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Negligence and Warranty: the Forms of Action Live

NEGLIGENCE & WARRANTY: THE FORMS OF ACTION LIVE

In the past decade the trend in products liability cases pursued *in tort* has been toward the abandonment of the privity of contract requirement.[1] In cases pursued *in warranty,* however, a majority of states still require privity.[2] A plaintiff's choice of remedy, therefore, may de-

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[1]Breach of warranty originally sounded in tort as an action on the case and was connected with deceit. Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612, 614 (1950); Freeman v. Navarre, 47 Wash. 2d 760, 289 P.2d 1015, 1017-18 (1955); 1 Williston, Sales §§ 195-97 (rev. ed. 1948); Ames, *History of Assumpsit,* 2 Harv. L. Rev. 1, 8 (1888). It was not until Stuart v. Wilkins, 1 Dougl. 18, 99 Eng. Rep. 15 (1778), that a contract action was even recognized. The historic case of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842), led to a separation of the tort and contract approaches to products liability. Although *Winterbottom* held only that an action on the case would not lie on a contract, it was generally misread to stand for the proposition that privity of contract was necessary to recover for injuries due to defective chattels in an action *ex contractu.* Prosser, Torts § 96 at 658-59 (3d ed. 1964). Thomas v. Winchester, 2 Seld 397 (N.Y. 1852). rejected privity in tort cases by holding that privity was no bar to an action in tort where "negligence" was involved; but this trend culminated in the historic case of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), which held that a manufacturer not in privity with the plaintiff was under a liability-imposing duty to inspect for defective components in assembling a product to be used by the purchaser without further inspection.

[2]The prevailing view in states which have not passed the U.C.C. is that privity is indispensable to a successful warranty action by an injured person against a defendant manufacturer or seller. *Alabama,* Birmingham Chero-Cola Bottling Co. v. Clark, 205 Ala 678, 89 So. 64 (1921); *Arizona,* Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P.2d 1094 (1957); *Delaware,* Ciociola v. Delaware Coca-Cola Bottling Co., 53 Del. 477, 172 A.2d 252 (1961); *Kansas,* Alexander v. Inland Steel Co., 263 F.2d 314 (8th Cir. 1958), but see B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959) (Lack of privity bars recovery for breach of express warranty but not for breach of implied warranty); *Minnesota,* Torpey v. Red Owl Stores, Inc., 228 F.2d 117 (8th Cir. 1955); *Mississippi,* Grey v. Hayes-Sammons Chem. Co., 310 F.2d 291 (5th Cir. 1962); *Nevada,* Long v. Flanigan Warehouse Co., 79 Nev. 241, 382 P.2d 399 (1963); *North Carolina,* Perfecting Serv. Co. v. Product Dev. & Sales Co., 259 N.C. 400, 131 S.E.2d 9 (1963); *South Carolina,* Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956); *South Dakota,* Whitethorn v. Nash-Finch Co., 67 S.D. 465, 293 N.W. 859 (1940); *Texas,* Luse v. Valley Steel Prods. Co., 293 F.2d 625 (5th Cir. 1961); *Washington,* Kasey v. Suburban Gas Heat, Inc., 60 Wash. 2d 468, 374 P.2d 549 (1962).

However, an expanding number of jurisdictions recognize an exception to the privity requirement in cases involving impure food products and inherently dangerous products. *Alabama,* Birmingham Chero-Cola Bottling Co. v. Clark, supra; *California,* Vassallo v. Sabatte Land Co., 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (Dist. Ct. App. 1963); *Maine,* Pelletier v. DuPont, 124 Me. 269, 128 Atl. 186 (1925); *Maryland,* Atwell v. Pepsi-Cola Bottling Co., 152 A.2d 196 (D.C. Munic. Ct. App. 1959); *North Carolina,* Ward v. Morehead City Sea Food Co., 171 N.C. 223, 87 S.E. 958 (1916); *Ohio,* Ward Baking Co. v. Trizzino, 27 Ohio App. 274, 161 N.E. 557 (1928); *South Dakota,* Whitethorn v. Nash-Finch Co., supra; *Virginia,* Colonna v. Rosedale Dairy Co., 166 Va. 314, 186 S.E. 94 (1936); *West Virginia,* Burgess v. Sanitary Meat

termine the result in a products liability situation.[3]

In *Henry v. John W. Eshelman & Sons*[4] the plaintiff's only remedy was an action for breach of warranty.[5] The plaintiff's chickens were

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Mkt., 121 W. Va. 605, 5 S.E.2d 785, 6 S.E.2d 254 (1939); *Wisconsin,* Smith v. Atco Co., 6 Wis. 2d 371, 94 N.W.2d 709 (1959).

Exceptions involving food containers are found in: *California,* Vassallo v. Sabatte Land Co., supra, *Florida,* Canada Dry Bottling Co. v. Shaw, 118 So. 2d 840 (Fla. Dist. Ct. App. 1960); *Michigan,* Dobrenski v. Blatz Brewing Co., 41 F. Supp 291 (W.D. Mich. 1941). Contra, *Missouri,* McIntyre v. Kansas City Coca-Cola Bottling Co., 85 F. Supp. 708 (W.D. Mo. 1949); *Oklahoma,* Soter v. Griesedieck W. Brewer Co., 200 Okla. 302, 193 P.2d 575 (1948).

Exceptions involving animal food, as in the principal case, are found in: *California,* McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954); *Montana,* Seaton Ranch Co. v. Montana Vegetable Oil & Feed Co., 123 Mont. 396, 217 P.2d 549 (1950).

[3]Confusion between tort and contract approaches to the privity requirement has hindered any uniform application which might give the plaintiff a clear understanding of what he must state to prove his case. Following are some of the problems encountered; Senter v. B. F. Goodrich Co., 127 F. Supp. 705, 708-09 (D. Colo. 1954) (proof of a breach of a duty of care); Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7, 21 (Munic. Ct. 1958) (contributory negligence); Chapman v. Brown, 198 F. Supp. 78, 85-86 (D. Hawaii 1961) (contributory negligence and assumption of risk); Gosling v. Nichols, 59 Cal. App. 2d 442, 139 P.2d 86 (Dist. Ct. App. 1943) (survival of actions); B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959) (wrongful death); Hinton v. Republic Aviation Corp., 180 F. Supp. 31 (S.D.N.Y. 1959) (wrongful death); Schuler v. Union News Co., 295 Mass. 350, 4 N.E.2d 465 (1936) (wrongful death); Greco v. S. S. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557 (1938) (wrongful death); Jones v. Goggs & Buhl, Inc., 355 Pa. 135, 49 A.2d 379 (1946) (statute of limitations); Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (Dist. Ct. App. 1954) (statute of limitations); Amran & Goodman, *Some Problems in the Law of Implied Warranty,* 3 Syracuse L. Rev. 259, 268 (1952) (measure of damages).

Further confusion has come from the variety of fictions courts have used to circumvent the privity barrier in contract actions. Mr. Cornelius W. Gilliam has uncovered twenty-nine different rationalizations by courts; Gilliam, *Products Liability in a Nutshell,* 37 Ore. L. Rev. 119, 153 (1958), of which fictitious agency, Bowman v. Great Atl. & Pac. Tea Co., 284 App. Div. 663, 133 N.Y.S.2d 904 (1954), and third party beneficiary contracts, Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928), Parish v. Great Atl. & Pac. Tea Co., supra at 12-14, 26, have been the most prevalent. In the last decade the concept of an implied warranty of merchantability running with the goods, as found in the principal case, has supplanted previous theories, Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919, 921 (D.C. Munic. Ct. App. 1962).

[4]209 A.2d 46 (R.I. 1965).

[5]Plaintiff's counsel pointed out the difficulties of a system in which the action could be brought in tort or contract when he stated to the writer in correspondence dated Sept. 30, 1965: "We would have preferred to pursue the Plaintiff's claim in tort, but unfortunately the defendant was not then susceptible to service in the state of Rhode Island, except by an action in rem, in that we were aware of certain funds due and owing to the defendant by one of its Rhode Island dealers. Since Rhode Island permits attachments in contract but not in tort we brought the action in assumpsit for breach of warranty, attaching the funds of the defendant in the hands and possession of its Rhode Island dealer, hoping that our Supreme Court would finally abolish the privity requirement."

harmed by the use of a feed manufactured by defendant. Plaintiff alleged that the feeds in question were manufactured and packaged in sealed bags for sale to the public[6] and that the defendant therefore impliedly warranted that the feeds were of merchantable quality, reasonably safe, and suitable for their intended purpose when properly used.

The Supreme Court of Rhode Island declined the opportunity to abolish the privity requirement in *ex contractu* actions. The court, noting that contract and tort actions were treated separately in Rhode Island, felt that it could not resort to judicial legislation to undo the decisional law requiring privity in a contract action and that it could not allow a tort recovery when the action had been pursued in assumpsit. The acquiescence of the legislature to prior criticism of this policy was taken by the court as implied approval of the previous decisions on this point.

Although the court in the principal case held that the adoption of the Uniform Commercial Code did not change the existing law concerning privity with the manufacturer or imply that such change was thereby delegated to the courts,[7] a more thorough examination

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[6]Although we do not know for certain that advertising played a part in the plaintiff's purchasing of the chicken feed, it is interesting to note that this was not considered in the case. Courts have drawn an exception to the general rule requiring privity in warranty cases where it appeared that the injured party, although not in privity with the manufacturer, acted in reliance on the manufacturer's statements in his labels and advertising. Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954); Worley v. Procter & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952); Lardaro v. MBS Cigar Corp., 10 Misc. 2d 873, 177 N.Y.S.2d 6(Munic. Ct. 1957); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

The immediate issue in the principal case was one of proper pleading, and the court intimates that if the action had been brought in trespass on the case the result would have been in plaintiff's favor. Henry v. John W. Eshelman & Sons, 209 A.2d 46 (R.I. 1965). Although this might seem to be little more than a lesson in procedure for one who could not readily bring his action in tort, this might qualify as an "emergency or extreme condition" which the court had said would warrant resort to judicial legislation. Id. at 48.

It might be enlightening to consider the holding on this same question of Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691, 694 (1951), where the court found that their "court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it.... [I]t is the duty of the court to bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'"

[7]The Rhode Island court, while recognizing the modern approach to products liability, cited Lombardi v. California Packing Sales Co., 83 R.I. 51, 112 A.2d 701 (1955), and Wolf v. S.H. Wintman Co., 87 R.I. 156, 139 A.2d 84 (1958), as Rhode Island precedents which controlled the law on the requirement of privity in as-

of the code's effect upon privity is necessary. At present the U.C.C. has been adopted in 44 jurisdictions.[8]

§ 2-318
Third Party Beneficiaries of Warranties Express or Implied

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sumpsit and expressed its reluctance to overrule these decisions since no emergency warranting change existed. Supra note 4, at 47.

The court stated in the principal case that, "such long acquiescence in decision law by the legislature, especially after its attention has been called to repeated litigous criticism of its underlying policy, is persuasive proof of at least implied legislative approval of the decisions." Supra note 4, at 48. That argument is questionable in view of the fact that it was the courts who fabricated the rule requiring privity in contract actions, Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 404, 226 N.Y.S.2d 363 (1962), and the apparent fact that legislatures could easily remain ignorant of a problem or not consider it without any idea of impliedly approving of privity. The concurring opinion of Justice Joslin in the principal case takes this into account when he states, "While a deferral to the legislature in the initiation of changes in matters affecting public policy may often be appropriate, it is not required where the concept demanding change is judicial in its origins. The requirement of privity in suits against the manufacturer is such a concept. It is of judicial making and was first enunciated in Winterbottom v. Wright." Supra note 5, at 51.

[8]Carroll & Whiteside, Forms for Commercial Transactions Under the Uniform Commercial Code, Preface to 1966 repl. part (1965).

> 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.
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> § 2-318:1. Official Code Comment.
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> 3.... 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 re-sells, extend to other persons in the distributive chain.

Within the distributive chain from the manufacturer through the wholesaler to the retailer to the ultimate purchaser and his possible family, household, and guests there are actually two separate privity problems. The first is whether a member of the family or household or a guest of the purchaser who actually bought the goods from the retailer could sue the retailer irrespective of lack of privity. This has been explicitly answered yes by § 2-318 of the U.C.C. However, the question of whether the purchaser, a member of his family or his household or a guest could sue the manufacturer directly despite lack of privity between the parties, the question in the principal case, is left by the U.C.C. to the "developing case law."

The "neutrality" and "developing case law" language in the comments to § 2-318 reflect the careful attitude that was necessarily adopted by the framers of the U.C.C. in order that this apparently controversial issue might not hinder the acceptance of the Code or cause change or deletion of § 2-318. In the interpretation of comment 3 the courts have had to decide whether the courts or the legislatures were to have control over this area, and, contrary to the principal case, this language has been held to expressly leave the question of privity to the judiciary.[10] It should be pointed out that the accepted trend in products liability is toward abolition of privity.[11] Thus, the

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[10]"Appellee contends that the Uniform Sales Act codified the doctrine of privity and that any change must come from legislation. This argument has been rejected often by the courts. Moreover, the Uniform Commercial Code, the most comprehensive proposed legislation on the subject, expressly leaves questions concerning privity to the judiciary." Picker X-Ray Corp. v. General Motors Corp., supra note 3, at 922-23.

[11]The reasoning behind the liberalizing trend, which today strives toward the abolition of privity of contract in both implied and express warranties, is one of social policy. Jacob E. Decker & Sons, Inc v. Capps, 139 Tex. 609, 164 S.W.2d 828, 829 (1942). Manufacturing has advanced past the stage of the 18th century artisan and customer in an over-the-counter relationship and has grown to nationwide

language leaving the settlement of this question to the "developing case law" might be interpreted to intimate that the framers of the U.C.C. were not in favor of the privity doctrine but would wish to see its gradual judicial demise by reference to an existing liberal judicial trend.

Although no clear cut classification can be drawn, it may be said that of the 44 jurisdictions which have passed the U.C.C. at least 9, have abandoned the requirement of privity for actions upon an implied warranty running from the manufacturer, and the U.C.C. played no apparent part in any actual decisional abandonment of privity.[12]

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production and distribution of goods. The privity doctrine was conceived when the producer and the buyer dealt with each other personally and the products were relatively less complicated and conducive to adequate inspection and evaluation by the immediate purchaser. With the advent of mass production of more sophisticated goods, the manufacturer became remote from the purchaser, and intermediaries handled the goods and cultivated the public into potential consumers. At the same time the product often became so complicated or highly refined that the average person could not be expected to pass judgment on its fitness for the purpose for which it was intended. Thus, a majority of the legal writers, Hursh, American Law of Products Liability § 6.16 at 534 (1961); Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960); Jaeger, Products Liability: The Constructive Warranty, 39 Notre Dame Lawyer 501 (1964), and a growing minority of the jurisdiction, E.g., Henningsen v. Bloomfield Motors, Inc., 23 N.J. 358, 161 A.2d 69, 80-81 (1960), have felt that the law should have changed with the mode of industry and have sought methods for holding the manufacturer liable for the harm done by his defective products.

[12]*California,* § 2-318 of the Uniform Commercial Code is entirely omitted from the California version of the Code, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (strict tort liability upon the manufacturer for defective product imposed without reliance on warranty); *Connecticut,* Simpson v. Powered Prods. of Mich., Inc., 24 Conn. Supp. 409, 192 A.2d 555 (1963) (U.C.C. considered as broadening the old rule but not a necessary factor in the abolition of privity); *District of Columbia,* Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Munic. Ct. App. 1962) (U.C.C. does not codify privity question and thus not significant); *Michigan,* Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W.2d 918 (1961) (U.C.C. not taken into account); Spence v. Three Rivers Builders & Masonary Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (U.C.C. does not effect decision); *New Jersey,* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (U.C.C. not considered), Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (1960); *New York,* Williams v. Union Carbide Corp., 17 App. Div. 2d 661, 230 N.Y.S.2d 476 (1962) (U.C.C. not considered); *Oregon,* Spada v. Stauffer Chem. Co., 195 F. Supp. 819 (D. Ore. 1961) (applying Oregon law, noting lack of applicable Oregon state court decisions); *Pennsylvania,* McQuaide v. Bridgeport Brass Co., 190 F. Supp. 252 (D. Conn. 1960) (applying Pennsylvania law), *but see* Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963) (necessity of privity has been abolished only in cases of goods for human consumption which cause injury to a *subpurchaser*; third parties must sue in tort); *Tennessee,* Ford Motor Co., v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840, 852 (1946) (implied that privity not necessary in a negligence action), Coca-

The law of the 19 or 20 U.C.C. states which require privity of contract in implied warranty represents every qualification of the privity question. A rudimentary accounting of the ways in which these jurisdictions have limited the abolition of privity in both negligence and breach of warranty will show the approaches that the different courts have taken toward the privity doctrine.[13] Some have done away with privity when an impure food product[14] or an inherently danger-

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Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S.W.2d 721 (1942) (no privity required in cases of injury from unwholesome food and drugs).

Virginia abolished the defense of lack of privity in breach of warranty and negligence actions by Acts 1962, ch. 476, which became § 8-654.3 of Va. Code Ann. Since this section goes further than U.C.C. § 2-318, which remains neutral regarding extension of right to sue manufacturers directly, the assumption is that it will remain in effect after Jan. 1, 1966, when the U.C.C. goes into effect in Virginia. *But see* note to Va. Code Ann. § 8-654.3 (Supp. 1965).

[13]*Alaska,* no cases available; *Arkansas,* Green v. Equitable Powder Mfg. Co., 94 F. Supp. 126 (W.D. Ark 1950) (general requirement of privity in warranty cases); *Georgia,* Revlon, Inc. v. Murdock, 102 Ga. App. 842, 120 S.E.2d 912 (1961) (where the implied warranty to be relied upon by the statutory "ultimate consumer," was held to mean only purchaser and not a non-purchasing consumer or user) (but note effect of U.C.C. upon family, household, guests, etc.); *Indiana,* Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836 (7th Cir. 1957) (privity necessary if manufacturer did not have a duty to warn the purchaser); *Kentucky,* Schultz v. Tesumseh Prods., 310 F.2d 426 (6th Cir. 1962) (citing Kentucky law to the effect that privity is essential in a breach of implied warranty), C. D. Herme, Inc. v. R. C. Tway Co., 294 S.W.2d 534 (Ky. 1956) (privity not required in negligence); *Maryland,* Atwell v. Pepsi-Cola Bottling Co., 152 A.2d 196 (D.C. Munic. Ct. App. 1959) (where privity required an implied warranty), Babylon v. Scruton, 215 Md. 299, 138 A.2d 375 (1958) (privity not required in negligence); *Massachusetts,* Sullivan v. H. P. Hood & Sons, Inc., 341 Mass. 216, 168 N.E.2d 80 (1960) (privity an absolute defense in warranty), Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946) (privity requirement in negligence actions abandoned); *Missouri,* Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964) (lack of privity in implied warranty no bar to the action); *Montana,* Larson v. United States Rubber Co., 163 F. Supp. 327 (D. Mont. 1958) (court found no Montana law upon the requirement for privity in negligence but held there would be no requirement); *New Hampshire,* Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1945) (privity required in breach of implied warranty); *Ohio,* Kennedy v. General Beauty Prods., Inc., 84 Ohio L. Abs. 135, 167 N. E. 116 (Ct. App. 1960) (privity required in implied warranty); *Rhode Island,* Lombardi v. California Packing Sales Co., 83 R.I. 51, 112 A.2d 701 (1955) (privity necessary in implied warranty); *West Virginia,* Burgess v. Sanitary Meat Mkt., 121 W. Va. 605, 5 S.E.2d 785, 6 S.E.2d 254 (1939) (court held privity essential in breach of warranty); *Wisconsin,* Smith v. Atco Co., 6 Wis., 2d 371, 94 N.W.2d 697 (1959) (privity not necessary in negligence); Cohan v. Associated Fur Farms, 261 Wis. 584, 53 N.W.2d 788 (1952) (privity required in implied warranty); *Wyoming* substituted "any person who may reasonably be expected to use, consume or be affected by the goods" for the U.C.C. § 2-318 text describing those persons protected by a seller's warranty. Wyo. Stat. Ann. § 34:2-318 (1957).

[14]*Arkansas,* Drury v. Armour & Co., 140 Ark. 371, 216 S.W. 40 (1919) (exception to the requirement of privity in negligence allowed where impure food was involved); *Illinois,* Albin v. Illinois Corp Improvement Ass'n, 30 Ill. App. 2d 283, 174 N.E.2d 697 (1961) (recognizing the exception to the privity rule applied for food pro-

ous product[15] is involved. This demonstrates how the failure of the U.C.C. to take a firm stand on this apparently controversial issue has left unresolved the mass of conflicts which existed prior to the adoption of the U.C.C. between the jurisdictions and even within a single jurisdiction.

Tort concepts as a rule have advanced toward the complete abolition of privity at a much faster rate.[16] The differences between tort and contract approaches to the problem, however, could be eliminated by the combination of these two types of claims into a distinct remedy for products liability as a whole.[17] In many cases liability is not predicated upon either negligence or breach of implied warranty of fitness but upon the broad policy principle of protecting human

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ducts in both warranty and negligence); *Montana,* Seaton Ranch Co. v. Montana Vegetable Oil & Food Co., 123 Mont. 396, 217 P.2d 549 (1950) (food product exception to the privity requirement upheld); *Nebraska,* Asher v. Coca-Cola Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961) (privity in implied warranty involving a food product not required); *Oklahoma,* Cook v. Safeway Store, Inc., 330 P.2d 375 (Okla. 1958) (privity not necessary in action in implied warranty involving a food product); *Rhode Island,* Minutilla v. Providence Ice Cream Co., 50 R.I. 43, 144 Atl. 884 (1929) (privity was necessary in negligence action involving unwholesome food or beverage).

[15]*Illinois,* Albin v. Illinois Crop Improvement Ass'n, 30 Ill. Ap. 2d 283, 174 N.E.2d 697 (1961) (recognizing the exception to the privity requirement applied to inherently dangerous products in warranty and negligence action); *Indiana,* Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836 (7th Cir. 1957) (privity necessary if not an inherently dangerous product); *Maine,* Pelletier v. DuPont, 124 Me. 269, 128 Atl. 186 (1925) (privity not required as to contract or negligence actions involving inherently or imminently dangerous products); *Missouri,* Stevens v. Durbin-Durco, Inc., 377 S.W.2d 343 (Mo. 1964) (exception to the privity rule in negligence action involving imminently or inherently dangerous products); *Nebraska,* Colvin v. John Powell & Co., 163 Neb. 112, 77 N.W.2d 900 (1956) (privity not necessary in negligence action involving imminently or inherently dangerous products); *New Hampshire,* Lenz v. Standard Oil Co., 88 N.H. 212, 186 Atl. 329 (1936) (inherently or imminently dangerous product exception to the privity rule recognized in negligence action); *New Mexico,* Wood v. Sloan, 20 N.M. 127, 148 Pac. 507 (1915) (exception to rule requiring privity in negligence actions was recognized as to inherently or imminently dangerous products); *Ohio,* Inglis v. American Motors Corp., 94 Ohio L. Abs. 438, 197 N.E.2d 921 (Ct. App. 1964) (no privity required in breach of express warranty in advertising or as to inherently dangerous products); *Oklahoma,* Crane Co. v. Sears, 168 Okla. 603, 35 P.2d 916 (1934) (where the imminently or inherently dangerous product exception to the privity rule in negligence case was upheld); *Rhode Island,* Collette v. Page, 44 R.I. 26, 114 Atl. 136 (1921) (privity not required in negligence action involving an imminently dangerous product); *West Virginia,* Roush v. Johnson, 139 W. Va. 607, 80 S.E.2d 857 (1954) (privity required in negligence action no involving imminently or inherently dangerous product).

[16]Restatement (Second), Torts § 402A comment a (1965). Jaeger, Products Liability: The Constructive Warranty, 39 Notre Dame Law. 501 (1964).

[17]Jaeger, Id. at 504.