privity under the present North Carolina law and urged the court to adopt the majority rule. This case presents the question: is it necessary to abandon the privity requirement in order to provide adequate remedies for an injured consumer or ultimate user?

At common law, the courts required privity of contract in a negligence action against the manufacturer.⁵ However, when manufacturers began making extensive use of distributors and retailers to peddle their products to the public, the courts realized the injustice of this requirement.⁶ The initial onslaught began in *Mac-*

⁴⁰ Some of the obvious advantages would be in the relative ease of obtaining service of process, the jurisdictional requirements, and the most important would be that of uniformity. For the problems appendant to 10b-5 as a corporation law, and its effect on such things as the stock market, directors, etc., see Ruder, *supra* note 24.

¹ Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). Dean Prosser stated that no state has adopted this privity requirement since 1935 but many have rejected it. *Id.* at 1110.

² 263 N.C. 1, 138 S.E.2d 753 (1964).

³ *Id.* at 3, 138 S.E.2d at 754.

⁴ *Id.* at 3, 138 S.E.2d at 754. Justice Sharp concurred because she found a lack of evidence that the fly was in the bottle when it left the defendant's control.

⁵ *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

⁶ See generally Prosser, *supra* note 1.

Pherson v. Buick Motor Co.,⁷ where the court discarded the need for privity in negligence actions and imposed a duty on manufacturers to make their product reasonably safe for all foreseeable users.⁸ This rule has been accepted by all jurisdictions⁹ and has been extended by some to protect bystanders "within the vicinity of probable use."¹⁰

Apart from negligence, the courts held the manufacturer liable in contract.¹¹ Where the manufacturer made express representations to the public about the quality of his product,¹² almost all jurisdictions have held him strictly liable to the consumer or ultimate user.¹³ In absence of express warranties, the courts held a food manufacturer, packer, or processor liable to the consumer on an implied warranty only if they were in privity of contract.¹⁴ But, because of modern merchandizing and public policy, a distinct majority of the jurisdictions completely abrogated the privity requirement and held a food manufacturer strictly liable to the ultimate consumer.¹⁵ The courts extended this warranty to nonfood manu-

⁷ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁸ For discussion of a manufacturer's negligence see Noel, *Manufacturer's Negligence of Design or Directions for Use of A Product*, 71 YALE L.J. 816 (1962). See generally 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY §§ 5-15 (1964).

⁹ Prosser, *supra* note 1, at 1100.

¹⁰ *E.g.*, Gaidry Motors, Inc. v. Brannon, 268 S.W.2d 627 (Ky. 1954).

¹¹ See generally WILLISTON, SALES § 197 (1948).

¹² Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (TV—"Nose, throat, and accessory organs not adversely affected by smoking Chesterfields"); Maecherlin v. Sealy Mattress Co., 145 Cal. App. 2d 275, 302 P.2d 331 (Ct. App. 1956) (billboard—"Ten Year Warranty"); Lane v. C. A. Swanson & Sons, 130 Cal. App. 2d 272, 278 P.2d 723 (Ct. App. 1955) (newspaper—"Boned Chicken"); Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952) (label—"Kind to Hands"); Randy Knitware, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 339, 226 N.Y.S.2d 363 (1962) (magazine—"Will Not Shrink or Stretch Out of Fit").

¹³ Only three states appear to require privity in an action on an express warranty: Barnard v. Pennsylvania Range Boiler Co., 216 F. Supp. 560 (E.D. Pa. 1963) (applying Massachusetts law) (water heater); Senter v. B. F. Goodrich Co., 127 F. Supp. 705 (D. Colo. 1954) (tire); Chanin v. Chevrolet Motor Co., 89 F.2d 889 (7th Cir. 1937) (applying Illinois law) (windshield glass).

¹⁴ *E.g.*, Race v. Krum, 222 N.Y. 410, 118 N.E. 853 (1918).

¹⁵ The jurisdictions of the following cases appear to require privity in food cases for an action on an implied warranty: Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala. 678, 89 So. 64 (1921) (fly in bottle); Nelson v. Armour Packing Co., 76 Ark. 352, 90 S.W. 288 (1905) (deleterious canned tongue); *but see* Delta Oxygen Co. v. Scott, 383 S.W.2d 885 (Ark. 1964); Nehi Bottling Co. v. Thomas, 236 Ky. 684, 33 S.W.2d 701 (1930)

facturers,¹⁶ and, again, a majority of the jurisdictions abolished privity¹⁷ and held the manufacturer strictly liable to foreseeable users.¹⁸ As a final step in abolishing the entire privity concept, some courts have held a manufacturer strictly liable in tort.¹⁹

(soda with arsenic); *Pelletier v. Dupont*, 124 Me. 269, 128 A. 186 (1925) (pin in bread); *Vaccarino v. Cozzubo*, 181 Md. 614, 31 A.2d 316 (1943) (sausage with trichinosis); *Carlson v. Turner Centre System*, 263 Mass. 339, 161 N.E. 245 (1928) (glass in bottled milk); *Smith v. Salem Coca-Cola Bottling Co.*, 92 N.H. 97, 25 A.2d 125 (1942) (glass in coke); *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30 (1935) (rat in sack of flour); *Lombardi v. California Packing Sales Corp.*, 83 R.I. 51, 112 A.2d 701 (1955) (deleterious apricot juice); *Whitehorn v. Nash-Finch Co.*, 67 S.D. 465, 293 N.W. 859 (1940) (poisonous candy); *Burgess v. Sanitary Meat Market*, 121 W. Va. 605, 5 S.E.2d 785 (1939) (dictum). Some of the theories utilized by the courts that have abrogated privity are: *Williams v. Campbell Soup Co.*, 80 F. Supp. 865 (W.D. Mo. 1948) (rejected privity as against public policy); *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939) (warranty from manufacturer to retailer inured to the consumer's benefit); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920) (manufacturer's marketing was a representation to the public that the goods are merchantable); *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927) (warranty runs with the goods); *Madouros v. Kansas City Coca-Cola Bottling Co.*, 230 Mo. App. 275, 90 S.W.2d 445 (1936) (retailer assigned his warranty to the consumer); *Cohen v. Dugan Bros.*, 134 Misc. 155, 235 N.Y. Supp. 118 (1929) (privity evaded by impleader); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928) (consumer was a third party beneficiary of the retailer's contract with the manufacturer). See generally Gillam, *Products Liability in A Nutshell*, 37 ORE. L. REV. 119, 153-54 (1958).

¹⁶ *E.g.*, *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W.2d 873 (1958).

¹⁷ In addition to the jurisdictions in note 15 *supra*, the following jurisdictions still appear to require privity in nonfood cases: *Barlow v. DeVilbiss Co.*, 214 F. Supp. 540 (E.D. Wisc. 1963) (defective container); *Larson v. United States Rubber Co.*, 163 F. Supp. 327 (D. Mont. 1958) (rubber boots); *Jordan v. Worthington Pump & Mach. Co.*, 73 Ariz. 329, 241 P.2d 433 (1952) (pump); *Behringer v. William Gretz Brewing Co.*, 53 Del. 365, 169 A.2d 249 (1961) (beer carton); *Long v. Flanigan Warehouse Co.*, 79 Nev. 241, 382 P.2d 399 (1963) (ladder); *Kennedy v. General Beauty Prods.*, 112 Ohio App. 505, 167 N.E.2d 116 (1960) (hair dye); *Odom v. Ford Motor Co.*, 230 S.C. 320, 95 S.E.2d 601 (1956) (tractor lift); *Kyker v. General Motors Corp.*, 381 S.W.2d 884 (Tenn. 1964) (defective auto engine).

¹⁸ *Henningesen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). The following are considered "foreseeable users:" *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (user-borrower); *Simpson v. Powered Prods., Inc.*, 24 Conn. Supp. 409, 192 A.2d 555 (C.P. 1963) (lessee); *Connolly v. Hagi*, 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963) (repairman); and *Jakubowski v. Minnesota Mining & Mfg. Co.*, 80 N.J. Super. 184, 193 A.2d 275 (1963) (employee). However, the courts refuse to extend the benefit of this warranty to the general public. *Kuschy v. Norris*, 206 A.2d 275 (Conn. 1964); *Hahn v. Ford Motor Co.*, 126 N.W.2d 350 (Iowa 1964). *But see Henningesen v. Bloomfield Motors, Inc.*, *supra*.

¹⁹ *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964) (applying

North Carolina accepts the majority rule in only two instances—where the action is in negligence²⁰ and where a food manufacturer has made express warranties to the consumer.²¹ As exemplified by *Terry*, the court continues to require privity of contract in an action against a manufacturer on an implied warranty.²² However, in cases involving sealed food stuffs, North Carolina has allowed a defendant seller to join his seller; thus the manufacturer may eventually be brought in as a party defendant.²³

A manufacturer is primarily responsible for the quality of its products; moreover, it is usually financially more able than intermediate sellers to redress harmful effects caused by its products. As has been indicated, the remedies available to an injured consumer or ultimate user against a manufacturer are limited in North Carolina. Thus the question: are they adequate?

In a negligence action, the consumer or ultimate user is always confronted with the difficulty of proof.²⁴ When there is no direct evidence of negligence, a majority of the courts allow him to resort

Texas law); *Lartigue v. R. J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963) (applying Louisiana law); and *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 67, 377 P.2d 897 (1963). This view is embodied in the *Restatement of Torts*, RESTATEMENT (SECOND), TORTS § 402 A (Tent. Draft No. 10, 1964).

²⁰ *E.g.*, *Gwyn v. Lucky City Motors, Inc.*, 252 N.C. 123, 113 S.E.2d 302 (1960).

²¹ In *Simpson v. American Oil Co.*, 217 N.C. 542, 8 S.E.2d 813 (1940), the court held that the statement "Amox is made for the purpose of killing insects, it is not poisonous to human beings" was an express warranty appearing on a can of insecticide. However, this express warranty exception "has been limited to cases involving sale of goods, intended for human consumption, in sealed packages prepared by the manufacturer and having labels with representations to consumers inscribed thereto." *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 261 N.C. 660, 668, 136 S.E.2d 56, 62-63 (1964).

²² *E.g.*, *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, *supra* note 21 (non-food); *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30 (1935) (food).

²³ *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951). The opinion emphasized that the distributor, a remote seller, was primarily liable. *Id.* at 287, 63 S.E.2d at 826. *Davis* was limited by *Perfecting Serv. Co. v. Product Dev. & Sales Co.*, 261 N.C. 660, 136 S.E.2d 56 (1964), where the court emphasized "that it was not intended to abandon the privity rule in all warranty cases, but the procedure approved therein was to apply only to sale of articles for human consumption sold in sealed packages prepared by the manufacturer." *Id.* at 670, 136 S.E.2d at 64.

²⁴ For discussion of the difficulties involved in proving negligence, see *Ashe, So You're Going to Try A Products Liability Case*, 13 HASTINGS L.J. 66 (1961).

to *res ipsa loquitur*.²⁵ However, North Carolina rejects this doctrine in sealed food cases and requires the consumer to show "similar instances,"²⁶ an almost insurmountable task.²⁷ In an action on an express warranty, he has to show that the representations of a food manufacturer do in fact constitute an express warranty.²⁸ Either because of lack of proof in negligence or lack of express warranty, the consumer or ultimate user's only relief is an action on an implied warranty. Because of the requirement of privity, he cannot sue the manufacturer and is relegated to suing his immediate seller, who may be equitably insolvent. Even under the joinder procedure in sealed food cases, he is at the mercy of his immediate seller and other interim sellers to join the manufacturer.²⁹ In all

²⁵ 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 12.03 (1964).

²⁶ *Enloe v. Charlotte Coca-Cola Bottling Co.*, 208 N.C. 305, 180 S.E. 582 (1935). In non-food cases, it seems that the court does not require a showing of "similar instances" but allows the use of *res ipsa loquitur* if the injured user can show that the product was under the exclusive control of the manufacturer. See *Wyatt v. North Carolina Equipment Co.*, 253 N.C. 355, 117 S.E.2d 21 (1960).

²⁷ *Graham v. Winston Coca-Cola Bottling Co.*, 257 N.C. 188, 125 S.E.2d 429 (1962) (evidence that a bottle exploded without impact is not a similar instance when the plaintiff's bottle exploded on a slight impact); *McLeod v. Lexington Coca-Cola Bottling Co.*, 212 N.C. 671, 194 S.E. 82 (1937) (evidence that two types of drinks bottled by the defendant contained foreign substances was not a similar instance when the plaintiff's drink was of a third type); *Enloe v. Charlotte Coca-Cola Bottling Co.*, 208 N.C. 305, 180 S.E. 582 (1935) (evidence that other drinks bottled by the defendant contained a "green looking thing," a dead fly, and a piece of glass was not a similar instance when the plaintiff's bottle contained a mouse). *But see Caudle v. F. M. Bohannon Tobacco Co.*, 220 N.C. 105, 16 S.E.2d 680 (1941) (evidence that a plug of tobacco, a non-sealed product, contained a rat's foot was sufficient to take the case to the jury even though the plaintiff's plug contained a fish hook).

²⁸ A seller's representation about the quality of his product may be considered mere "puffing". Even though he may not specifically express himself in such words as "I promise you . . ." or "This product will not . . .," the seller is constantly extolling his product as a "perfect product."

It is to shut one's eyes and ears in today's "world of advertising" to say that, because no reassuring words appear on the product's container, the manufacturer of a nationally advertised product has made no representation to the purchaser. He makes one every day—sometimes every hour on the hour. Any [product] entitled to status as a "famous name brand" has been warranted by the manufacturer to the consumer—very probably in color!—in magazines, on billboards, and by "glamorous stars of stage and screen" over radio and television.

Terry v. Double Cola Bottling Co., 263 N.C. 1, 13, 138 S.E.2d 753, 761 (Sharp, J., concurring). However, the court must find positive express warranty. See *Murray v. Bensen Aircraft Corp.*, 259 N.C. 638, 131 S.E.2d 367 (1963).

²⁹ See *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951).

other instances, the consequence is a multitude of litigation of buyer against seller. Thus, in many cases, the requirement of privity leaves an injured consumer or user without redress from the manufacturer. Moreover, it could leave him without relief from anyone.

An injured consumer or user who is not in fact the buyer cannot sue the retailer on an implied warranty since there is no privity. Therefore, neither a purchaser's husband, employee, or guest can sue the retailer in absence of an agency relationship.⁸⁰ Apart from cases where the retailer of the defective product is known, the buyer may be unable to determine who was the seller of the defective product when he has made identical purchases from various retailers. Thus, in some cases, the privity requirement is an absolute bar to redress from anyone in the absence of a negligence action against the manufacturer.

The Uniform Commercial Code would provide limited relief. It abandons the privity requirement to the extent that a buyer's family, or member of his household, or guest can sue the *last seller*.⁸¹ However, since the Code has no vitality in the distributive chain,⁸² it does not change the existing case law in determining whether a buyer or those named third party beneficiaries can directly sue the manufacturer on an implied warranty. Since the North Carolina case law requires privity, the Code would be useless in allowing a

⁸⁰ In *Rabb v. Covington*, 215 N.C. 572, 2 S.E.2d 705 (1939), the consumer's mother purchased a package of sausage containing a piece of metal. Indicating that she purchased it for her son, the court held the retailer liable but made no reference to the agency relation.

⁸¹ "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 . . ." UNIFORM COMMERCIAL CODE § 2-318. This provision was not adopted by California since their case law had already extended greater coverage than that provided by the Code. CAL. COM. CODE § 2318, comment. Moreover, even though the legislature in one state did adopt this provision, the court allowed a person not a named third party beneficiary under this provision to sue the manufacturer on a breach of an implied warranty. *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961). Some courts have construed the word "family" to include "industrial family." *Delta Oxygen Co. v. Scott*, 383 S.W.2d 885 (Ark. 1964). *Contra*, *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963).

⁸² UNIFORM COMMERCIAL CODE § 2-318, comment 3 (1962 Official Text with Comments), provides that "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 distributive chain."

suit against the manufacturer. Thus, privity must be abrogated either by judicial decision or legislative enactment independent of the Code.

The court in *Terry* could have easily adopted the majority rule and eliminated privity without overruling any recent food case,³³ or it could have utilized a tort approach in holding the manufacturer strictly liable to the consumer without impeaching the privity requirement in warranty actions.³⁴ Moreover, it could have invoked the majority rule³⁵ that a violation of a pure food act³⁶ is negligence *per se* in a civil action.³⁷ But the court refused to falter.

³³ It appears that the only food case expressly requiring privity was *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E. 30 (1935). However, this rule has been stated countless times by nonfood cases citing *Thomason*. The court keeps repeating their impregnable rule requiring privity and defying its common law capacity.

[The majority rule] truly exemplified the capacity of the common law to originate, modify, abandon, extend or adjust ideas, theories and rules to meet changing conditions or achieve greater perfection in rendering justice. Those who would freeze privity at any one stage of its development are both ignoring its common-law origin as an imperfect idea in the fallible human brains of certain judges—not a divine unchanging principle in which there can be no error—and denying its common-law capacity to develop. The truth is that privity was never a static concept, and it should not now be any more static than the common-law is static

Chapman v. Brown, 198 F. Supp. 78, 104-05 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

³⁴ In *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951), the court by dictum noted that a manufacturer's liability in sealed food cases was a matter of "primary liability." *Id.* at 287, 63 S.E.2d at 826.

³⁵ *Criswell Baking Co. v. Milligan*, 77 Ga. App. 861, 50 S.E.2d 136 (1948) (contaminated pie); *Myer v. Greenwood*, 125 Ind. App. 288, 124 N.E.2d 870 (1955) (trichinosis); *Kelly v. J. R. Daily Co.*, 56 Mont. 63, 181 P. 326 (1919) (impure pig's feet); *Alpine v. LaSalle Diners*, 197 Misc. 415, 98 N.Y.S.2d 511 (1950) (wire in pie); *Mahoney v. Shaker Square Beverages*, 46 Ohio Op. 250, 102 N.E.2d 281 (1951) (exploding bottle); *Tedder v. Coca-Cola Bottling Co.*, 224 S.C. 46, 77 S.E.2d 293 (1953) (glass in coke). *Contra*, *Walter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N.E.2d 739 (1943) (paint in milk is evidence of negligence); *Gearing v. Berkson*, 223 Mass. 257, 111 N.E. 785 (1916) (unwholesome pork chops is some evidence of negligence); *Cheli v. Cudahy Bros. Co.*, 267 Mich. 690, 255 N.W. 414 (1934) (trichinosis is no evidence of negligence).

³⁶ N.C. GEN. STAT. §§ 106-120 to -145 (1960). The presence of a substance "natural" to the food is not an adulteration. *Adams v. Great Atl. & Pac. Tea Co.*, 251 N.C. 565, 112 S.E.2d 92 (1960) (crystallized corn in corn flakes).

³⁷ In *Ward v. Morehead Sea Food Co.*, 171 N.C. 33, 87 S.E. 958 (1916), the court imposed civil liability for a violation of this statute but did not resolve the question of whether such a violation was negligence *per se*. It seems that no decision since *Ward* has considered this question. However, the court has held that a violation of a safety statute having force as law is

The most effective remedy for an injured consumer and ultimate user is usually an action against the manufacturer on an implied warranty. Since the Code is inadequate and the court apparently refuses to alter the case law, the legislature should expressly abrogate privity to provide adequate protection to the public.³⁸

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negligence *per se*. Lutz Indus. Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955) (North Carolina Building Code). There, the court said "it is well settled law in this jurisdiction, that when a statute imposes upon a person a specific duty for the protection of others, that a violation of such statute is negligence *per se*." *Id.* at 341, 88 S.E.2d at 339.

³⁸ Virginia has enacted such a statute.

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods

VA. CODE ANN. § 8-654.3 (Supp. 1964). A bill that would partially abrogate the privity requirement had been introduced into the North Carolina General Assembly, H.B. 251, 1965 Sess., but was killed in committee. News and Observer, April 23, 1965, p. 12, col. 1.