Marquette Law Review

Volume 51
Issue 3 *Winter 1967-1968*

Article 10

Sales Law: Feasibility of Broadening the Scope of Warranty Protection of Third Party Beneficiaries

Joseph D. Melendes

RECENT DECISIONS

Sales Law: Feasibility of Broadening the Scope of Warranty Protection of Third Party Beneficiaries: When the Uniform Commercial Code was enacted in Wisconsin,[1] it made several changes in existing Wisconsin sales law. Section 402.318 of the Wisconsin Statutes,[2] regarding third party beneficiaries of warranties presented a major break with prior Wisconsin case law by changing the privity of contract rule associated with warranties in sales contracts as announced in *Prinsen v. Russos*[3] in 1927.

In the *Prinsen* case, the plaintiff was injured by eating infected ham in a sandwich purchased for her by another from defendant restaurant. The trial court refused to submit the case on the theory of implied warranty. The Supreme Court, in affirming the trial court, stated in its opinion:

> To assert a right, however, based upon a breach of warranty, express or implied, it is necessary that the required elements of a contract be present. The express language of the statute . . . invoked by plaintiff makes the rule there declared applicable as between *buyer* and *seller,* and manifestly is not intended to create a liability of seller towards any person outside of such so defined and limited contractual relationship. . . . Unless there be privity of contract the general rule is that there is no liability for a breach of the contract to outsiders.[4]

Thus the Supreme Court limited the scope of protection afforded by sales contract warranties to the buyer and based its decision on a privity of contract theory.

The Supreme Court had not changed its rule in 1952 when it cited the *Prinsen* case with approval in *Cohan v. Associated Fur Farms, Inc.*[5] In the *Cohan* case, the plaintiff had purchased a feed mixture for his mink from defendant Associated, who had mixed the feed expressly for that purpose. Many mink died and the cause of death was traced to infected pork livers which middleman Associated had purchased from Armour. Associated impleaded Armour and in an amended complaint the plaintiff brought an action for breach of implied warranty against Armour, claiming he had relied on Armour's skill in processing and on its warranties relative thereto in purchasing the goods. Armour's de-

---

[1] Wis. Laws 1963, ch. 158 (effective July 1, 1965).

[2] WIS. STAT. 402.318 (1965): Third party beneficiaries of warranties, express or implied. 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 effected 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.

[3] 194 Wis. 142, 215 N.W. 905 (1927).

[4] *Id.* at 145, 215 N.W. at 906.

[5] 261 Wis. 584, 53 N.W.2d 788 (1951).

murrer to the complaint was sustained by the trial court. On appeal the Supreme Court affirmed, stating that in order to permit recovery for breach of warranty by an ultimate buyer against the manufacturer, there must be privity of contractual relations between them.

A 1959 case involving a breach of warranty claim was *Smith v. Atco Company.*[6] In the *Smith* case, the Supreme Court announced that privity between the plaintiff and a manufacturer was no longer required in a negligence action. The court cited by way of a footnote a Michigan case[7] which had abolished privity as a requirement for liability in both negligent tort and breach of warranty actions. The Wisconsin court, however, expressed its adherence to the rule announced in *Prinsen* with regard to privity in a breach of warranty action. But a step had been taken toward the breakdown of privity as a liability test, though limited to tort actions.

A further and much more decisive step toward the abolishment of the privity test in a breach of warranty action was taken by Wisconsin in 1963 in *Strahlendorf v. Walgreen Co.*[8] In *Strahlendorf,* the plaintiff's grandmother purchased a toy plane set from defendant and took it to the home of her son. There the plaintiff's five year old brother launched the plane and it struck plaintiff in the eye, seriously injuring her. The plaintiff sued, alleging that the defendant had impliedly warranted that the plane was safe for use by minors. The trial court directed a verdict for defendant on the ground of lack of privity between plaintiff and defendant. The Supreme Court affirmed the decision on a different ground. By way of dicta, the court indicated that it was cognizant of the modern trend of decisions[9] which have abolished the requirement of privity in breach of warranty cases and the court went on to say:

> When this court declared in footnote in *Smith v. Atco Co.* . . . that Wisconsin requires privity in breach-of-implied-warranty cases, it was merely stating the then present status of our law. This does not mean that this court will adhere to this rule forever, regardless of the persuasiveness of the arguments made, or the authorities cited, in favor of changing it. However, we do not deem the instant case a proper one in which to give consideration to this question.[10]

Thus, prior to the enactment of the Uniform Commercial Code in this state, the Wisconsin court did not recognize the law as stated in

[6] Wis. 2d 371, 94 N.W.2d 697 (1959).
[7] Spence v. Three Rivers Builders and Masonry Supply, 353 Mich. 120, 90 N.W.2d 873 (1958).
[8] 16 Wis. 2d 421, 114 N.W.2d 823 (1962).
[9] *See, e.g.,* Henningsen v. Bloomfield Motors, Inc. 32 N.J. 358, 161 A.2d 69 (1960). In this case involving breach of implied warranty, the court held privity of contract was not essential to recovery and based its conclusion on a consideration of modern marketing practices and the complete dependence of the buyer upon the ability of the manufacturer to make a product fit for its represented use.
[10] 16 Wis. 2d at 435, 114 N.W.2d at 831.

402.318, although it indicated that it might have reached a similar rule if the proper case had presented itself. By adopting section 402.318 as part of the Uniform Commercial Code, the legislature extended the scope of protection afforded by sales contract warranties to any person who is in the family or household of the buyer or is a guest in his home and who could reasonably be expected to use, consume or be affected by the goods.[11]

In its most recent decision regarding privity of contract in implied warranty cases, *Dippel v. Sciano*,[12] the court considered section 402.318 in the form enacted by the legislature. The action in *Dippel* was to recover for personal injuries sustained by the plaintiff in moving a large coin-operated pool table at the request of defendant's employee. While in the process of moving the table, the leg assembly collapsed and the table crushed plaintiff's foot. The accident occurred on premises owned by the defendant and prior to the enactment of the Code in Wisconsin. The plaintiff also joined as defendants in the action the manufacturer of the table, the sales distributor, and the lessor of the table. The plaintiff's third cause of action alleged breach of express and implied warranties of merchantability and fitness for a particular purpose against the manufacturer and the sales distributor. The distributor demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer on the ground of lack of privity of contract between the plaintiff-user and the defendant-sales distributor.

Whereas the plaintiff on appeal based his action on breach of implied warranty and sought to have the rule regarding privity of contract between seller and ultimate user abrogated, the court refused to deal with this issue, thereby rejecting its earlier dicta in *Strahlendorf*, and rather viewed the issue in regard to a cause of action in strict liability in tort. The court decided that a plaintiff who had been injured due to a defective product would be more effectively protected by adopting a rule of strict liability rather than under implied warranty which depended upon privity. The court examined section 402.318 and decided it was inadequate in its extension of protection to third parties as enacted. The court said, "The section does not substantially change the doctrine of privity. The code, in fact, does not provide a much more desirable basis for extension than does the Uniform Sales Act."[13] The court went on to say,

> The abrogation of the privity requirement is not strictly and exclusively a matter of sales and contract law. When the manufacturer or the seller offers a product for sale which he expects to be used by the consuming public within its intended use and

[11] WIS. ANNOT.—UCC, Sales, at 95 (1961).
[12] 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
[13] *Id.* at 454, 155 N.W.2d at 60.

> such product is defective and injures the consumer, his liability in tort can be based upon a breach of duty quite apart from contract obligations. In these situations the Uniform Commercial Code is inapplicable.
>
> We are of the opinion that the rule which requires privity of contract in products-liability cases should not be used to defeat a claim based upon a defective product unreasonably dangerous to a nonprivity user. For products-liability cases we adopt the rule of strict liability in tort as set forth in section 402 A of Restatement, 2 Torts (2d), pp. 347, 348.[14]

And in conclusion the court said,

> The third cause of action of the plaintiff's complaint is grounded upon a theory of an abolition of the rule of privity of contract in actions for breach of implied warranty. Because we have determined that physically injured users or consumers of unreasonably dangerous defective products should pursue their remedy under the rule of strict liability in tort, we conclude that the third cause of action in the complaint does not state facts sufficient to constitute a cause of action and the order sustaining the demurrer should be affirmed but with leave to plead over.[15]

The court has thus put section 402.318 into a limbo beyond the recall of plaintiffs due to its restricted use as now enacted. The Supreme Court arrived at this decision probably becauses it felt the legislature had preempted the field of implied warranty by its adoption of 402.318 and found the class of beneficiaries under the section too restrictive to be of help in our affluent society.[16] It now appears that the legislature can redeem section 402.318 and give plaintiffs a cause of action based on warranty by enacting one of the amendments promulgated by the Permanent Editorial Board for the Uniform Commercial Code.

The Permanent Editorial Board for the Uniform Commercial Code, in its report to the American Law Institute,[17] stated that the primary object of the Code was uniformity in the laws of the states which enacted the Code and that the individual states, by making their own amendments, were imperiling this object. Therefore, it became the policy of the Permanent Board, "in attaining and maintaining uniformity," to propose alternative amendments to the Code to facilitate the Code's acceptance.[18] Acting under this authority, the Permanent Board has promulgated optional amendments to the Code section 402.318 in the form of three alternatives, in order to allow states a choice as to how far to extend the warranties of merchantability and fitness for a particular purpose and yet keep uniformity in the enactments.[19] Their adoption

[14] *Id.* at 458-459, 155 N.W.2d at 62-63.
[15] *Id.* at 463, 155 N.W.2d at 65.
[16] *Id.* at 454-455, 155 N.W.2d at 60.
[17] UNIFORM COMMERCIAL CODE at viii (1962).
[18] *Id.* at xiv.
[19] PERMANENT EDITORIAL BOARD for the UNIFORM COMMERCIAL CODE, Report No. 3, at 1 3(1967).

was due to the fact that many states had enacted variations because the section 402.318 was considered too restrictive, and there was no unanimity as to the scope of warranty protection which was necessary.

The promulgation of the alternative amendments necessitates a comparison of their differing coverage under a seller's warranty and consideration of the advisability of an amendment to the Wisconsin section 402.318.

Alternative A of Uniform section 2-318 is the present Wisconsin law as embodied in 402.318. A consideration of the present statute shows that in order for a person to be a beneficiary of the seller's warranty, (1) he must be a member of the purchaser's family or a guest of his household, and (2) it must be reasonable to assume that such a person would use the goods sold. The section does not permit recovery for damage to property of the user nor to a guest in a restaurant.[20]

Alternative B of Uniform section 2-318 reads as follows:

> A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to 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.[21]

The significant change that alternative B makes is that it expands the class of beneficiaries to any natural person who "may reasonably be expected" to use, consume or be affected by the goods and thus removes the limitation, as now embodied in 402.318, to the family, household and guests of the purchaser. This Alternative B would modify the *Strahlendorf* decision because it would bring the infant plaintiff in that case within the class of beneficiaries.

Alternative C is quite liberal in its classification of third party beneficiaries and approaches the strict liability of section 402 A of the Restatement of Torts. Alternative C states:

> A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.[22]

This alternative, like B, expands the class of beneficiaries beyond 402.318. However, C, drops the word "natural" as a prefix to person and thus allows any person, human or otherwise, to recover if it "may reasonably be expected" to use, consume or be affected by the goods. Alternative C also allows recovery of damage to property as well as to

[20] REPORT OF THE COMMERCIAL CODE COMMITTEE TO THE WISCONSIN LEGISLATIVE COUNCIL, Meeting of Dec. 6, 1960 at p. 15 (July, 1961).
[21] *Supra*, note 19.
[22] *Ibid.*

person, as witnessed by the deletion of the words "in person" in its damage clause.

Any consideration of these alternatives would not be complete without an analysis of section 402 A of the Restatement of Torts.[23] This section, entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer," states that:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[24]

The rule stated in this section is strict liability and it applies even in the absence of negligence on the part of the seller.[25] It is limited to sales by a merchant,[26] but it is not governed by the limitation imposed by the Uniform Commercial Code on the scope and content of warranties or by the limitation to "buyer" and "seller" in that statute; the consumer is not required to give notice of injury within a reasonable time, as is required in the Code,[27] nor is the consumer's cause of action affected by disclaimers or agreement between the seller and the immediate buyer, as is possible under the Code.[28]

Prior to the *Dippel* case, Wisconsin had rejected the rule stated in section 402 A.[29] This was due to the theory of implied warranty as applied to products liability cases by the Wisconsin court.[30]

> Thus the concept of strict liability in the field of products liability, when predicated upon a theory of implied warranty of fitness and/or merchantability, with a resulting breach, has actually proven to be a deterrent in many states rather than an aid to strict liability. The concept of warranty has involved many major difficulties and disadvantages that it is very questionable

---

[23] RESTATEMENT (SECOND), TORTS § 402A, vol. 2 at 347-348.
[24] *Id.*
[25] *Id.*, comment a at 348.
[26] *Id.*, comment f at 350.
[27] *Id.*, comment m at 356.
[28] *Ibid.*
[29] See note 4, RESTATEMENT (SECOND) TORTS, Appendix (1966).
[30] See Ghiardi, *The Last Word in Products Liability—Section 402-A of the Restatement of Torts*, 6 WISCONSIN CONTINUING LEGAL EDUCATION, 101 (1966), in which the author traces the history of products liability in Wisconsin.

> whether it has not become a burden rather than a boon to the courts in liberalizing liability. Wisconsin, presently implying that it may revert to the consideration of warranty is essentially an action in the nature of tort, will have done so when it directly abolishes the privity requirement.[31]

Therefore, the only obstacles that blocked section 402 A from becoming the law in Wisconsin were recognition by the Supreme Court that warranty is a matter of tort liability and failure by the court to accept the social policies supporting strict liability in products liability cases.

As compared to the three optional amendments proposed in the Uniform Commercial Code, Restatement section 402 A affords the consumer much more protection. However, it does not rely on the warranties of merchantability and fitness for a particular purpose made by the seller, but instead on a special responsibility placed on the seller of products to be consumed by the public. The Code deals specifically with these warranties and attempts to afford protection to third parties while working within the framework of the sales contract. Nevertheless, foreseeability is a relevant factor in arriving at liability in sales. To limit a retailer's breach of warranty to his immediate vendee or even to his family and household is unrealistic when both the retailer and the buyer are aware at the time of the sale of the goods that many persons outside this group may use or come in contact with it.[32]

Upon final analysis, enactment of alternative C as an amendment to section 402.318 is desirable on the basis of sound social policy. The purchaser of goods and parties in relation to him should be protected to the fullest extent by the seller's warranty that the goods he sells are menchantable and fit for the ordinary purpose for which such goods are used. The section as it now exists has been rendered useless by the court in its ability to meet this need. If alternative C were enacted, it would protect all buyers in their person and property from defects in goods which have been represented to them as safe and suitable for use. As a result, any beneficiary of a warranty could bring a direct action against a seller for breach without any technical rules as to privity. Also, in a warranty theory action, the plaintiff's case would not be subject to the defense of contributory negligence as is possible under the strict liability in tort theory adopted by the Supreme Court in the *Dippel case*.[33] Only by action of the legislature in enacting such alternative amendment can full protection be extended to ultimate consumers of products intended for use by the general public.

JOSEPH D. MELENDES

---

[31] *Id.* at 121.
[32] Annot., 75 A.L.R.2d 39 (1961).
[33] 37 Wis. 2d 443, 462, 155 N.W.2d 55, 65-66 (1967).