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Products Liability—Privity

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> In recent years many authorities have criticized the requirement of privity, questioning its utility in light of modern merchandising practices and the needs of ultimate consumers. . . However, . . .such arguments should properly have been addressed to the legislature. . . .Whether the legislature, by its enactment of the Uniform Commercial Code with the desire to simplify, clarify, and modernize the law governing commercial transactions, has afforded us an opportunity to pass upon the necessity of privity. . .we need not now decide.[1]

Warranties have been described as both contractual in nature,[2] and as sounding in tort.[3] Consequently, a party defending may allege that a warranty is contractual, and that there can be no liability without privity;[4] or he may allege that the acount sounds in tort to obtain the benefit of a tort statute of limitations.[5] Conversely, a plaintiff may allege that the action sounds in tort to avoid problems of privity,[6] or allege a contractual relationship to avoid a tort statute of limitations.[7]

SIMILARITY TO CONTRACT: PRIVITY REQUIREMENTS

The contractual nature of warranty is most apparent in the application of the privity doctrine, which is not generally considered in a negligence action.[8] *Winterbottom v. Wright* established the privity doctrine in warranty law by holding that a supplier of a defective product was liable only to those with whom he had a contractual relationship.[9] Courts soon recognized the harshness of this doctrine and began making exceptions on numerous legal theories. As a result, the privity doctrine as applied to warranty actions not only varies from state to state, but is often inconsistently applied within a single state.[10]

Much of the chaos results from the language used to justify the exceptions. As one court so aptly stated: ". . .awesome have been the semantic bogs when courts attempted to get around a harsh rule by artificial means. A court which lacks a clear and understandable rule of its own can scarcely be expected to impart it to others."[11] This disorder be-

[1]Jangula v. United States Rubber Company, 147 Mont. 98, 410 P.2d 426 (1966).

[2]Seaton Ranch Co. v. Montana Vegetable Oil and Feed Co., 123 Mont. 396, 217 P.2d 549 (1949) (dissenting opinion).

[3]Rogers v. Toni Home Permanent Co., 167 Ohio 244, 147 N.E.2d 612 (1958).

[4]Winterbottom v. Wright, 10 M. & W. 109, 11 L.J.Ex. 415 (1842).

[5]Gardiner v. Philadelphia Gas Works, 413 Pa. 415, 197 A.2d 612 (1964).

[6]Kelley v. John R. Daily Co., 56 Mont. 63, 181 Pac. 326 (1919); Bolitho v. Safeway Stores Inc., 109 Mont. 213, 95 P.2d 443 (1939). In these cases the plaintiff "spread his shots" alleging both tort and breach of warranty.

[7]*Gardiner v. Philadelphia Gas Works, supra* note 5.

[8]1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, § 5.03 (1).

[9]*Winterbottom v. Wright, supra* note 4.

[10]Inconsistency within the states is most apparent when food products are involved because states will then abrogate the privity requirements, but if other products are involved, they may not. Annot. 75 A.L.R.2d 39 (1961).

[11]Spence v. Three Rivers Builders and Masonry Supply, 353 Mich. 120, 90 N.W.2d 873, 877 (1958).

comes most apparent when the cases are analyzed. Courts have used at least twenty-nine separate legal thories to support decisions creating excetions to the privity requirement.[12] This prolixity makes it practically impossible to classify the exceptions.

States recognizing the general contract rationale may deny recovery unless there is a contractual relationship. However, not all jurisdictions restrict this relationship to the contracting parties. The effect is to limit the strictness of the requirement of privity. Two Pennsylvania cases, *Hochgertel v. Canada Dry Corp.*,[13] and *Yentzer v. Taylor Wine Company*,[14] illustrate differences in application of the privity doctrine. The facts in both cases were strikingly similar. During the course of employment both plaintiffs were injured by an exploding bottle. In *Hochgertel,* recovery was denied because there was no privity between the employee and the bottler. But in *Yentzer,* the court held that the privity requirement had been met because the plaintiff had personally contracted to buy the beverage; therefore, he was a "buyer" even though the purchase was made in his capacity as an employee. In fact the "buyer's" contract was not with the defendant winery; it was with a liquor store, which in turn had purchased the wine from the defendant. Consequently, the plaintiff was not a party to the original sales contract, but a sub-purchaser. Nevertheless, the court held that a contractual relationship "within the distributive chain"[15] would link the prime seller and the sub-purchaser and establish the necessary privity.

Warranties have been extended between such diverse parties as an airline passenger and an airplane manufacturer,[16] a factory employee and an industrial supplier,[17] and a truck driver and a tire manufacturer.[18] Extension of warranties to other than the contracting parties can be rationalized by reasoning that the additional parties are implied by law as being included within the scope of the warranties. Nevertheless, it is apparent that warranties differ from ordinary contracts in that exclusions and modifications are limited by law, and warranties are extended to other parties through operation of law rather than by consensual agreement.[19]

[12]GILLAM, PRODUCTS LIABILITY IN THE AUTOMOBILE INDUSTRY, 59-60 (1960).

[13]409 Pa. 610, 187 A.2d 575 (1963).

[14]414 Pa. 272, 199 A.2d 463 (1964).

[15]*Id.* at 464. Eliminating privity within the distributive chain would also eliminate unnecessary trials. Unless privity is eliminated, the ultimate consumer would have to sue his supplier who, in turn, would have to bring another action against the one who supplied him. UNIFORM COMMERCIAL CODE § 2-314, 8 specifies that one who buys for resale is protected by the warranty of merchantibility. (UNIFORM COMMERCIAL CODE is hereinafter cited U.C.C.)

[16]Goldberg v. Kollsman Instrument Co., 240 N.Y.S. 592, 191 N.E.2d 81 (1963).

[17]Jakubowski v. Minnesota Mining & Manufacturing, 42 N.J. 177, 199 A.2d 826 (1964) (reversed on other grounds).

[18]Dagley v. Armstrong Rubber Co., 344 F.2d 245 (7th Cir. 1965).

[19]U.C.C. §§ 2-316, 2-318.

SIMILARITY TO TORT

Tort defenses such as assumption of risk, contributory negligence, and proximate cause are often used in warranty actions.[20] Proximate cause is used in the sense of foreseeability[21] rather than cause in fact. This means that the seller does not have to foresee a particular chain of events causing damage, but he must foresee that when his product is used in a contemplated manner, a breach of warranty could result in injury. For example, an implied warranty that food products shall be pure and harmless[22] would render a seller liable for purveying a ham containing buckshot if the buyer broke his tooth eating the ham. However, the seller would not be liable if the extra weight of the buckshot caused the buyer to drop the ham and break his toe. Although the seller should foresee that injury could result from eating impure food, he could not foresee harm from handling impure food; therefore, in the second case the breach of warranty would not be the proximate cause of the injury.

Courts often allow contributory negligence as a defense in warranty actions. However,

> . . .it is arguably the better view that contributory negligence as such, as distinguished from misuse of the product, is not a defense. Depending upon the facts, the distinction between contributory negligence and misuse of the product may be nothing more than a matter of semantics. In other words, some courts have talked of contributory negligence as a defense in warranty when they could have said instead that there was misuse or voluntary and unnecessary exposure to risk with knowledge of the danger, which generally is a defense to strict liability.[23]

The proponents of the above view recognize that their position does not square with those cases denying recovery when the contributory negligence was failure to reasonably inspect, when inspection would have revealed a defective product.[24] Failure to inspect may be contributory negligence in a limited sense, but the failure goes to the buyer's knowledge rather than to the buyer's use of the product which contributed to the accident.[25]

In food cases, courts look to the product, not the parties, because placing food on the market creates a duty to see that such food is fit and merchantable. Thus, a breach of warranty sounds in tort rather than in contract, and courts which treat warranty as strictly contractual in nature often eliminate the privity requirement when a food product is involved.[26] The extension of warranties to all food consumers is based on public policy. The consequences of eating impure and unwholesome food

[20] ANNOT., 4 A.L.R. 3rd 501 (1965).
[21] U.C.C. § 2-715, comment 5.
[22] REVISED CODES OF MONTANA, 1947, § 87A-314 (1). (THE REVISED CODES OF MONTANA are hereinafter cited R.C.M.)
[23] FRUMER, *op. cit. supra* note 8, § 16.01(3).
[24] *Ibid.*
[25] *Ibid.*
[26] Annot., 75 A.L.R.2d 39 (1961).

are so disastrous that the public interest is best served by allowing the ultimate consumer an action in warranty regardless of privity. Thus, defective food is felt to be less likely to reach the market place if the seller is liable for the consequences.[27]

In 1960, New Jersey extended the public policy rationale to non-food cases in *Henningsen v. Bloomfield Motors*.[28] The court there stated:

> We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person; the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.[29]

The decision was based principally on the public policy of risk distribution, rather than deterrent effect. The court reasoned that because of the increasing complexity of our economy, the manufacturer and ultimate consumer no longer meet face to face in the market. As a consequence, the implied warranty should run with the goods to protect those persons reasonably expected to use the product. By placing the burden on the manufacturer, who can control the quality of the goods, the manufacturer in turn can make an equitable distribution of loss through price adjustments or insurance. Because the loss is "produced by the hazards of a defendant's enterprise, . . .the risk of loss is properly a risk of that enterprise."[30]

The theory of allocating the risk to the enterprise has been criticized as overly broad. One court stated it could be applied not only to sales, but to any of the seller's activities which produce risks. "Thus a manufacturer would be strictly liable, even in the absence of fault, for an injury to a person struck by one of the manufacturer's trucks being used in transporting his good to market."[31]

Regardless of which rationale, deterrent or risk allocation is used, an increasing number of jurisdictions are examining the product to determine whether warranty should be extended. And, when a food product or extremely dangerous non-food product is involved, it is probable that lack of privity will not bar a warranty action.[32] In effect, this is strict liability, based on warranty, since the seller is liable for the foreseeable damage resulting from the sale of a defective product. The classical concept of strict liability in tort law holds that one is absolutely liable for any harm resulting from an ultra-hazardous instrument in his control.[33] Strict liability in the warranty area is not this comprehensive, even

[27] *Supra* at 71-80.
[28] 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960).
[29] *Id.* 161 A.2d at 84.
[30] James, *General Products—Should Manufacturers be Liable Without Negligence?* 24 TENN. L. REV. 923, 926 (1957).
[31] Wights v. Staff Jennings, Inc., 405 P.2d 624 (Ore. 1965).
[32] *Supra* note 10.
[33] Rylands v. Fletcher, L.R. 3 H. L. 330, 37 L.J.Ex. 161 (1868).

though it allows recovery without proof of negligence. In warranty, the plaintiff need not prove negligence; but he must show that the defendant sold a defective product, and that this product was the proximate cause of plaintiff's injury. It is erroneous to consider strict warranty liability to be the same as the traditional tort concept of strict liability. It is more analagous to an action based on negligence *per se.*

The court found reliance on an express warranty as a basis for liability in *Ford Motor Co. v. Loman.*[34] Loman purchased a Ford tractor from a local dealer, relying on the manufacturer's advertising in making the purchase. The court found that the advertisements created express warranties which created a duty on the part of the manufacturers to purchasers relying on them. Ford was held liable in tort, although liability was based on breach of warranty rather than negligence. Logically, the same reasoning should apply to implied warranties; dicta in the *Loman* case so indicates. Further, the court stated that it would not be necessary to show reliance when a defective product is placed on the market which is unreasonably dangerous to potential users, saying ". . .the manufacturer should incur a strict liability in tort, apart from any warranties or representation which he may have made."[35]

Under the Restatement of Torts (Second), one who sells a defective product is liable for any resulting personal damage.[36] And because the action is in tort rather than in contract, it is "not subject to the various contract rules which have grown up to surround sales."[37]

The article "must be dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics."[38] Although there is a duty to warn of dangers, this is not necessary in the case of a product which may cause an allergic reaction if the reaction is well-known and common to widely distributed goods such as strawberries.[39] Nor is there a duty to warn when the danger arising from consuming a particular product is generally known and recognized;[40] *i.e.,* trichinosis from uncooked pork. Strict liability is not created by the justifiable sale of unavoidably dangerous products. Although the Restatement uses rabies vaccination as an example,[41] the rule would seem equally applicable to blood for transfusions.

The Restatement, in contrast to the Uniform Commercial Code, does not allow as a defense the negligent failure to inspect.[42] This position is

[34]398 S.W.2d 240 (Tenn. 1966).
[35]*Id.* at 251.
[36]RESTATEMENT (SECOND) TORTS § 402A (1966).
[37]*Id.* at comment *m.*
[38]*Id.* at comment *i.*
[39]*Id.* at comment *j.*
[40]*Ibid.*
[41]*Id.* at comment *k.*
[42]*Id.* at comment *n.* This comment should be read in conjunction with the rule that the article must be dangerous to an extent beyond which would be contemplated by

consistent with the Restatement's concept of strict liability, justified by the public policy that one who consumes is entitled to protection, and that those who market are the proper parties to provide this protection.[43] Some cases have extended the Restatement's rationale to include such non-users as casual bystanders.[44]

WARRANTY AND THE UNIFORM COMERCIAL CODE

The Uniform Commercial Code describes express warranties as those arising from actual promises made by the seller,[45] whereas implied warranties of merchantability and of fitness of purpose arise through operation of law.[46]

Warranties of merchantability guarantee that goods which are purchased from a merchant customarily dealing in that product shall be of fair average quality.[47] Warranties of fitness of purpose do not distinguish between merchants and other sellers, but require that the goods shall be fit for a particular purpose if the buyer relies on the seller's skill and judgment. The seller must either have the buyer's reliance made known to him,[48] or from the circumstances of the transaction should realize that such reliance exists.[49] The two implied warranties, although separate, often overlap and both can be created by a single sale.[50] For example, a pair of trousers made of flammable material would breach the warranty of merchantability because they were not of fair average quality; the warranty of fitness would be breached because the seller knew the article was purchased for clothing, and that the buyer relied on his skill and judgment to select clothes which were not inherently dangerous. When both implied warranties are present, they "shall be construed as consistent with each other and as cumulative,"[51] and in the event of conflict, "any question of fact as to which warranty was intended by the parties to apply must be resolved in favor of the warranty of fitness for a particular purpose. . ."[52]

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the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics. (See comment *i, supra* note 38). See also Webster v. Blue Ship Tea Room Inc., 347 Mass. 421, 198 N.E.2d 309 (1964), holding no liability when a New Englander was injured by fish bones in a chowder.

[43]RESTATEMENT (SECOND) TORTS § 402A (1966), comment *c.*

[44]Mitchell v. Miller, 26 Conn.Supp. 142, 214 A.2d 694 (1965); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965).

[45]R.C.M. 1947, § 87A-2-313.

[46]R.C.M. 1947, §§ 87A-2-313-315.

[47]R.C.M. 1947, § 87A-2-314.

[48]R.C.M. 1947, § 87A-2-315.

[49]U.C.C. § 2-315, comment 1.

[50]Brown v. Chapman, 198 F.Supp. 78 (D. Hawaii 1961) *aff'd* 304 F.2d 149 (9th Cir. 1962). It has been held that not even a sale is necessary. See Garthwait v. Burgio, 216 A.2d 189 (Conn. 1965), (injuries for faulty application of hair dye); Cintrone v. Hertz Truck Leasing, 45 N.J. 434, 212 A.2d 769 (1965), (lessor of truck held liable to lessee's employee).

[51]R.C.M. 1947, § 87A-2-317.

[52]U.C.C. § 2-315, comment 2, referring also to § 2-317.

Warranty liability arises when damage is caused by the failure of a product to meet the express or implied representations made by the seller.[53] "The whole purpose of the law of warranty is to determine what it is that the seller in essence agreed to sell. . ."[54] The seller is liable in any manner which is reasonable[55] if the product does not conform to the warranty. Three elements necessary to establish liability under the Code are: (1) existence of the warranty; (2) breach of the warranty; and (3) that the breach was the proximate cause of the loss sustained.[56] Because the breach is proved by showing a defective product, the product itself is the best evidence. However, circumstantial evidence equivalent to a preponderance of probabilities is also acceptable to prove breach.[57]

The Code recognizes failure to inspect as a defense to a warranty action.[58] However, the standard of inspection is one of reasonableness under the circumstances, rather than an absolute duty to inspect. The buyer's conduct should be a defense to a warranty action only if it amounts to a misuse of the product, and is a cause in fact of the injury. This proposition may be illustrated by a defective tire. The seller should be liable for breach of warranty if the buyer did not discover, or should not have discovered the defect. The liability would remain even if the tire were to blow out while the driver was exceeding the speed limit, because the harm would have been caused by the defective tire, not by the driver's negligence.[59]

Another means of limiting warranty liability is the use of disclaimer clauses. The Code recognizes and distinguishes two separate disclaimers; one modifies damages,[60] and the other negates any warranty liability.[61] The latter is a true disclaimer because it excludes warranty. The difference between the two types may be shown by a new car warranty stating that the automobile shall be free from defects in material and workmanship for twenty-four months, and that the obligation of the seller shall be fulfilled by repairing or replacing any defective part. The disclaimer clause provides that the warranty is *in lieu* of any other express or implied warranty, including any implied warranties of merchant-

[53]FRUMER, *op. cit. supra* note 8, § 16.01.

[54]U.C.C. § 2-313, comment 4.

[55]R.C.M. 1947, § 87A-2-714 (1).

[56]U.C.C. § 2-314, comment 13.

[57]*Supra* note 28; Petterson v. George H. Weyer, 189 Kan. 501, 370 P.2d 116 (1962).

[58]U.C.C. § 2-715, comments 2 and 4.

[59]Assuming that the driver was not traveling at such a speed that he misused the tires beyond a point which the seller could reasonably foresee. Some courts classify such careless use as contributory negligence. E. G. Maironio v. Weco Products Co., 214 A.2d 18 (N.J. 1965), where damage was caused through careless handling of a tooth brush container. True product misuse arises where the goods are used in a different manner than the seller could foresee. See also McCready v. United Iron and Steel Co., 272 F.2d 700 (10th Cir. 1959), where, in a negligence action, a manufacturer was held not liable for injuries caused when construction workers used window frames as ladders.

[60]R.C.M. 1947, §§ 87A-2-718, 87A-2-719.

[61]R.C.M. 1947, § 87A-2-316.

ability or fitness.[62] The modification of the express warranty is the limitation of recovery to repair or replacement costs. The modification clause will probably be held ineffective if a breach results in personal injury since the Code states that modification of remedies in the sale of consumer goods is prima facie unconscionable when it limits or negates damages for injury to the person.[63] Although a seller is free to disclaim warranty liability, he must do so by disclaiming all warranties, not by limiting the amount of his liability[64] and even a complete disclaimer may not protect a seller because a court may refuse to recognize it if it is unconscionable.[65]

Under the Uniform Commercial Code, when a warranty extends to future performance, the cause of action accrues at the time of injury unless the "breach is or should have been discovered."[66] Although the Code makes no provision for a tort statute of limitations, it provides that a warranty action will toll the regular statute, thus permiting a future tort action.[67]

The framers of the Uniform Commercial Code comment that its provisions are "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. . . ."[68] The reference to developing case law indicates that court decisions[69] as well as legislative acts may be the basis for eliminating the requirement of privity within the distributive chain. This extension must be distinguished from warranties extended to those outside the chain who are not buyers, and who have no contractual relationship, yet may be covered by warranty. Such outside coverage was expressly provided in the Code by extending warranties to the buyer's household and to his guests.[70] Beyond this, the Code is neutral, stating that "sections of this Article are not designed in

[62]R.C.M. 1947, § 87A-2-316 provides that exclusion or modification of implied warranties must be conspicuous when it is in writing; and that the implied warranty of fitness must always be excluded in writing.

[63]R.C.M. 1947, § 87A-2-719(3).

[64]R.C.M. 1947, § 87A-2-719 (3), dealing with modification of remedies, states that the seller is free to disclaim warranties in the manner provided in § 2-316. Combined with the comments to § 2-316, it is clear that the seller must disclaim the warranty rather than modify the remedy for breach.

[65]U.C.C. § 2-302, comment 1 provides that one test shall be whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses are so one-sided as to be unconscionable under the circumstances at the time of the making of the contract.

[66]R.C.M. 1947, § 87A-2-725(2). R.C.M. 1947, § 87A-2-607(3)(a) provides that notice of breach must be given within a reasonable time. Where there is no privity of contract between the seller and injured party it has been held that no notice is required. Lonzrick v. Republic Steel Corp., 1 Ohio App.2d 374, 205 N.E.2d 92 (1966); Wilson v. Modern Mobile Homes, Inc., 137 N.W.2d 144 (Mich. 1965); Tomczuk v. Town of Cheshire, 26 Conn.Supp. 219, 217 A.2d 71 (1965).

[67]R.C.M. 1947, § 87A-2-725(3). If the tort cause of action expired between commencement and termination of the first action, the tort action must be commenced within six months of the termination date.

[68]U.C.C. § 2-318, comment 3.

[69]*Contra,* Henry v. Eshelman & Sons, 209 A.2d 46 (R. I. 1965).

[70]R.C.M. 1947, § 87A-2-318.

[71]U.C.C. § 2-313, comment 2.

any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract."[71]

MONTANA LAW

To date, Montana has not ruled on the position taken by the Restatement, nor has it stated whether privity will be extended under the Uniform Commercial Code. However, the Code has made important changes in Montana warranty law, especially with regard to the implied warranties of fitness and merchantability. Until the Code became effective,[72] warranty was limited to those transactions enumerated by statute.[73] The warranty of merchantability covered only those goods which the buyer did not have an opportunity to examine;[74] while the warranty of fitness of purpose applied only to those products built for a special purpose, or provisions sold for domestic use.[75] One case law exception utilized the Pure Food and Drug Act to extend the warranty of fitness to others than the contracting parties.[76] Two cases, based on the Pure Food and Drug Act, held the seller responsible, regardless of privity, for damages resulting from the sale of impure food. However, the cases reached the same conclusion for different reasons. In *Kelly v. John R. Daily Co.*,[77] the plaintiff's husband purchased discolored meat. Plaintiff became ill and recovered damages from Daily. On appeal, the court held that the Pure Food and Drug Act established a duty to sell wholesome meat products, and breaching that duty made the seller liable in either contract or tort, regardless of privity. The court further held that there was no contributory negligence, as the plaintiff had no reason to know the meat was bad. Some years later, the privity question rose again in *Bolitho v. Safeway Stores*,[78] when plaintiff's son became ill from contaminated cereal. Although the Pure Food and Drug Act stated that criminal liability did not attach to retailers who sold food in sealed containers, the court held that civil liability could attach, and that the Pure Food and Drug Act created a warranty. In doing so it distinguished a Maine holding[79] that unless the seller gave an express warranty, there was no civil liability for violation of the Act.

A number of other jurisdictions hold that warranty liability may be based on violations of the Pure Food and Drug Act.[80] These decisions

[72]January 1, 1965. See R.C.M. 1947, § 87A-10-101.

[73]See R.C.M. 1947, §§ 74-309 et. seq.

[74]R.C.M. 1947, § 74-324.

[75]R.C.M. 1947, §§ 74-316, 74-321.

[76]Mason, *Article 2: Sales, a Symposium, Montana Law and the Uniform Commercial Code*, 21 MONT. L. REV. 12-14. (1959).

[77]56 Mont. 63, 181 Pac. 326 (1919). There was no attempt to bring in Safeway's supplier as a party to this suit. This was probably due to the difficulty of obtaining jurisdiction over an out-of-state defendant at that time.

[78]109 Mont. 213, 95 P.2d 443 (1938).

[79]Bigelow v. Maine Central R. R. Co., 110 Me. 105, 85 A. 396 (1912).

[80]*Supra* note 10, at 71-80, 98-101; *contra*, Flynn v. Growers Outlet, 307 Mass. 373, 30 N.E.2d 250 (1940); Howson v. Foster Beef Co., 87 N.H. 365, 189 A. 865

do not consider whether a violation creates tort or contract based warranty liability. The central issue seems to be whether the plaintiff is a member of the class which the statute protects. "The recognition of a warranty right of action rests on the public policy of protecting an innocent buyer from harm rather than to insure a contractual right.[81] There is no reason why the concept of protection should not extend to the non-buyer, protecting him from the effects of eating unwholesome food. This position was approved in dictum in *Seaton Ranch Co. v. Montana Vegetable Oil and Feed Co.*[82] The court there stated that a seller of provisions insures the wholesomeness of his product; and that this protection is extended to the general public by the Pure Food and Drug Act. A vigorous dissent held that warranty is in essence contractual. On rehearing the court affirmed saying, "When a seller warrants that food is sound and wholesome, he thereby covenants to make good any defect or loss incurred by its use by the consumer. This is exactly what is meant by an insurer of the purity of the product."[83]

A further issue in *Seaton* was whether the plaintiff was guilty of contributory negligence by continuing to use defendant's feed after some sheep died. The plaintiff maintained he had thought the sheep died from eating poisonous shrubs. The court held the issue to be one for the jury, thus by implication allowing contributory negligence as a defense, if the plaintiff knew or should have known of the risk. As yet, Montana has not determined whether true contributory negligence is a warranty defense, nor has it taken a stand on privity under the U. C. C.

There is precedent in Montana to abrogate the defense of privity in both contract and tort. *Daily* established the tort doctrine that a breach of statutory duty creates warranty liability. The Uniform Commercial Code requires that goods be fit and merchantable;[84] therefore, breach of warranty proves breach of that duty, making the seller liable. Although the Code states that it is the buyer who receives the warranty,[85] the comments to the Code make it clear that warranties can be extended through court decisions.[86] In many instances, an injured third party falls within the group whom a seller could reasonably anticipate as a purchaser; but if warranty protection is limited to actual buyers, the result is that the seller's duty is limited, and those whom the law intended

(1937). This rule is generally applied in negligence actions. See 38 AM. JUR. *Negligence* §§ 158 *et. seq.;* however, negligence and warranty are both civil actions. The controlling issue should be compensation to the injured party as opposed to punishing the defendant. If the purpose is compensation for one protected by statute, then a civil action in warranty should be allowed.

[81] *Supra* note 3, at 614.

[82] Seaton Ranch Co. v. Montana Vegetable Oil and Feed Co., 123 Mont. 396, 217 P.2d 549 (1949) (dissenting opinion).

[83] *Supra* at 559.

[84] *Supra* note 47.

[85] *Supra* notes 45, 48. However, R.C.M. 1947, § 87A-2-314, which creates the implied warranty of merchantability, does not specify a buyer as such. See note 47 *supra.*

[86] *Supra* note 71.

to be protected are without a remedy in warranty. The privity problem would remain if the court should hold that warranty actions are in essence contractual. However, warranty may still be extended under the reasoning in *Bolitho,* which held that one who fell within the purview of a statute designed to protect him became a party to the warranty. When a third person falls within a class which the Uniform Commercial Code protects, he should become a party to the warranty contract.[87]

The negligence rationale employed in *Baumgartner v. National Cash Register*[88] could also be used to eliminate the privity requirement. In *Baumgartner,* the plaintiff was an employee of Safeway Stores. She suffered an electrical shock from a cash register owned by Safeway, but maintained and repaired by National Cash Register pursuant to a contract with Safeway. No evidence of negligence was shown other than that the wire which grounded the machine had been broken. National's defense was testimony that the ground wires were frequently bumped by wastebaskets and jarred loose. The judge instructed the jury on *res ipsa loquitur.* The jury found for the plaintiff and National appearel.

The *res ipsa* instruction was held to be proper on appeal because the injury was found to be caused by a faulty machine; the court stating, "[I]f the machine had been properly grounded the accident would not have happened." The court further held that physical control of the register was not needed, saying ". . .it would be far better, and much confusion would be avoided, if the idea of 'control' were discarded altogether, and if we were to say merely that the apparent cause of the accident must be such that the defendant would be responsible for any negligence connected with it."[89] The court continued, ". . .this does not mean that the possibility of other causes be eliminated altogether, but only that it be shown that the greater probability lies at the defendant's door."[90]

Although the jury can always reject the *res ipsa* inference, they may well find as they did in *Baumgartner,* that the inference outweighed the defendant's evidence of due care. All that was needed to sustain the instruction in *Baumgartner* was that the greater probability of negligence lay at the defendant's door, and that the defendant had exercised control at some time prior to the injury.

Baumgartner may be distinguishable because the plaintiff was employed by a contracting party. However, the court assumed that the maintenance contract established a duty not to be negligent toward those within the foreseeable risk area. Thus, *Baumgartner* can also stand for the proposition that a contract can impose an affirmative duty which extends to third persons.

[87] *Supra* note 78.

[88] 146 Mont. 346, 406 P.2d 686 (1965).

[89] *Id.* at 690, quoting PROSSER, TORTS 225 (3rd ed. 1964).

[90] *Ibid.,* quoting 2 HARPER & JAMES, TORTS § 19.7, at 1086 (1956).

Regardless of whether warranty actions sound in contract or tort, it is necessary to (1) prove a defective product, (2) a causal relation between the fact and the injury. The problem of proof troubled the Montana Court when they were confronted by Mr. Jangula's rubber boots.[91] Jangula, a Butte copper miner, suffered from atopic dermatitis allegedly caused by wearing boots manufactured by defendant. Suit was instituted alleging both negligent manufacture and breach of warranty. On appeal from a plaintiff's verdict, the court held that was no proof of negligent manufacture, harmful or irritant substance, proximate cause, or medical causation. The court also considered plaintiff's cross-appeal on the district court's ruling which sustained a demurrer to the warranty action. Plaintiff there argued that it was not necessary to show a defective product if a simple common sense inference could be drawn by the jury; and that this inference, coupled with medical testimony that there was a causal relationship between the product and the injury would be sufficient proof that an implied warranty was breached. The court disposed of the warranty question by holding there was no privity between the parties.[92] At plaintiff's request, a rehearing was granted.

On rehearing, the court came to the same conclusions on negligence, but looked to the pleadings to determine the warranty issue.[93] The initial complaint had alleged that defendant had expressly warranted the boots; upon amendment, it "realleged that certain chemicals were negligently compounded and the boots were of defective workmanship."[94] The court said no express warranty was established, stating ". . .the fact recital of (defendant's) distribution methods designed to reach the ultimate user were national in scope and by means of advertising to create a demand. It seems obvious that no *express warranty* could be established by such a method alleged."[95]

A few older decisions do hold that advertisements cannot create express warranties, but they are in the minority. The jurisdictions allowing recovery do so when the advertisement induced the purchase,[96] and if the buyer relied on the warranty after the purchase.[97] Advertisements create express warranties which affirm actual promises made before or as part of the sale, while the warranties of fitness and merchantability are implied to the seller at the time of the sale.

[91]Jangula v. United States Rubber Co., 147 Mont. 98, 410 P.2d 426 (1966).

[92]*Supra.* Authority for this position was a single sentence of dicta in Larson v. United States Rubber Co., 163 F.Supp. 327, 330 (D. Mont. 1958). "Montana statutes on warranty . . . require privity of contract between the manufacturer and the person seeking to enforce the warranty . . . ." The Federal court gave no supporting case law for this position, but it was not necessary as there was judgment for the plaintiff based on negligence.

[93]*Supra* note 91.

[94]*Supra* note 91, at 468.

[95]*Supra* note 91, at 469.

[96]*Cf.*, Manns v. Macwhyte Co., 155 F.2d 445 (3rd. Cir. 1946).

[97]*Cf.*, Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3rd Cir. 1965), interpreting Pennsylvania law; Brown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966).

Jangula typifies the position which many courts take when faced with privity. They circumvent the requirement rather than affirming or abolishing it. There are four reasons why this is done: (1) Failure to understand the strict liability concept as applied to defective products; (2) Fear that eliminating privity will increase law suits; (3) Belief that industry needs the protection afforded by privity, and (4) Distaste for a public policy rationale based on risk distribution.

Strict Liability Concept. This terminology is confusing because it has been used in actions involving defective products as well as those involving ultra-hazardous products. Strict liability should be used only when the case concerns an ultra-hazardous product. On the other hand, when a defective product is involved, a better description would be strict product liability. The distinction has not always been made clear, and as a result courts confuse the two liabilities, even though each is a separate legal doctrine of strict liability. One controlling an ultra-hazardous instrument or manufacturing an ultra-hazardous product is responsible for all damages resulting from its use, regardless of any negligence or the absence thereof on the part of the controller or manufacturer. But under the doctrine of strict product liability, there must have been a reliance on the seller's express or implied assurance. Because strict liability does not require this proof, a court thinking only in such terms would hesitate before eliminating privity in product liability cases.

Danger of Increased Law Suits. Courts fear that strict products liability will cause more law suits to be initiated, but the record does not bear this out. In Montana, for example, strict product liability was established for food in 1919[98] and since that time there has been only one other reported case in this area—in 1938.[99] Even those jurisdictions which have completely eliminated the privity requirement do not show a large increase in product liability cases.

Industry Protection. The food industry exemplifies the incorrectness of this position. Foods have been subject to strict product liability for a number of years, yet the industry continues to grow and prosper. The argument against industry protection was expressed succinctly in a recent Pennsylvania opinion:

> Throughout the entire history of the law, legal Jeremiahs have moaned that if financial responsibility were imposed in the accomplishment of certain enterprises, the ensuing litigation would be great, chaos would reign and civilization would stand still. It was argued that if railroads had to be responsible for their acts of negligence, no company could possibly run trains; if turnpike companies had to pay for harm done through negligence, no roads would be built; if municipalities were to be financially liable for damage done by their motor vehicles, the treasuries would be depleted. Nevertheless liability has been imposed in accordance with elementary rules of justice and the moral code, and civilization in consequence, has not been bankrupted, nor have the courts been inundated with confusion.[100]

[98]Kelley v. John R. Daily Co., 56 Mont. 63, 181 Pac. 326 (1919).

[99]Bolitho v. Safeway Stores, Inc., 109 Mont. 213, 95 P.2d 443 (1939).

[100]Doyle v. South Pittsburg Water Co., 414 Pa. 199, 199 A.2d 875, 884 (1964), holding

Public Policy Rationale. The rationale that the risk should be allocated to the enterprise could logically be extended to include losses not caused by a defective product. However, there is another public policy rationale based on the deterrent effect; by making the seller liable for defective products, quality will be improved and the consumer protected. It is submitted that the deterrent rationale is the better because there is no real danger that it will be extended to all phases of industry, yet it has the same effect as spreading the risk.

CONCLUSION

Justice John C. Harrison, concurring in *Jangula,* stated "I do not believe that the doctrine of privity should be a shield against a breach of warranty action."[101] Many states, particularly those with large populations, have abrogated the privity requirement.

It is submitted that existing case law can support tort actions by consumers who rely directly or indirectly on a seller's express or implied warranties. By sustaining such actions, the Montana courts would not only protect state citizens, but do away with the tortuous decisions which result when it becomes necessary to interpret law that sounds in tort yet carries an implication of contractual relationship.

ALDEN PEDERSEN.

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that a private water company was liable for fire damages to a city resident when the company negligently maintained a fire hydrant.

[101] *Supra,* note 91 at 471.