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COMMENT

Pigeonholes, Privity, and Strict
Products Liability

Morris G. Shanker*

Why must the legal mind look so desperately for an exclusive pigeonhole? Has not the time come to recognize that the business of law is to determine liability between people and not to place their claims in pigeonholes?

SO I WROTE IN 1965.¹ If there is wisdom in these words, the Ohio Supreme Court fails to perceive it. Twice, — first in *Lonzrick v. Republic Steel Corp.*² and now in *United States Fidelity & Guaranty Co. v. Truck & Concrete Equipment Co.*³ — the Ohio Supreme Court has declared that the extent of a seller's strict liability⁴ for selling defective products depends upon whether the plaintiff's claim is pigeonholed as a "contract" or a "tort." The full consequences of this kind of pigeonhole jurisprudence were not readily apparent when the court first announced it in *Lonzrick*. The actual holding of *Lonzrick* was to permit the plaintiff in that case to recover in the "tort" pigeonhole what would have been available to a plaintiff suing in the "contract" pigeonhole. Most applauded that decision. Few, if any, realized that the opinion had planted the seeds for more questionable results in the future. Those seeds bore fruit

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¹ Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code*, 17 W. RES. L. REV. 5, 36 (1965) [now CASE W. RES. L. REV.].

² 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

³ 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970).

⁴ Strict liability should be carefully distinguished from products liability based on a seller's fault, such as negligence. This paper is confined to discussing the problems arising under strict (non-fault) theories of liability for defective products. Typically, such strict liability has been based on a breach of a sales warranty arising under article 2 of the Uniform Commercial Code (UCC) or on strict tort defined in section 402A of the *Restatement (Second) of Torts* (1965). Ohio may be developing yet a third theory of strict liability. For a discussion of this possibility, see text accompanying notes 17-34 *infra*.

in *United States Fidelity*, a case which graphically demonstrated the impact of pigeonhole jurisprudence. Having decided that the plaintiff's property damage claim belonged in the "tort" pigeonhole, the court held that it was barred by a 2-year statute of limitations.⁵ If, instead, the court had placed that claim in the "contract" pigeonhole, then plaintiff's suit would have been barred only after the 4-year statute of limitations set out in the Uniform Commercial Code (UCC) had run.⁶

Ohio may not be alone in using this kind of pigeonhole approach to decide strict products liability cases. Recent decisions from the Rhode Island Supreme Court⁷ and the Tennessee federal district court⁸ also seem to have accepted the idea, suggesting, perhaps, a national judicial trend toward it. However, the Ohio decisions are particularly express about the idea. They also raise some rather unique problems about the scope and substance of the two pigeonholes. Further, the Ohio approach seems to be different from that accepted by some authorities elsewhere which hold that strict products liability law is not to be divided into "tort" and "contract" components, but, instead, is *always* to be treated as a matter of strict tort.⁹ Therefore, this Comment will emphasize the Ohio story, although many of its points have application to and may prove instructive to the situation now developing in other states.

I. DETERMINING THE PIGEONHOLES

A. *The Resurgence of Privity*

Obviously, it is critical to know how the court selects the appropriate pigeonhole to govern the case. In legal areas beyond

⁵ OHIO REV. CODE ANN. § 2305.10 (Page 1953).

⁶ UCC § 2-725 [OHIO REV. CODE ANN. § 1302.98 (Page 1962)].

⁷ Local 57, IUOE v. Chrysler Motor Corp., 258 A.2d 271 (R.I. 1969).

⁸ *Bowling v. Ford Motor Co.*, 296 F. Supp. 312 (E.D. Tenn. 1968).

⁹ The Ohio approach divides strict liability into "contract" and "tort" pigeonholes depending upon whether privity exists. For a discussion of the role of privity, see text accompanying notes 10-11 *infra*. Ohio's approach should be carefully distinguished from some authorities elsewhere which suggest that strict liability cases for defective products are *always* "strict tort" matters irrespective of the presence or absence of privity. See RESTATEMENT (SECOND) OF TORTS § 402A, comment *l* (1965).

I have previously discussed and criticized the total eclipsing of the UCC warranties by strict tort. Among my points was that strict tort added little, if anything, that was not possible under the UCC. See Shanker, *supra* note 1, at 21-30. See also Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965). This paper limits itself to discussing the peculiar Ohio situation which might be said to be more like a partial eclipse; that is, one part of strict liability is governed by "contract" (*i.e.*, the UCC) and the other by "tort," depending upon the presence or absence of privity.

strict products liability, the characterization of a suit typically depends upon the *defendant's* acts. Thus, if the *defendant* acts in a careless fashion, then the suit against him is called negligence. If the *defendant* walks on property, then the suit against him is called trespass. If a *defendant* does not perform a promise, then the suit against him typically is called assumpsit or breach of contract, etc. One might expect, therefore, that the categorization of a suit within the strict products liability arena equally would depend on what the *defendant* does. Curiously, that does not appear to be the case. Instead, when strict liability for defective products is involved, the suit characterization seems to depend upon *who* the *plaintiff* is. According to the Ohio Supreme Court, if the injured *plaintiff* is the one who purchased the defective goods from the offending seller, *i.e.*, is in "privity" with the seller, then the appropriate pigeonhole for the suit is "contract." However, all other *plaintiffs* injured by the same defective goods are required to sue that seller in the "tort" pigeonhole.¹⁰ So, privity once again becomes a critical factor in Ohio in determining a seller's strict liability for his defective products. In fact, an Ohio lawyer can come close to resolving his strict liability cases by the use of three easy-to-apply equations, namely:

1. P (privity) = K (contract pigeonhole)
2. N.P. (nonprivity) = T (tort pigeonhole)
3. S.L. (seller's liability) = existence either of K or T = existence either of P or N.P.

Just what policy is served by treating a plaintiff in privity differently from one not in privity is hard to fathom since the offending seller seems to have acted exactly the same way in both cases. Regardless of which plaintiff is involved, the seller's single wrongful act was to inject defective goods into the stream of commerce. Notwithstanding, the extent of his liability for this single fault will depend upon the happenstance of *who* those defective goods happen to injure!

B. *Warnings from History*

The history of products liability law should warn that there may be danger in making the privity doctrine the basis for determining substantive rights of parties injured by defective products. Only a

¹⁰ See *United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co.*, 21 Ohio St. 2d 244, 251, 257 N.E.2d 380, 384 (1970); *Lonzrick v. Republic Steel Co.*, 6 Ohio St. 2d 227, 229, 218 N.E.2d 185, 186 (1966).

short time ago, it was the favorite judicial doctrine used to deny recovery to large groups of persons injured by a seller's defective products.¹¹ More recent developments had suggested, however, that the privity doctrine was on its way to oblivion.¹² In fact, the Ohio Supreme Court was a leader in moving toward what appeared to be an outright rejection and repudiation of it.¹³ Those who welcomed that leadership must be sorely disappointed because it is now clear that the Ohio Supreme Court still recognizes that the privity doctrine has important vitality. Perhaps, it will not be used, as in yesteryear, completely to slam the door of recovery in the face of a plaintiff injured by a defective product. However, *United States Fidelity* makes clear that it will be used to determine whether that recovery door will stay open for 2 or 4 years.

The Ohio Supreme Court's approach of determining a seller's strict liability by a "tort" or "contract" pigeonhole, which in turn is determined by privity, is not a welcome step. Indeed it is hard to conceive what social purpose is served by distinguishing between injured plaintiffs who sue the *same* defendant for the *same* wrongful act of placing the *same* defective goods into the stream of commerce, simply because one plaintiff is in privity and one is not. Privity has caused much grief in the past. The Ohio Supreme Court's present suggestion that it still has some kind of vitality in Ohio is disappointing, and hopefully will be reconsidered.

II. SCOPE AND SUBSTANCE OF THE PIGEONHOLES

Until and unless the Ohio Supreme Court rejects the pigeonhole-privity approach to strict products liability law, the bench and bar are going to have to learn to live with it. Putting it more precisely, lawyers and judges need to know the exact nature and substance of each of the two pigeonholes within which an Ohio plaintiff injured by defective goods may find himself.

¹¹ For a list of commentators on the subject, see Shanker, *supra* note 1, at 6 n.2. Perhaps the leading discussion on the subject is Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).

¹² For a more recent look at the doctrine of privity, see Dickerson, *The ABC's of Products Liability — With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439 (1969); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

¹³ See *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965); *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612 (1958). Even the precise holding of *Lonzrick* was moving in this direction.

A. *Statute of Limitations Dimension — The Irony of United States Fidelity's Holding*

The *United States Fidelity* case dealt with one of the dimensions of the two products liability pigeonholes; namely, the statute of limitations. Yet, despite its holding that strict liability in the "tort" pigeonhole is limited to 2 years, manufacturer-sellers will soon realize that they typically will remain liable for their defective products for the full 4 years contemplated by section 2-725 of the UCC, exactly as the plaintiff in *United States Fidelity* had urged. The irony of the *United States Fidelity* decision is that it overlooked the fact that a plaintiff need not necessarily sue the remote manufacturer-seller who originally placed the defective goods in the stream of commerce. Instead, that plaintiff could typically sue a party in the distributive marketing chain closer to him, such as the retailer, who handled the defective goods. After the retailer pays the judgment to the injured plaintiff, the retailer could then sue to recover his loss over from the wholesaler. In turn, the wholesaler could then sue to recover over from the manufacturer whose original sale of the defective goods actually caused the problem.¹⁴ In this last action between the wholesaler and manufacturer, the suit will be between parties in privity with each other. As such, "contract" will be the appropriate pigeonhole for this suit and the 4-year UCC statute of limitations will apply. Thus, despite *United States Fidelity's* adoption of a 2-year statute of limitations for "tort" cases, the manufacturer-seller who originally placed the defective goods in the stream of commerce typically¹⁵ will, as a result of this

¹⁴ This process comes about because each seller in the distributive marketing chain typically makes some implied or express sales warranty at least to his immediate buyer. For discussion of this process, see authorities cited notes 11-12 *supra*. By use of third party practice under procedural rules comparable to Rule 14 of the *Federal Rules of Civil Procedure* or vouching in principles similar to section 2-607(5) of the UCC, this series of suits could be reduced to a single litigation.

¹⁵ I say "typically" and not "invariably." Cases can arise where the seller will avoid the full 4-year liability. An example would be where the injured party was not a buyer, such as a member of the buyer's family, an employee of the buyer, or an innocent bystander. Because a nonbuyer would not be in "privity of contract" with anyone, in Ohio he would be placed in the "tort" pigeonhole and required to sue within 2 years. Should he fail to do so, then the buyers within the vertical marketing chain would suffer no loss requiring a suit over for reimbursement. Under such facts, the original seller whose defective products caused the injury might actually be excused at the end of the 2 years. This is what seems to have happened in *Local 57, IUOE v. Chrysler Motor Corp.*, 258 A.2d 271 (R.I. 1969). When an offending seller gets out of the full 4-year liability because of these fact patterns, there appears to me to be a windfall to the offending seller to which he was not entitled.

One should also note situations where the 2-year tort statute of limitations will give a plaintiff more time within which to sue than the 4-year limitation set out in

series of lawsuits, continue to be responsible for them for the full 4 years contemplated by section 2-725 of the UCC. It, therefore, makes little sense that that same seller should not be equally liable for the same full 4 years in a direct action by the remote (not in privity) plaintiff who actually suffered the injury.

Nor can the seller complain about being held responsible for the full 4-year period set out by the UCC, even though his defective goods injured one not in privity with him. This length of liability is exactly what the seller had to expect when he sold and delivered the defective goods into the stream of commerce. The very fact of his sale made the seller potentially liable for *all* of the consequences imposed thereon by article 2 of the UCC, including its statute of limitations,¹⁶ and no lawyer would dare advise him to expect less. Surely, then, there is no reason to excuse the seller from the very statutory liability which he had to be prepared to accept when he sold the defective goods, simply because of the happenstance that they injure a remote party rather than a direct party. To suggest otherwise is simply to let chance become the prime factor in determining the extent of a seller's liability for his defective products. Products liability law certainly ought to be based on firmer stuff.

B. *Other Dimensions of the Pigeonholes*

What are the dimensions of the two strict products liability pigeonholes beyond the statute of limitations question? In particular, what substantive duties does each impose upon a seller?

1. *The "Tort" Pigeonhole — Is It Strict Tort, Commercial Code Warranty, or What?*

a. *Comparison With Strict Tort.*— When the Ohio Supreme

section 2-725 of the UCC. This is because a "tort" action does not accrue until the actual injury, whereas section 2-725 in *certain* cases starts running upon delivery of the goods. See *Rosenau v. New Brunswick*, 51 N.J. 130, 238 A.2d 169 (1967), where a plaintiff was permitted to sue the seller more than 24 years after he had sold the defective product. *But cf. Mendel v. Pittsburgh Plate Glass Co.*, 57 Misc. 2d 45, 46, 291 N.Y.S.2d 94 (Sup. Ct. 1967), where the court stated that the cause of action in all cases should accrue "at the time of sale and installation." There is also a possibility that the UCC statute of limitations could be reduced below 4 years. For a discussion of such a reduction, see note 16 *infra*.

¹⁶ By agreement, individuals are permitted to reduce the limitations period to as little as 1 year. UCC § 2-725 (1). Query: Would such an agreement bind individuals not parties thereto? There are no cases on this question. However, by reason of general contract principles which supplement the UCC, I doubt that this question would be answered in the affirmative. See UCC § 1-103. However, even if I am wrong, should not the seller's expectations based on the interpretation of a lawfully enacted statute (the UCC) determine his liability rather than the judicial privity doctrine?

Court in *Lonzrick* first set up the "tort" pigeonhole, most probably assumed that the court was establishing in Ohio the "strict tort" concept described in section 402A of the *Restatement (Second) of Torts*, which was then being fast accepted by other courts of the country.¹⁷ In fact, the Ohio Supreme Court actually cited section 402A of the *Restatement* to "support" its position.¹⁸ However, a more careful study of *Lonzrick* and *United States Fidelity* makes one wonder whether the Ohio Supreme Court does, in fact, intend to equate the new Ohio "tort" with the "strict tort" defined in section 402A of the *Restatement*. Interestingly, the court has never specifically used the label "strict tort" to define the new Ohio "tort"; and there appear to be significant differences between what the *Restatement* has in mind for "strict tort" and what the court has in mind for the new Ohio "tort."

One of the differences may relate to the defendants upon whom the obligation is imposed. The Ohio Supreme Court so far has stated that the Ohio "tort" duty is imposed only upon "manufacturer-sellers."¹⁹ But, what about sellers who are not the manufacturer, such as the wholesaler or retailer, who also handled and also sold the defective goods? Will the Ohio "tort" duty also be imposed upon them? The *Restatement* makes clear that "strict tort" is not limited to manufacturers but equally applies to *all* sellers in the distributive chain, including wholesalers and retailers.²⁰ However, the Ohio Supreme Court has yet to indicate that this will be so with respect to the new Ohio "tort."

There are also significant differences between the *Restatement's* description of the duty imposed by "strict tort" and how the court describes the duty imposed by the new Ohio "tort." Section 402A of the *Restatement* states that "strict tort" prohibits a seller from "selling any product in a defective condition [which is] unreasonably dangerous to the user or consumer." This is a far cry from the language employed by the Ohio Supreme Court. It describes the Ohio "tort" as an "implied warranty" based on an "implicit representation" to sell products which are of "good and merchant-

¹⁷ For commentary regarding the development of strict tort, see authorities cited notes 11-12 *supra*.

¹⁸ *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 239, 218 N.E.2d 185, 194 (1966).

¹⁹ *Id.* at 230, 218 N.E.2d at 188; *United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co.*, 21 Ohio St. 2d 244, 251, 257 N.E.2d 380, 384 (1970).

²⁰ RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965). See also *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362, 365 (Mo. 1969).

able quality and fit for the intended use."²¹ These words ("implied warranty," "merchantable quality," and "fitness for intended use") not only differ sharply from the "unreasonably dangerous" words employed by the *Restatement*: They seem, in fact, almost to be borrowed from the implied sales warranty sections of the UCC!²² Thus, despite the label "tort," there is a distinct possibility that the court intends to adopt UCC warranty ideas as the substantive scope of the Ohio "tort." If, indeed, this is what the court has in mind, then this clearly is at odds with what the *Restatement* had in mind for "strict tort."²³

b. Comparison with Uniform Commercial Code Warranties.— Assuming that the Ohio Supreme Court means to develop its "tort" along the lines of the implied sales warranties of the UCC, then there are serious questions as to which of the two possible UCC implied warranties (*i.e.*, implied warranty of merchantability, or implied warranty of fitness for particular purpose)²⁴ is intended. The court's use of the words "implied warranty" and "merchantable quality" are close to the words used in the UCC's implied warranty of merchantability, suggesting that that is the warranty intended. The trouble with this suggestion is the apparent discrepancy between the court and the UCC in describing what "merchantability" is all about. The court seems to be saying that its "tort" of implied warranty of merchantable quality requires the product to be "fit for *intended use*."²⁵ However, the UCC's implied warranty of merchantability requires "fitness for *ordinary purposes*."²⁶ Whether the court's fitness for "intended use" and the UCC's fitness for "ordinary purposes" are the same is yet unknown, although there is a hint in *Lonzrick* that they may be.²⁷

Another possible interpretation of the court's words "fitness for intended use" is that the product must meet the *specific* and *unique*

²¹ *United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co.*, 21 Ohio St. 2d 244, 251-52, 257 N.E.2d 380, 384 (1970). The Ohio Supreme Court used almost identical language in *Lonzrick*. 6 Ohio St. 2d at 230, 218 N.E.2d at 188-89.

²² Section 2-314 of the UCC generally deals with the implied warranty of merchantability. Section 2-315 deals with the implied warranty of fitness for a particular purpose.

²³ See RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* (1965).

²⁴ See note 22 *supra*.

²⁵ *United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co.*, 21 Ohio St. 2d 244, 252, 257 N.E.2d 380, 384 (1970); *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 230, 218 N.E.2d 185, 188 (1966).

²⁶ UCC § 2-314(2)(c).

²⁷ In *Lonzrick* the court stated that the tort has an implied warranty that the goods "were of good and merchantable quality, fit for their *ordinary* intended use." 6 Ohio St. 2d at 235, 218 N.E.2d at 191 (emphasis added).

needs of the particular user. If that is what the court intends, then the Ohio "tort" would be rather close to the UCC's implied warranty requiring fitness for particular purpose.²⁸ Such an approach would place a heavy burden on a manufacturer. While a manufacturer may be charged with the knowledge of the *ordinary* use to which his goods might be put, he would rarely know the *specific* and *unique* needs of a remote consumer with whom he never dealt.

Which, if either, of the two UCC implied warranties the Ohio court has in mind by using the words "merchantable quality" and "fitness for intended use" is yet to be determined. Perhaps the answer is that the Ohio "tort" will somehow combine ideas from *both* the UCC's implied warranty of merchantability requiring fitness for ordinary purpose and *also* the UCC's implied warranty of fitness for particular purpose, but just how is unknown.

More uncertainty about the nature of this new Ohio "tort" develops by investigating its possible relationship to the UCC's express warranties.²⁹ Both in *Lonzrick*³⁰ and in *United States Fidelity*,³¹ the Ohio Supreme Court expressly approved its prior decision in *Inglis v. American Motors Corp.*,³² and declared that that decision fully supported its newly announced "tort" concept imposing upon sellers an *implied* warranty. However, *Inglis* deliberately stated that its holding was based on an *express* sales warranty theory, and that where such an *express* warranty was present, then "there is *no need* for the law to *imply* a warranty."³³ On the surface, the statements made in *Inglis* regarding "express" warranties and their negating "implied" warranties seem to be irreconcilable with the statements made in *Lonzrick* and *United States Fidelity* setting up only an "implied" warranty. Yet, the Ohio Supreme Court has twice stated that these decisions support each other and somehow can be reconciled. However, the specifics of this reconciliation are not clear. A possibility may be that the Ohio Supreme Court will overrule its language in *Inglis* and accept the UCC approach that express and

²⁸ UCC § 2-315.

²⁹ For provisions relating to express sales warranties, see UCC § 2-314.

³⁰ 6 Ohio St. 2d at 227, 218 N.E.2d at 185 (syllabus, para. 1).

³¹ 21 Ohio St. 2d at 251, 257 N.E.2d at 384.

³² 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

³³ *Id.* at 140, 209 N.E.2d at 588. It is interesting to note that *Inglis* raised problems of its own internal consistency. Performing a feat of remarkable judicial gymnastics, the *Inglis* court relied upon diametrically opposing authorities to support its holding. See Shanker, *supra* note 1, at 12-13 n.25.

implied warranties are not inconsistent per se, but, in fact, are to be construed as consistent and cumulative unless that would be unreasonable.³⁴

From the above, it is obvious that the exact substance and scope of the new Ohio "tort" are not clear. However, in summary, the following possibilities seem to exist.

(1) As shown by the court's use of UCC warranty language, the "tort" is defined essentially along the lines of one or more of the UCC warranties. But, if that is what is intended, why does the court persist in calling the action a "tort"? Why not, instead, call it a UCC warranty which simply has been made available to remote (not in privity) parties?³⁵

(2) As shown by the court's describing the action as a "tort," it is intended that the liability be defined in accordance with the "strict tort" principles found in section 402A of the *Restatement*. But, if this is what is intended, why does the court consistently avoid using the label "strict tort." And, why does the court avoid using the language and concepts which the *Restatement* and other authorities have used to describe "strict tort"?

(3) The court has in mind developing some new strict liability theory in Ohio which simply is not known elsewhere. It will combine in a mold yet to be determined elements of the UCC's express and implied warranties, perhaps elements of "strict tort," and maybe some new ideas.

(4) The court has gotten badly tangled up with words. A new and better defined approach will be developed.

Time alone will tell which of the above is intended by the Ohio Supreme Court.

2. *Scope of the "Contract" Pigeonhole.*— Where privity is present, then the Ohio Supreme Court states that the strict products liability pigeonhole in which to sue the seller is "contract." The

³⁴ UCC § 2-317.

³⁵ The 1962 version of the UCC, which is in force in Ohio, permits the courts to make the Code warranties available to those not in privity with the seller. See UCC § 2-313, comment 2; *id.* § 2-318, comment 3. Compare alternative C of the 1966 version of section 2-318 of the UCC, wherein privity can also be eliminated by legislative action. Some have argued that the 1962 version of the UCC permits the judicial elimination of privity only in the vertical line but not in the horizontal chain. See *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 251, 218 N.E.2d 185, 201 (1965) (Taft, C.J., dissenting). For criticism of this position, see Shanker, *supra* note 1, at 25. See also *Delta Oxygen Co. v. Scott*, 238 Ark. 534, 383 S.W.2d 885 (1964). For a discussion and collection of cases where privity was judicially eliminated for nonbuyers in the horizontal chain, see *Cottom v. McGuire Funeral Service*, 7 UCC RBP. SERV. 406 (D.C. Cir., Mar. 6, 1970).

scope of this "contract" pigeonhole seems better defined than the "tort" pigeonhole. Apparently, the court intends that the scope and substantive aspects of the "contract" pigeonhole be essentially the same as the warranty liabilities found in article 2 of the UCC.³⁶

One might wish that the court would directly state that fact; namely, that the suit of a plaintiff who is in privity with the seller is based on the UCC. Stating, instead, that it is a "contract" action may lead to the erroneous notion that the seller's liabilities are those determined under common law principles of contract. Referring to a "contract" action perhaps made a great deal of sense when one was talking about lawsuits brought under the old Uniform Sales Act which was little more than a codification of common law contract law. And, in fact, the *Lonzrick* case, where the court first mentioned the "contract" language, was decided under the former Uniform Sales Act and prior to the enactment of the UCC. However, now that the UCC is the law of Ohio, it is not precise to describe actions brought thereunder as sounding in "contract." As I stated previously:

So Article 2, the Sales article of the Commercial Code, is much more than an exercise in logic of common law principles applied to sales contracts. Indeed, basic common law notions are often rejected outright and replaced by new ones. When found useful, even doctrines developed beyond the law of contract were written into Article 2 [specific illustrations cited].

. . . [T]he above demonstrates that the Commercial Code's approach to sales law was a far different one than that of the Uniform Sales Act. Perpetuating the common law logic of contracts and its concomitant doctrines about the unrestrained freedom to contract was not the Code's only concern. Sensible commercial practice and fair dealing with consumers were also important objectives.³⁷

Thus, if one is to be precise about it, the theory of an action brought under the UCC is not "contract" as that term has been historically understood. Quite true, there is involved a contract of sale which brings the UCC into action. However, the method by which that contract was formed and the liabilities which stem therefrom are not necessarily based on pure common law contract principles. It is better to recognize that a buyer's action against a seller under the UCC is a statutory action; that is, one grounded on a statute which actually repealed and replaced many common law "contract" principles.

³⁶ See *United States Fidelity & Guar. Co. v. Truck & Concrete Equip. Co.*, 21 Ohio St. 2d 244, 251, 257 N.E.2d 380, 384 (1970).

³⁷ Shanker, *supra* note 1, at 21.

Insisting that there is a distinction between an action under the UCC and an action in "contract" is not simply to quibble about words. Failure to make this distinction can at best lead to confusion and at worst lead to injustice. Indeed, the Ohio Supreme Court's fascination with the word "contract" may be the reason that it resurrected the privity doctrine to determine the substantive rights of plaintiffs in strict products liability cases. Having focused upon the word "contract," it was easy enough to fall into the trap of reasoning that contract benefits can be made available only to those who are parties, *i.e.*, in privity, to it. Logically, therefore, those not in privity to the contract must find a remedy, if they have one, in some other theory, like "tort."

This kind of natural legal logic, in which the "privity" doctrine and "contract" actions are associated with each other, has a strong historical pull on the legal mind. It is exactly the premise on which the former Uniform Sales Act was written and largely interpreted. However, perpetuating this kind of historical legal logic certainly is not what the UCC intended.³⁸ It certainly was not wedded to any privity doctrine, no matter how logical privity may appear to be and historically was to a "contract" action. Indeed, both with respect to privity and many other matters, a great deal can be done under the UCC which never was possible nor logical under contract law.³⁹

III. SUMMARY AND FINAL COMMENT

Should not the obvious be recognized? When a seller sells goods, he has no choice but to recognize and accept the fact that the sale and its concomitant liabilities are those found in the UCC. No lawyer would dare advise that a seller could ignore the very statute which was enacted to deal directly with his sales transactions. If the seller happens to sell defective goods, then who they may injure is often a matter of chance. One day, luck will have it that the injury will be to the party who directly bought the goods from the seller, *i.e.*, the party in privity with the seller. On another day, the injury will be to a party not in privity. It is hard to accept the Ohio Supreme Court's suggestion that one of these plaintiffs should have a different set of rights than the other. Both were

³⁸ For further discussion of the historical problems raised by carrying the word "contract" to its logical extreme, see Shanker, *supra* note 1, at 20.

³⁹ See Shanker, *supra* note 1, at 1; Speidel, *supra* note 9, at 804. See also Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Products Cases*, 18 STAN. L. REV. 974 (1966).

injured by the *same* defective goods and both are suing the *same* seller for the *same* wrongful act of injecting those defective goods into the stream of commerce. Indeed, just what useful social purpose is served by developing this dichotomy between plaintiffs is equally hard to fathom. What is more, through a series of lawsuits, the seller who first delivered the defective goods typically will have to face up to all the liabilities which the UCC imposed upon him. If this can be accomplished by the indirect route of several suits, then it should be equally possible with a direct suit by the plaintiff who actually suffered the injury against the defendant who originally caused it.

There may well arise a curious set of circumstances whereby the original seller will somehow avoid the full impact of the liabilities imposed upon him by the UCC because of the pigeonhole-privy jurisprudence which the Ohio Supreme Court is now pursuing.⁴⁰ Should this happen, then the offending seller simply gets a windfall to which he ought not be entitled. The very fact of the original sale required the seller to accept and expect all the liabilities imposed by article 2 of the UCC. A pigeonhole-privy theory of jurisprudence should not be the escape hatch from them.

In 1965, I wrote:

To continue to press a jurisprudence which emphasizes pigeonholes and eclipses is to ignore history. It is submitted that such a jurisprudence can assure only continued confusion and injustice in the law of products liability where confusion and injustice have already reigned too long.⁴¹

I now repeat that statement.

⁴⁰ See note 15 *supra*.

⁴¹ Shanker, *supra* note 1, at 11.

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