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## Caveat Emptor to Strict Liability: One Hundred Years of Products Liability Law

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## ARTICLES

### CAVEAT EMPTOR TO STRICT LIABILITY: ONE HUNDRED YEARS OF PRODUCTS LIABILITY LAW

*Emanuel Emrock\**

THE development of the law of products liability is historically related to industrial growth, business and economic expansion, and the growing demand over the years for consumer protection. As the industrial system has come of age and man has begun to make excursions into outer space, the ancient principle of caveat emptor—"let the buyer beware"—has been significantly changed in favor of the consumer.<sup>1</sup> As we emerged from the ancient mercantile society, where the seller and buyer usually met and bargained, to an impersonal market characterized by corporate organization, industrial and technological advancement and complexity, and sophisticated marketing and finance, the law changed in response to the new circumstances. Although the shift from caveat emptor to the promulgation of judicial and legislative rules, safeguards and standards, enlarging the legal rights of the buyer and consumer, came slowly and irregularly in the United States, greater strides have been made in the development of products liability law in the last decade than were made in the entire preceding century. This greater advance can be accounted for by the scientific and economic explosion following World War II and by the greater concern and emphasis being placed on human loss and injury resulting from defective products than on commercial loss suffered by the buyer.

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<sup>1</sup> Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1958).

The restrictions on the right of recovery by the injured consumer or user often stemmed from the limitations fixed in the law of sales and contracts. These limitations were somewhat relaxed in the early stages of the common law by the creation of warranty devices and rules, which were in the nature of an express warranty given at the time of sale and a warranty of fitness for a particular purpose which the law implied as part of the bargain when goods were ordered in advance of manufacture and the buyer relied upon the seller.<sup>2</sup> Later came the implied warranty of merchantability that the goods were fit for their general and ordinary purposes. Problems arising from the underlying sales contract, such as lack of privity, reliance and disclaimer, continued to confront the ultimate consumer and user in his effort to seek compensation for his injuries and loss in negligence and warranty cases. Many of these obstacles have been overcome by decisional and statutory rules, thus allowing recovery against remote vendors and manufacturers who were immune from direct action until recent times.

Numerous exceptions have been made by the courts to overcome the stringent rule of non-liability of the manufacturer to the remote vendee or user in both food and non-food products liability cases based on negligence; warranty rules have been enlarged and the assault upon the privity wall has continued unabated.<sup>3</sup> In very recent times, what Dean Prosser calls the most rapid and spectacular overturn of an established rule in the entire history of the law of torts<sup>4</sup> has taken place in the acceptance of the doctrine of strict liability in tort. This latter doctrine eliminates privity as a requirement in actions for damages and severs the rules of sales and contracts from the tort aspects in the determination of the issues of the defectiveness of the product and the proximate cause of any injury or loss suffered by the consumer, user or person affected by such product. The law has progressed to the socio-economic consideration

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<sup>2</sup> It is interesting to note that the court in *Gerst v. Jones & Co.*, 73 Va. (32 Gratt.) 518, 527 (1879), quoting from *Jones v. Bright*, 5 Bing. 533, stated that the rule of implied warranty of fitness for a particular purpose "is of great importance, because it will teach manufacturers that they must not undersell each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold."

<sup>3</sup> Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982 (1962). The public demand for greater consumer protection with regard to food, drugs and other articles unquestionably influenced the Virginia General Assembly in its decision to give favorable approval to a recent statute dispensing with the privity requirement. See VA. CODE ANN. § 8.2-318 (1965).

<sup>4</sup> Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

that the risk of loss from a defective product should be on the party who is in the best position to stand such loss.<sup>5</sup>

#### NEGLIGENCE AND WARRANTY LIABILITY IN FOOD CASES

Historically in Virginia, an injured consumer has been permitted a tort action against the manufacturer for negligence in marketing and selling unfit and unwholesome food and drink, even in the absence of privity between such manufacturer and consumer. In *Norfolk Coca-Cola Bottling Works, Inc. v. Krausse*,<sup>6</sup> the court held that the consumer could sue the bottling company for personal injuries suffered as a result of swallowing glass contained in a bottled product which was put on the market by the defendant and purchased from a retail grocer by the plaintiff. A prima facie case of negligence was established by the plaintiff when proof was offered that foreign substances were contained in a bottle which had not been tampered with since leaving the possession of the bottling company. In subsequent cases the court followed the doctrine that one who sells foodstuffs for human consumption is liable for failure to use reasonable and due care in the preparation and handling of his product.<sup>7</sup> Thus, Virginia was not concerned with the absence of privity in negligence actions in food cases.

In actions based on breach of warranty of fitness of food, the injured purchaser, until recently, could only seek recovery against his immediate seller, since the absence of privity blocked an action against others in the chain of distribution. Likewise, if the consumer or user was not a buyer, he was barred from maintaining any action on implied warranty. Although it recognized both the modern concept that from the sale of food for immediate domestic use there arises, as between the dealer and the consumer, an implied warranty that such food is wholesome and fit to be eaten, and a public policy of consumer protection and promotion of public health in implying such warranty, the court

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<sup>5</sup> See W. PROSSER, *THE LAW OF TORTS* § 74, 508 (3d ed. 1964).

<sup>6</sup> 162 Va. 107, 173 S.E. 497 (1934).

<sup>7</sup> *Campbell Soup Co. v. Davis*, 163 Va. 89, 175 S.E. 743 (1934) (glass in a can of pork and beans); *Middlesboro Coca-Cola Bottling Works, Inc. v. Campbell*, 179 Va. 693, 20 S.E.2d 479 (1942) (deleterious matter in a bottled product); *Norfolk Coca-Cola Bottling Works, Inc. v. Land*, 189 Va. 35, 52 S.E.2d 85 (1949) (worm in a drink product); *Pepsi-Cola Bottling Co. v. McCullers*, 189 Va. 89, 52 S.E.2d 257 (1949) (mouse and other obnoxious matter in a bottled product); *Newport News Coca-Cola Bottling Co. v. Babb*, 190 Va. 360, 57 S.E.2d 41 (1950) (snail or slug in a bottled product).

in *Colonna v. Rosedale Dairy Co.*<sup>8</sup> denied recovery to an infant plaintiff who became ill from Malta Fever germs in bottled milk which his father had purchased from the defendant processor-retailer. The decision was based on an absence of privity of contract between the infant and the retailer. In *Kroger Grocery Co. v. Dunn*<sup>9</sup> the plaintiff was allowed recovery on an implied warranty by the retailer with whom he was in privity and from whom the plaintiff had purchased food in an unsealed package. Such implied warranty was again recognized by the court in the later case of *Brockett v. Harrell Brothers, Inc.*,<sup>10</sup> in which it was held that the plaintiff, who was injured by biting on buckshot imbedded in ham sold in an unsealed package by the defendant retailer, could recover from the retailer for breach of implied warranty of fitness of the product. In *Blythe v. Camp Manufacturing Co.*<sup>11</sup> the court reserved for future determination whether a retailer who sells unwholesome food or beverages for human consumption is liable to the purchaser for the consequences of a breach of implied warranty, when such food or beverages are resold in the original sealed containers bearing the label of a reputable manufacturer. However, the United States District Court, applying Virginia law, forecast that the Virginia court would extend a warranty of wholesomeness to the retail sale of cosmetics in a sealed package.<sup>12</sup>

Twenty-three years after *Colonna v. Rosedale Dairy Co.*,<sup>13</sup> the liability of a manufacturer to the consumer for injury from contaminated food sold in a sealed container was clearly enunciated by the Virginia court in the leading case of *Swift & Co. v. Wells*.<sup>14</sup> The manufacturer was held liable on an implied warranty of wholesomeness, despite a lack of privity between it and the consumer, the court basing its decision on sound public policy principles recognized in *Colonna*. In a case involving a similar warranty of fitness of food, the court in *Brockett v. Harrell Bros., Inc.*<sup>15</sup> found that a processor of meat, who was joined with the retailer, could be held liable in the absence of privity,<sup>16</sup> even though the

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<sup>8</sup> 166 Va. 314, 186 S.E. 94 (1936).

<sup>9</sup> 181 Va. 390, 25 S.E.2d 254 (1943).

<sup>10</sup> 206 Va. 457, 143 S.E.2d 897 (1965).

<sup>11</sup> 183 Va. 432, 32 S.E.2d 659 (1945).

<sup>12</sup> *Higbee v. Giant Food Shopping Center*, 106 F. Supp. 586 (E.D. Va. 1952).

<sup>13</sup> 166 Va. 314, 186 S.E. 94 (1936).

<sup>14</sup> 201 Va. 213, 110 S.E.2d 203 (1959).

<sup>15</sup> 206 Va. 457, 143 S.E.2d 897 (1965).

<sup>16</sup> Privity had been abolished in Virginia by statute when this decision was rendered. See VA. CODE ANN. § 8.2-318 (1965).

package had been opened and the product repackaged by the retailer.

The court in *Swift*, by decisional creativity, extended the doctrine of warranty liability without privity, but in two subsequent non-food cases the court rejected the assaults upon the privity doctrine in actions based on negligence and warranty.<sup>17</sup>

#### LIABILITY FOR NEGLIGENCE IN NON-FOOD CASES

In 1961 the Supreme Court of Appeals of Virginia spoke out on the right of a consumer or user to sue the manufacturer for negligence in a non-food products liability case. In *General Bronze Corp. v. Kostopulos*<sup>18</sup> the court held that unless the manufactured product was *inherently* dangerous,<sup>19</sup> a remote vendee could not recover for negligence in the absence of privity of contract between the parties. In all other cases a consumer, user or remote vendee would be barred from maintaining an action against the manufacturer or one with whom the injured party was not in privity. In *General Bronze* a motel owner sued the manufacturer for negligence in the design and construction of sliding glass doors which were installed in the rooms of the motel, and it was held that there was nothing inherently dangerous about such doors.

It had been indicated both before and after *MacPherson v. Buick Motor Co.*<sup>20</sup> that the Virginia court was giving some consideration to the *MacPherson* rule, which established the "imminently dangerous" exception to the privity doctrine that "[i]f the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."<sup>20a</sup> Twelve years before the decision in *MacPherson*, the Virginia court in *Standard Oil Co. v. Wakefield's Administrator*<sup>21</sup> had intimated that Virginia had adopted the "imminently dangerous" rule in permitting the administrator of a deceased servant of a consignee to sue the shipper for negligence, although no privity of contract existed between the shipper and such servant. The article involved was naphtha, commonly recognized as a dangerous substance. The court said that liability does not depend upon privity of contract, but on the duty of every person to so use his own property as

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<sup>17</sup> *General Bronze Corp. v. Kostopulos*, 203 Va. 66, 122 S.E.2d (1961); *Harris v. Hampton Roads Tractor & Equip. Co.*, 202 Va. 958, 121 S.E.2d 471 (1961).

<sup>18</sup> 203 Va. 66, 122 S.E.2d 548 (1961).

<sup>19</sup> "A product is inherently dangerous when the danger of injury stems from the product itself, and not from any defect in it." *Id.* at 70, 122 S.E.2d at 551.

<sup>20</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>20a</sup> *Id.* at 389, 111 N.E. at 1053.

<sup>21</sup> 102 Va. 824, 47 S.E. 830 (1904).

not to injure the persons or property of others, and that a person who negligently uses a dangerous instrument, or causes or authorizes its use by another in such a manner or under such circumstances that he has reason to know it is likely to produce injury, is responsible for the natural and probable consequences of his act. It has been questioned whether the actual holding in *Wakefield's Administrator* reflected the modern rule of *MacPherson*, or only the law with respect to an inherently dangerous product,<sup>22</sup> since the court decided the case on the broad theories of proximate cause and foreseeability.

In *Robey v. Richmond Coca-Cola Bottling Works*<sup>23</sup> the court set forth, without adopting, two exceptions to the general rule of non-liability of the manufacturer to the consumer or user in the absence of privity of contract. The first exception was quoted from *Cooley on Torts* and provided that a person who knowingly sells or furnishes an article which by reason of defective construction, or otherwise, is imminently dangerous to life or property, without notice or warning of the defect or danger, is liable to third persons who suffer therefrom. This exception was limited to failure to warn the consumer or user of any defects known to the manufacturer or seller upon the sale of an article. In referring to the second exception, the *Robey* court stated that "beginning with the decision in *MacPherson v. Buick Motor Co.*, . . . the recent cases have enlarged the liability of a manufacturer to a remote vendee to include articles not inherently dangerous and not dangerous when properly constructed and put to their intended use, which if defectively constructed may reasonably be anticipated to cause injury to those properly using them."<sup>24</sup> Although the *Robey* court declined to adopt any such exceptions to the general rule of non-liability, considering them inapplicable to the solution of the factual situation of that case, the opinion recognized the broadening concepts in the field of products liability and the erosion of the general rule of non-liability.

The Fourth Circuit Court of Appeals in *Pierce v. Ford Motor Co.*<sup>25</sup> thought that the decision in *Robey* anticipated Virginia's approval of the *MacPherson* rule and rejected the contention that the doctrine of that case was not the law of Virginia.<sup>26</sup> The court quoted the

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<sup>22</sup> See Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982, 983 n. 5, 984 n. 9 (1962).

<sup>23</sup> 192 Va. 192, 64 S.E.2d 723 (1951).

<sup>24</sup> *Id.* at 196-97, 64 S.E.2d at 726.

<sup>25</sup> 190 F.2d 910 (4th Cir. 1951), *cert. denied*, 342 U.S. 887 (1951).

<sup>26</sup> In *Pierce* the court said: "And we are not impressed with the argument that the

*Cooley* and *MacPherson* exceptions from the opinion in *Robey*, and also stated that the Virginia court in *Standard Oil Co. v. Wakefield's Administrator*<sup>27</sup> had laid down the general principle upon which the *MacPherson* case and those following it were founded.

*McClanahan v. California Spray-Chemical Corp.*<sup>28</sup> involved the defoliation of trees resulting from the application of a newly perfected scab eradicator then being marketed in Virginia for the first time. The court adopted and applied the exception to the general rule that the manufacturer who knowingly sells a product which, by reason of defective construction or otherwise, is imminently dangerous<sup>29</sup> to life or property, and who gives neither adequate notice nor warning of such defect or danger, is liable for any injury resulting therefrom. This is the same exception quoted by the court in *Robey*. In *McClanahan* the court found that the manufacturer of the spray was liable because of its failure to warn of circumstances which it could have reasonably anticipated.<sup>30</sup>

The struggle by the courts to determine the liability of the manufacturer or seller in the absence of privity, and which exceptions, if any, to adopt, and whether the exceptions were swallowing the general rule of non-liability ended in Virginia in 1962 with the statutory abrogation of privity as a defense.<sup>31</sup>

## IMPLIED WARRANTY LIABILITY IN NON-FOOD CASES

### A. *Fitness For a Particular Purpose*

The doctrine of implied warranty was resisted as an innovation sought to be borrowed from the civil law until the early part of the nineteenth

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doctrine of that case [*MacPherson*] is not the law of Virginia merely because in the recent case of *Robey v. Richmond Coca-Cola Bottling Works*, 192 Va. 192, 64 S.E.2d 723, 726, the Supreme Court of Appeals of that state assumed without deciding that its doctrine was applicable. The reasoning of the court clearly indicates its approval of the rule in the following passage of its opinion . . . ." *Id.* at 914.

<sup>27</sup> 102 Va. 824, 47 S.E. 830 (1904).

<sup>28</sup> 194 Va. 842, 75 S.E.2d 712 (1953).

<sup>29</sup> The court in *McClanahan* spoke of "potentially dangerous" and may have intended to use that phrase synonymously with "imminently dangerous," although "potentially dangerous" more clearly defines a product which may have been perfectly constructed but has a potential to cause injury when used in an anticipated manner without warning by the manufacturer.

<sup>30</sup> See generally Dillard and Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955). Cf. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962).

<sup>31</sup> VA. CODE ANN. § 8.2-318 (1965).



century, and until that time the common law rule of caveat emptor was maintained in all its integrity.<sup>32</sup> However, implied warranties under some circumstances were recognized by the courts and accepted as part of the common law. Thus, upon a sale by sample there was an implied warranty that the bulk of the goods corresponded in quality with the sample. In the case of an executory contract of sale, where the goods were ordered for a particular use or purpose known to the seller, he impliedly undertook that such goods would be reasonably fit for the use or purposes for which they were intended. Such implied warranty of fitness for a particular purpose attached only when the buyer, in reliance upon the seller, described a particular use he had for some undescribed and unascertained product, and the seller then undertook to provide a product. In most cases the courts held the rationale for the rule to be that the buyer relied on the judgment or skill of the manufacturer, dealer or seller that the product would be reasonably fit for the purpose for which it was to be used.<sup>33</sup> When the purchase was of a known, described and definite product, the seller performed his part of the contract by delivering the product, and in the absence of fraud or some positive affirmation amounting to an express warranty, he was not liable for a defect in the quality of such product. Under such circumstances the purchaser, in selecting the particular product, relied upon his own judgment and assumed the risk of it being suitable for his own purposes.

Although the foregoing summary of the early history of implied warranty in Virginia is mainly structured in the context of the law of sales rather than products liability, Virginia had occasion to consider a products liability situation in *Gerst v. Jones & Co.*<sup>34</sup> This is perhaps the first case decided in Virginia applying the rule of implied warranty of fitness for a particular purpose. The manufacturer agreed to furnish to the plaintiff, during the manufacturing season, as many wooden tobacco boxes as the plaintiff required. The plaintiff pressed its tobacco in these boxes and, because unseasoned timber was used in making the boxes, the tobacco placed therein became moulded. The plaintiff relied upon the defendant to select and use proper box material and timber and to make the necessary tests to determine whether the boxes were made of seasoned or dry timber. It was shown that it was not customary

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<sup>32</sup> *Mason v. Chappell*, 56 Va. (15 Gratt.) 572 (1860).

<sup>33</sup> *Id.*; *Gerst v. Jones & Co.*, 73 Va. (32 Gratt.) 518 (1879); *Universal Motor Co. v. Snow*, 149 Va. 690, 140 S.E. 653 (1927).

<sup>34</sup> 73 Va. (32 Gratt.) 518 (1879).

for tobacco manufacturers to subject the boxes furnished them by box manufacturers to any tests. The court held that the box manufacturer was liable to the plaintiff for injury to the tobacco for breach of its implied warranty.<sup>35</sup> *Gerst* involved economic loss based upon strict liability for breach of warranty.

On the basis of breach of an implied warranty of fitness for a particular purpose, the court in *Swersky v. Higgins*<sup>36</sup> allowed recovery against a contractor for damages to the plaintiff's home after the application of a paint-like material. The liability of the contractor was held to be the same as that of a manufacturer or a seller.

The common law rule of implied warranty of fitness for a particular purpose has remained unchanged since its first recognition in Virginia,<sup>37</sup> and its statutory counterpart has been included in the Uniform Commercial Code, as adopted in Virginia,<sup>38</sup> without any major change.<sup>39</sup>

### B. *The Implied Warranty of Merchantability*

In Virginia there had been no definite acceptance of the concept of implied warranty of merchantability<sup>40</sup> until 1961 when the Virginia Supreme Court of Appeals in *Smith v. Hensley*<sup>41</sup> engrafted such warranty upon the fabric of the Virginia law.<sup>42</sup> In *Smith v. Hensley*<sup>43</sup> the court held that where the buyer ordered from the seller by its trade name a product which had but one general purpose, namely, to be used as a roof coating, there was an implied warranty of merchantability or fitness of the product for the ordinary or general purpose for which it was sold. Thus, there was a definitive acceptance of this warranty for the first time in Virginia.

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<sup>35</sup> *Id.*

<sup>36</sup> 194 Va. 983, 76 S.E.2d 200 (1953).

<sup>37</sup> See *H. M. Gleason & Co. v. International Harvester Co.*, 197 Va. 255, 88 S.E.2d 904 (1955); *E. I. duPont deNemours & Co. v. Universal Moulded Products Corp.*, 191 Va. 525, 62 S.E.2d 233 (1950); *Greenland Dev. Corp. v. Allied Heating Products Co.*, 184 Va. 588, 35 S.E.2d 801 (1945); *Universal Motor Co. v. Snow*, 149 Va. 690, 140 S.E. 653 (1927); *Standard Paint Co. v. E. K. Vietor & Co.*, 120 Va. 595, 91 S.E. 752 (1917); *Gerst v. Jones & Co.*, 73 Va. (32 Gratt.) 518 (1879). See also 32 VA. L. REV. 679 (1946).

<sup>38</sup> VA. CODE ANN. § 8.2-315 (1965).

<sup>39</sup> See the Virginia comment to VA. CODE ANN. § 8.2-315 (1965).

<sup>40</sup> *Belcher v. Goff Bros.*, 145 Va. 448, 134 S.E. 588 (1926).

<sup>41</sup> 202 Va. 700, 119 S.E.2d 332 (1961).

<sup>42</sup> For a discussion of the nature and origin of the warranty, see Comment, *The Implied Warranty of Merchantability—Smith v. Hensley*, 48 VA. L. REV. 152 (1962).

<sup>43</sup> 202 Va. 700, 119 S.E.2d 332 (1961).

In *Harris v. Hampton Roads Tractors & Equipment Co.*,<sup>44</sup> the existence of an implied warranty of merchantability was recognized, but the decision turned on the theory that privity<sup>45</sup> was required for recovery based on implied warranty by an employee in a personal injury action against the seller of a tagline to the plaintiff's employer. The court stated that the then prevailing view was that there could be no recovery against the manufacturer or seller of the product alleged to have caused the injury, on the theory of breach of warranty, where there was no privity of contract between the injured party and the manufacturer or seller. The rule enunciated in *Harris* was changed by the statutory elimination of the necessity for privity in warranty actions in Virginia.<sup>46</sup>

Unlike the rule of implied warranty of fitness for a particular purpose, reliance is not an essential element under the implied warranty of merchantability.<sup>47</sup> Under the Uniform Commercial Code the implied warranty of merchantability encompasses the warranty of wholesomeness of food.<sup>48</sup>

#### ABROGATION OF PRIVACY IN VIRGINIA

After *Swift*, *Harris* and *General Bronze*, Virginia in 1962 by statute abrogated the requirement of privity in all products liability cases brought against a manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence.<sup>49</sup> Virginia was the first state to adopt such broad statutory provisions. The statute makes no distinction between food and non-food cases:

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<sup>44</sup> 202 Va. 958, 121 S.E.2d 471 (1961).

<sup>45</sup> The official text of the Uniform Commercial Code extends the seller's warranty 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 by breach of the warranty.

<sup>46</sup> VA. CODE ANN. § 8.2-318 (1965).

<sup>47</sup> *Smith v. Hensley*, 202 Va. 700, 119 S.E.2d 332 (1961).

<sup>48</sup> VA. CODE ANN. § 8.2-314 (1965). The Virginia Supreme Court of Appeals has had occasion since *Smith* and *Harris* to consider tangentially the implied warranty of merchantability. See *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 168 S.E.2d 257 (1969) (holding that the statute of limitations in implied warranty cases runs from the date of injury); *Freidman v. Peoples Service Drug Stores, Inc.*, 208 Va. 700, 160 S.E.2d 563 (1968) (holding two year personal injury statute of limitations to be applicable in an implied warranty case); *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 143 S.E.2d 897 (1965) (involving wholesomeness of food).

<sup>49</sup> VA. CODE ANN. § 8.2-318 (1965) (formerly included as § 8-654.3).

Lack of privity between the 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; however, this section shall not be construed to affect any litigation pending at its effective date.<sup>50</sup>

Thus, the wall of privity which had theretofore prevented the sub-purchaser from suing the manufacturer and the non-purchaser from suing the retailer or manufacturer was completely removed.<sup>51</sup>

Under the statute it is not necessary in a non-food negligence case to establish whether a product is inherently or imminently dangerous in order to effect a recovery, since the hurdle of privity has been abolished. The right of action in negligence cases is extended to all those persons whom the manufacturer or seller "might reasonably have expected to use, consume, or be affected by the goods."

In providing that "lack of privity shall be no defense," the statute implicitly extends the implied warranty of merchantability from the manufacturer and seller to any person within the foreseeable class. The Virginia court has said that the obvious purpose of the statute is to insure the implied warranty of fitness by the manufacturer to the consumer, despite the lack of privity between the two.<sup>52</sup>

The statute also abrogates privity as an essential element in an action in which the plaintiff relies upon an express warranty, which is now extended to foreseeable users, consumers, and those who may be affected by the goods.

It had been suggested that since the statute stripped warranty of its contractual aspect, an action for breach of warranty sounded in tort. However, the court in *Brockett v. Harrell Brothers, Inc.*<sup>53</sup> held that in actions for damages for the sale of unwholesome foodstuffs based on breach of implied warranty of fitness, Virginia has consistently regarded such actions as being *ex contractu*. The court went on to hold that contributory negligence of the plaintiff would not be material on the issue of the defendant's breach of implied warranty of fitness.

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<sup>50</sup> *Id.*

<sup>51</sup> Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982, 985 (1962).

<sup>52</sup> *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 143 S.E.2d 897 (1965).

<sup>53</sup> *Id.* at 463, 143 S.E.2d at 902.

In 1964 the General Assembly of Virginia adopted the Uniform Commercial Code, which became effective on January 1, 1966. The anti-privy statute of Virginia was included in lieu of the official text of the Code, which only provided for a limited abrogation of privy. It was never intended, when the original statute was first adopted in 1962, that its provisions should be locked in the Uniform Commercial Code and that the right of recovery in personal injury actions should be restricted and hampered by rules of sales, contract and commercial trap-pings.<sup>54</sup> In comparing the broadening concept of strict liability within the framework of the Uniform Commercial Code, as evidenced by the inclusion therein of the statute abrogating the privy requirement, and the approach of strict products liability in tort as covered by section 402A of the *Restatement (Second) of Torts*, it was suggested prior to the effective date of the Code that at that stage in the development of strict products liability, the Virginia approach of including the anti-privy statute in the Code was preferable.<sup>55</sup> At this post-Code juncture in the development of the law of products liability in actions for damages resulting from personal injury, some concern has arisen as to whether it would have been better procedure in Virginia not to have included the anti-privy statute in the Uniform Commercial Code and simply not to have adopted any section 2-318 of the Code.<sup>56</sup> There would seem to be much validity to this suggestion since the anti-privy statute covers negligence as well as warranty, and the Code is neither a legislative enactment nor a set of ground rules for personal injury actions resulting from defective products.

#### PRODUCTS LIABILITY IN THE UNITED STATES

In the past decade important advances in consumer protection in Virginia have provided some foundation for the development of products

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<sup>54</sup> Emroch, *Statutory Elimination of Privy Requirement in Products Liability Cases*, 48 VA. L. REV. 982 (1962).

<sup>55</sup> Speidel, *The Virginia "Anti-Privy" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965). The author proposes that the judicial application of the doctrine of strict products liability should be made within the limits of the Uniform Commercial Code and under its controlled conditions rather than outside the Code and under broad principles of tort law. The answer to this contention is that the fundamental reason and purpose for the creation and adoption of the doctrine of strict liability in tort was to avoid the commercial aspects and the incidental contractual nature of the product's placement on the market in an action based on tort for personal injury, and the refusal of the courts to permit manufacturers to define the scope of their own responsibility for defective products.

<sup>56</sup> California, in adopting the Uniform Commercial Code, did not include § 2-318, and the development of the law of strict liability has been on a case by case basis.

liability law in other jurisdictions.<sup>56a</sup> However, within the past five years a number of jurisdictions have accepted the doctrine of strict liability in tort, representing a significant departure from the contractual concepts in products liability cases. The historical advancement in this burgeoning area of the law in the United States has, within the last hundred years, run the entire gamut from non-liability to strict liability in tort.

In the early development of products liability in America, the courts borrowed the concept of non-liability from the English case of *Winterbottom v. Wright*,<sup>57</sup> wherein the Court of Exchequer held that breach of a contract to keep a mail coach in repair after it was sold would give no cause of action to the coach driver who was injured when it collapsed. The case was generally understood to state a rule of non-liability of any supplier to a third party. The court then began to develop exceptions to that general rule in order to permit recovery by persons not in privity with the manufacturer. Perhaps the most important exception was that a manufacturer of a chattel owed a duty to an expected user to use care to make it safe, provided the chattel was "inherently dangerous." "Inherently dangerous" was broad enough to include food and drink, drugs, firearms and explosives.<sup>58</sup>

In 1916 Judge Cardozo in the landmark case of *MacPherson v. Buick Motor Co.*<sup>59</sup> held that the manufacturer of an automobile who sells it to a dealer is liable to the remote vendee, despite the absence of privity, for any negligence in the manufacture or inspection of the vehicle. Thus, the citadel of privity in negligence cases was felled and the liability of manufacturers of chattels to third persons was based on general principles of negligence. The *MacPherson* rule placed an affirmative duty on the manufacturer not to create unreasonable risks of bodily harm to those within the area of risk or foreseeable zone of danger.

As we enter the decade of the seventies, *MacPherson* is now probably accepted by most American jurisdictions, either by decisional or statu-

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<sup>56a</sup> See *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); ARK. STATS. 1965, Act 35.

<sup>57</sup> 152 Eng. Rep. 402, (Ex. 1842).

<sup>58</sup> See, e.g., *Herman v. Markham Air Rifle Co.*, 258 F. 475 (E.D. Mich. 1918) (loaded air rifle); *Pillars v. R. J. Reynolds Tobacco Co.*, 117 Miss. 490, 78 So. 365 (1918) (human toe in plug of chewing tobacco); *Thomas v. Winchester*, 6 N.Y. 397 (1852) (defendant negligently mislabeled belladonna, a poison, as extract of dandelion and was held liable to plaintiff consumer despite absence of privity on the grounds that there must be an exception to the rule of nonliability where article sold is "inherently dangerous to life and health"); *Armstrong Packing Co. v. Clem*, 151 S.W. 576 (Tex. Civ. App. 1912) (soap containing poisonous ingredient).

<sup>59</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

tory rule.<sup>60</sup> This germinal rule has been extended to include property damage,<sup>61</sup> the protection of employees, members of their family, and other users of the chattel, as well as casual bystanders and others "in the vicinity of its probable use."<sup>62</sup> The rule has also been extended to makers of component parts, assemblers, sellers who put their names on goods made by others,<sup>63</sup> and those who give their approval to the design of the product.<sup>64</sup>

Paralleling the development and acceptance of the concept of responsibility for negligent conduct, but lacking the same rapidity, has

<sup>60</sup> See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). Within the last ten years, Virginia and Mississippi have embraced the *MacPherson* rule.

<sup>61</sup> See *Brown v. Bigelow*, 325 Mass. 4, 88 N.E.2d 542 (1949) (harm to cows from defective feed); *Genessee County Patrons Fire Relief Ass'n v. L. Sonneborn Sons*, 263 N.Y. 463, 189 N.E. 551 (1934) (harm to a farm resulting from failure to warn of flammability of waterproofing compound); *Dunn v. Ralston Purina Co.*, 38 Tenn. App. 229, 272 S.W.2d 479 (1954) (harm to horses from unfit feed).

<sup>62</sup> *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79 (4th Cir. 1962) (manufacturer liable for negligence in giving insufficient warning of danger of furniture polish which resulted in an infant's death); *Ford Motor Co. v. Zahn*, 265 F.2d 729 (8th Cir. 1959) (passenger in car lost eye when thrown against jagged ashtray in car manufactured by defendant); *Carpini v. Pittsburgh & Weirton Bus Co.*, 216 F.2d 404 (3d Cir. 1954) (manufacturer of bus liable for passenger injury and death caused by defective design); *Reed & Barton Corp. v. Maas*, 73 F.2d 359 (1st Cir. 1934) (social guest injured by defective coffee urn); *State ex rel. Woodzel v. Garzell Plastics Indus.*, 152 F. Supp. 483 (E.D. Mich. 1957) (recovery for death of occupant of boat from hull manufacturer); *Beadles v. Servel, Inc.*, 344 Ill. App. 133, 100 N.E.2d 405 (1951) (carbon monoxide gas given off by a refrigerator); *Rosebrock v. General Electric Co.*, 236 N.Y. 227, 140 N.E. 571 (1923) (employee of corporate vendee killed by explosion of electric transformers as a result of failure to warn employer that defendant had shipped transformers with wooden blocks packed inside); *White Sewing Mach. Co. v. Feisel*, 28 Ohio App. 152, 162 N.E. 633 (1927) (manufacturer liable to child for injury caused by failure to inspect sewing machine plug); *Flies v. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N.W. 855 (1928) (reconditioner of automobile liable to pedestrian who was struck because vehicle had bad brakes).

<sup>63</sup> *Block v. Urban*, 166 F. Supp. 19 (E.D. Mich. 1958) (anodizer of aluminum hunting bow liable for loss of eye of remote vendee); *Edison v. Lewis Mfg. Co.*, 168 Cal. App. 2d 429, 336 P.2d 286 (1959) (defective metal ring incorporated into safety belt made by another resulting in liability when oil derrickman fell to his death); *Rauch v. American Radiator & Standard Sanitary Corp.*, 252 Iowa 1, 104 N.W.2d 607 (1960) (liability of assembler of gas water heater); *Willey v. Fyrogas Co.*, 363 Mo. 406, 251 S.W.2d 635 (1952) (parts maker of valve); *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 576 (1932) (leading case laying down that under *MacPherson* maker of component part is in no better position than assembler of finished product; bottle maker liable to waitress for loss of her eye when charged bottle subsequently exploded); *Wojciuk v. United States Rubber Co.*, 13 Wis. 2d 173, 108 N.W.2d 149 (1961) (tire manufacturer liable to motorist injured when defective tire blew out).

<sup>64</sup> *Hempstead v. General Fire Extinguisher Corp.*, 269 F. Supp. 109 (D. Del. 1967).

been the development of the concept of strict liability of the manufacturer and seller of chattels. Strict liability, without requiring privity of contract, was imposed in pre-*MacPherson* cases involving defective food and drink.<sup>65</sup> The majority of American courts today impose strict liability upon the producer or seller of defective food, despite the absence of privity or negligence.<sup>66</sup> In the past decade the courts have gone beyond food in non-privity cases and have applied strict warranty liability to assorted products.<sup>67</sup>

The case of *Henningsen v. Bloomfield Motors, Inc.*<sup>68</sup> does for warranty liability what *MacPherson* did for negligence law in the products field. The New Jersey Supreme Court held that breach of implied warranty rendered an auto manufacturer liable for harm suffered by the remote purchaser's wife despite the absence of privity and a disclaimer clause.

Personal injury actions founded on breach of implied warranty of merchantability or of fitness for a particular purpose were treated before *Henningsen* as sounding in contract and tort, and the courts have for varying reasons either found privity present or have eliminated privity as a requirement.<sup>69</sup> Virginia, Arkansas and Wyoming are among several

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<sup>65</sup> *Parks v. G. C. Yost Pie Co.*, 93 Kan. 334, 144 P. 202 (1914); *Jackson Coca-Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 S. 791 (1914); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

<sup>66</sup> *Mazoni v. Detroit Coca-Cola Bottling Co.*, 363 Mich. 235, 109 N.W.2d 918 (1961); *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942); *Swift & Co. v. Wells*, 201 Va. 213, 110 S.E.2d 203 (1959). The Court of Appeals of New York in *Greenberg v. Lorenz*, *supra*, a case involving the right of an infant to recover for injuries resulting from a metal tag in a can of salmon purchased by his father, relied upon *Swift & Co. v. Wells*, *supra*, in holding that privity was not a requirement for recovery in implied warranty.

<sup>67</sup> See *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959) (tires); *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962) (combination power tool); *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960) (grinding wheel); *Continental Copper & Steel Indus. v. E. C. "Red" Cornelius, Inc.*, 104 So. 2d 40 (Fla. 1958) (electric cable); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (automobile); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (airplane). See also *Lambert, Storming of the Citadel: Waning of the Privity Rule in Implied Warranty Cases*, PERSONAL INJURY ANNUAL—1963, at 533; *Prosser, The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

<sup>68</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>69</sup> See *Madouros v. Kansas City Coca-Cola Bottling Co.*, 230 Mo. App. 275, 90 S.W.2d 445 (1936); *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928) (purchaser of product treated as third party beneficiary); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942) (warranty originally tortious in



states which have discarded the privity requirement by statutory rule.<sup>70</sup> In other cases the courts have discarded privity and allowed a recovery for breach of an express warranty upon proof that a false representation regarding the quality and condition of the product was made by the manufacturer, and that as a result the ultimate purchaser suffered personal injury or physical damage.<sup>71</sup>

In recent years there has been a growing and forthright recognition of liability as being "tortious in nature and strict in character."<sup>72</sup> In 1963 the California Supreme Court clearly delineated this new concept in products liability cases in *Greenman v. Yuba Power Products, Inc.*:<sup>73</sup>

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.<sup>74</sup>

This new doctrine has also been recognized by other courts.<sup>75</sup>

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nature so that contractual privity is not a necessary element); *Swift & Co. v. Wells*, 201 Va. 213, 110 S.E.2d 203 (1959) (public policy demands elimination of the privity requirement); *Wisdom v. Morris Hardware Co.*, 151 Wash. 86, 274 P. 1050 (1929) (retailer treated as agent of either the manufacturer or the purchaser).

<sup>70</sup> VA. CODE ANN. § 8.2-318 (1965); WYO. STAT. ANN. § 34-2-318 (1963); ARK. STATS. 1965, Act 35. The Arkansas anti-privity statute follows the Virginia enactment verbatim.

<sup>71</sup> See *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); *Ford Motor Co. v. Lonan*, 217 Tenn. 400, 398 S.W.2d 240 (1966); *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409 (1932); RESTATEMENT (SECOND) OF TORTS § 402B (1965).

<sup>72</sup> *Wade, Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 9 (1965).

<sup>73</sup> 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

<sup>74</sup> *Id.* at 901.

<sup>75</sup> See *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *O. S. Stapley Co. v. Miller*, 103 Ariz. 556, 447 P.2d 248 (1968); *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Mitchell v. Miller*, 26 Conn. Supp. 142, 214 A.2d 694 (1965); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Dealers Transport Corp. v. Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. 1966); *McCormack v. Hanksraft Co.*, 278 Minn. 322, 154 N.W.2d 488 (1967); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967); *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo. 1963); *Santor v. A. & M.*

Section 402A of the *Restatement (Second) of Torts*, which was adopted in 1964, sets forth the doctrine of strict liability in tort. It provides that the seller of "a defective product unreasonably dangerous to the user or consumer" is "subject to liability" even though he has "exercised all possible care."<sup>75a</sup> The requirement of privity is completely eliminated. Liability is outside the scope of the Uniform Commercial Code and the Uniform Sales Act. The requirement of notice and the contractual aspects of disclaimer and reliance are avoided.<sup>76</sup> The *Restatement* observes:

There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.<sup>77</sup>

California adopted the Uniform Commercial Code without including the official text of section 2-318, which limits the extension of the warranty to a "person who is in the family or household" of a buyer or "a guest in his home," thus leaving to decisional rule the responsibility for fixing strict liability as solely in tort without regard to contract or negligence.<sup>78</sup>

Virginia has adopted in lieu of the official text of section 2-318 of the Uniform Commercial Code a provision eliminating the requirement of privity in all actions against the manufacturer and seller of goods for negligence and breach of warranty, thus allowing recovery based upon strict liability by those persons who would reasonably be ex-

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Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); *Wights v. Staff Jennings, Inc.*, 241 Ore. 301, 405 P.2d 624 (1965); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966); *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); *Ulmer v. Ford Motor Co.*, 452 P.2d 729 (Wash. 1969); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

<sup>75a</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965). See *Caveat and Comments* I, o and q.

<sup>76</sup> Strict liability under Section 402A of the RESTATEMENT (SECOND) OF TORTS "is hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitations through inconsistencies with express warranties." *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965).

<sup>77</sup> RESTATEMENT (SECOND) OF TORTS § 402A, comment m.

<sup>78</sup> See *Lascher, Strict Liability in Tort for Defective Products: The Road To and Past Vandermark*, 38 S. CAL. L. REV. 30 (1965), for a discussion of the California cases.

pected to use, consume, or be affected by the goods. Under this statutory posture, recovery for breach of warranty may not be equated with strict liability in tort, for there may be differences in matters of proof and defenses.<sup>79</sup> In those states which have adopted the official text of section 2-318 of the Uniform Commercial Code, the courts may follow section 402A of the *Restatement (Second) of Torts*, or they may proceed under other common law rules in imposing strict products liability, particularly where there is any hostility toward involving sales intricacies in tort matters. Subsequent to January 1, 1963, the effective date of the Uniform Commercial Code in New Jersey, the highest court of that state decided several products liability cases on the basis of the common law principle of strict liability in tort without reference to the Code or to the *Restatement*.<sup>80</sup>

Today the American courts have accepted the manufacturer's liability to third persons for negligence. Likewise, a majority of the courts have adopted the strict liability rule, without negligence or privity, and hold manufacturers liable irrespective of fault in cases going beyond food and drink. Many of the courts have adopted the doctrine of strict liability in tort as set forth in section 402A of the *Restatement (Second) of Torts*, and it is anticipated that in this decade a majority of the American courts will embrace this concept.

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<sup>79</sup> Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965). The author points out:

It should be emphasized that if a court or legislature has decided that products liability does not depend upon contract or negligence, whether the new basis for liability is called "strict liability in tort" under the *Restatement of Torts Second*, or "implied warranty of merchantability" under the Uniform Commercial Code is relatively unimportant. In either case a duty to supply safe products is imposed upon a class of distributors for the protection of a class of consumers or users. The important question is whether there are substantial differences in the scope and content of the duties imposed by section 402A and the UCC. Until this question is answered, an intelligent decision between the two cannot be made by any court faced with a choice. There are two jurisdictions which have already made this choice: with both states virtually eliminating contract or negligence as conditions to liability, Virginia has elected to impose strict products liability under the Uniform Commercial Code and California has selected the approach of Section 402A of the *Restatement of Torts Second*.

*Id.* at 816.

<sup>80</sup> *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965). "Strict liability in tort does not mean that a manufacturer is absolutely liable for all damages proximately resulting from the use of its product." Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692 (1965).

## CONCLUSION

Paralleling the judicial and legislative development of consumer protection in other jurisdictions, Virginia has moved forward in certain areas of products liability law. The greatest single step was the statutory abrogation of privity in negligence and warranty actions. The present posture of the law permits a consumer, user, or any person who might reasonably be affected by the goods to recover on the basis of negligence and warranty in food and non-food cases against remote vendors and manufacturers. Assuming for the purposes of products liability law that common law warranties, both express and implied, exist in Virginia, in addition to the warranties within the Uniform Commercial Code, it would be proper to state a case within the context of either or both such warranties. The common law warranties may not be as heavily burdened with the intricacies of sales and contract law as those alleged under the Code.

The Virginia court has not had occasion to determine whether the doctrine of strict liability in tort under section 402A of the *Restatement (Second) of Torts* should also be permitted as a recovery route. Should the Virginia court adopt such concept, the burden will remain on the consumer to prove the relevant issues paramount in a products liability case, namely defective condition and causation. The placing of the risk of loss upon those who are better able to absorb it does not require that the manufacturer be fortified with the wrappings of commercial law within the judicial process.

The most recent trend in many jurisdictions has been to break completely with the encumbrances of commercial law by the adoption of strict liability in tort. Should Virginia adopt such concept, the unforeseen problems which have resulted from the inclusion of the anti-privity statute in the Uniform Commercial Code will have been resolved, and the purpose of the original adoption of the statute will have attained fruition, and the full extent of its usefulness will have been realized.