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Recent Decisions: Sales: Uniform Commercial Code: Section 2-318 and Its Effect on the Requirement of Privity

Jeremiah Hegarty

assumption of risk in all cases except those of express consent.[31] Therefore, the only similar alternative would be contributory negligence. However, under the comparative negligence statute[32] contributory negligence is no longer a complete bar to recovery, but must be compared with the negligence of the defendant.[33] But how can fault be compared with non-fault? The defense of contributory negligence is only applied when the defendant, as well as the plaintiff, has been negligent.[34] Yet, at the same time, justice demands that a plaintiff should be barred from recovery when he has proceeded willfully or negligently to use a product and suffered injury, after he has discovered the defect and is aware of the danger. It is interesting to ponder how Wisconsin would solve this problem.

In summation, the advent of strict liability has come upon the courts very rapidly, and more decisions can be expected in the near future. Dean Prosser has stated that "with the exception of the change in the law with respect to prenatal injuries, this is the most radical and spectacular development in tort law during this century."[35] Yet, strict liability is not a panacea. In reality, it probably raises as many problems as it solves. The assuagement, however, lies in the fact that strict liability in tort stands a good chance of being uniformly adopted by the courts. Universal agreement on a single theory of liability will serve to ameliorate and mollify the existing confusion resulting from a multitudinous variety of bases on which liability is currently founded.

MICHAEL W. WILCOX

Sales: Uniform Commercial Code: Section 2-318 and Its Effect on the Requirement of Privity—Plaintiff, employed as manager of a hotel, personally purchased from a state liquor store, on behalf of his employer, four bottles of champagne produced and bottled by the defendant corporation. The wine was intended for use and consumption by the guests of the hotel. While plaintiff and other employees were preparing to serve the wine, a cap from one suddenly ejected and hit the plaintiff in the eye, resulting in a serious injury. The trial court determined that the suit was barred because of lack of privity between the parties. On appeal, in *Yengtzer v. Taylor Wine Co.*,[1] the Supreme Court of Pennsylvania held that the employee was a buyer under sec-

[31] McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W. 2d 14 (1962) (host to guest in automobile), extended to all situations involving "tacit assumption of risk" in Gilson v. Drees Bros., 19 Wis. 2d 107, 120 N.W. 2d 63 (1959).
[32] WIS. STAT. §331.045 (1961).
[33] Nelson v. Hanson, 10 Wis. 2d 107, 102 N.W. 2d 251 (1959).
[34] RESTATEMENT, TORTS §467 (1934).
[35] RESTATEMENT (SECOND), TORTS, Note to Institute §402a (Tent. Draft No. 10, 1964).
[1] 414 Pa. 272, 199 A. 2d 463 (1964).

tion 2-318,[2] as defined by section 2-103[3] of the Uniform Commercial Code.

To recover damages caused by a defective product, a plaintiff must base his claim on either breach of warranty or negligence. The negligence approach has been rid of the requirement of privity traditional to warranty actions,[4] but, in general, still places a heavy burden of proof upon the plaintiff. The doctrine of res ipsa loquitur has provided only minimal assistance in meeting the problem of proof of negligence because a plaintiff must show control of the instrumentality of injury by the defendant.[5] As a result many courts have adopted a doctrine of strict liability in tort for all manufactured products,[6] but such a theory was not pursued in the principal case.

Because of the evidentiary difficulties involved in applying the negligence theory, the principal case was submitted on a theory of breach of warranty and hence was governed by the Uniform Commercial Code, particularly section 2-318 thereof which designates the categories of persons to whom sales warranties are deemed to run.

In analyzing section 2-318, it is important to first distinguish the two types of privity significant in every warranty action. Vertical privity is the relationship of purchasers and sellers in the commercial chain of distribution, while horizontal privity is the further relationship of a seller with a person using the product who has come into possession or control after the last sale has been made.

Section 2-318 of the recently adopted Uniform Commercial Code is significant only as to its impact on horizontal privity. The draftsmen of the Code limited its scope of protection only to members of the family, household, and household guests personally injured, and not to other reasonably forseeable victims. To be entitled under this pro-

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[2] UNIFORM COMMERCIAL CODE §2-318: *"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 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."

[3] UNIFORM COMMERCIAL CODE §2-103: *"Definitions and Index of Definitions.*
(1) Buyer means a person who buys or contracts to buy goods.
(b) Good Faith in the case of the merchant means honesty in fact and observance of reasonable commercial standards of fair dealing in the trade.
(c) Receipt of goods means taking physical possession of them.
(d) Seller means a person who sells or contracts to sell goods."

[4] MacPherson v. Buick Motor Co., 217 N.Y. 382, 110 N.E. 1050 (1916); Smith v. Atco, 6 Wis. 2d 356, 94 N.W. 2d 697 (1959); Dunn v. Ralston Purina Co., 38 Tenn. App. 229, 272 S.W. 2d 479 (1954); Carter v. Yardley & Co., 319 Mass. 372, 64 N.E. 2d 693 (1946); Babylon v. Scruton, 215 Md. 299, 138 A. 2d 375 (1958).

[5] PROSSER, TORTS §42 (1955); Ghiardi, *Res Ipsa Loquitur in Wisconsin,* 39 MARQ. L. REV. 361 (1955).

[6] Greenman v. Yuba Power Prods., 59 Cal. App. 2d 67, 377 P. 2d 897 (1962); Goldberg v. Kollsman Instrument Corp. 12 N.Y. 2d 432, 191 N.E. 2d 81 (1963); RESTATEMENT, TORTS §402A (Tent. Draft No. 10, 1964).

vision to rely upon warranties which a buyer receives from his seller, the injured party must establish

(a) that he is a natural person;
(b) that he is in the family or household of the buyer or is a guest in his home;
(c) that it was reasonable to expect that he might use, consume, or be affected by the goods; and
(d) that he was injured in person by breach of the warranty.

Even prior to the enactment of the Code, courts were aware of the harshness of the privity rule in warranty cases where the person injured was one who might reasonably have been expected to use the product and suffer injuries if it was defective.[7] Some courts desiring to protect the consumer diluted the privity requirement and allowed him recovery in case of injury. This was especially true in food cases.[8]

While many courts have elected not to formally abandon the privity requirement, they have employed various legal fictions to bring the particular cases within the rules of privity.[9] One such fiction was based on the rule of agency where, for example, the wife-agent purchases groceries for the husband-principal, who consumes the food and suffers personal injury. The courts have held that the warranty was actually given to the principal through his agent.[10] But this legal device is limited to cases where the "principal" is one who might reasonably have been foreseen as a user of the goods. Other courts rely instead upon a theory that once a warranty has been given, it "runs with the goods," and the consumer, wherever he may be in the chain of distributions or of subsequent usage, may avail himself of the warranty attached to the goods.[11] Still other jurisdictions have resorted to a third party beneficiary theory of recovery, extending the warranty obligation to others than the purchaser when the defendant-seller may reasonably expect the goods to be used by such persons.[12] However, the use of legal gymnastics to escape the privity issue was inadequate. It became imperative in drafting the Code to formulate rational rules of privity applicable in a commercial setting.

Section 2-318 attempted a statement of the law of privity in the light of modern commercial practice. One may be skeptical of its suc-

[7] Ketterer v. Armour & Co., 200 Fed. 322 (2d Cir. 1912); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Chapman Chem. Co. v. Taylor, 215 Ark. 630, 222 S.W. 2d 820 (1949).
[8] Kniess v. Armour & Co., 134 Ohio St. 432, 17 N.E. 2d 734 (1938); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942); Klien v. Duches Sandwich Co., Ltd., 14 Cal. 2d 272, 93 P. 2d 799 (1939).
[9] Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Davies v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920).
[10] Singer v. Zabelin, 24 N.Y.S. 962 (1941).
[11] Williams v. Paducah Coca-Cola Bottling Co., 343 Ill. App. 1, 98 N.E. 2d 164 (1951); Le Blanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952).
[12] Mouren v. Great A. & P. Tea Co., 139 N.Y.S. 2d 375 (App. Div. 1955).

cess in this effort. As a practical matter, the inadequacies and contradictions of this section are apparent. What if the defective product causes harm to a buyer's friend while they are on a picnic? The friend is not a guest in the buyer's home. What if the party injured is a tenant in a rooming house? He is not a member of the household. What if the defective product kills a dog belonging to the buyer's son? This is not an injury to a person.

Section 2-318 is only beneficial in extending horizontal privity to a few limited groups now only inadequately reached by evolving case law; the benefits of the section are far outweighed by its restrictive drafting as to persons eligible for recovery and the type of compensable injury.

When the Code was enacted in Wyoming, section 2-318 was amended to extend a seller's warranties "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."[13] California simply omitted this section on the ground that it would be a step backward from existing California law.[14]

Because of the restrictiveness of the Code, the court in *Yengtzer v. Taylor Wine Co.*[15] was placed in a dilemma. It would either have to deny recovery or construe an employee to be the principal buyer in order to reach an equitable decision, even though such construction was not in harmony with the statutory intent. The court construed the buyer as defined in section 2-103 of the Code as "a person who buys or contracts to buy."

Section 2-318 limited the court's discretion by use of a specific enumeration of categories which have generally been understood to be exclusive. Courts have held to the strict meaning of the statute where the case clearly called for a different result. They have concluded that an automobile is not a home and therefore a guest in a car can not recover in the absence of privity.[16] The Pennslyvania court said that an employee was not within the group to whom the warranty of merchantability extended under section 2-318 and on that basis refused to confer upon such employee the benefit of the warranty.[17]

It should be noted that section 2-318 takes no position as to the requirements of vertical privity. Comment 3 states: "Beyond this [family, household, guest] this section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to the buyer who resells, extend to other persons within

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[13] WYO. STAT. ANN. §40A-2-318 (Supp. 1961).
[14] See Senate Fact-Finding Com. of Judiciary, Sixth Progress Report to the Legislature, pt. 1, Uniform Commercial Code 457-58 (1959-1961).
[15] 414 Pa. 272, 199 A. 2d 463 (1964).
[16] Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961).
[17] Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A. 2d 575 (1963).

the distributive chain." The Code does not purport to affect vertical privity, but instead leaves the problem to the courts.

Many courts have done away with the requirement of vertical privity in certain situations.[18] Courts, when faced with the problem of whether a manufacturer is liable to a remote vendee or other third persons, state that there is liability whether or not privity of contract exists. Courts have done away with vertical privity by judicial decison, and it is believed that they would have done the same with horizontal privity in absence of section 2-318.

The rigidity of the statute as presently drafted produces interesting anomalies. For example, *Prinsen v. Russos*,[19] where plaintiff (a traveling companion of the purchaser of an infected ham sandwich) failed for want of privity to recover from the seller, has been criticized for many years as unjust; yet the decision would presumably not be changed under the presently drafted section 2-318. One cannot help but conclude that the statutory drafting of section 2-318 was not in harmony with developing case law throughout the country. The Wyoming legislative decision to broaden the Code to include all people reasonably expected to use the goods seems sound in that it clearly delineates a definite policy decision abolishing privity as a requirement. To enact a statute which must rely on a case by case approach defeats the intent of the Code. The Code should present to the community a clear and lucid statement of the law in order to avoid any undue litigation.

JEREMIAH HEGARTY

Joint Tenancy: Partition and Dower—Martin and Stella Jezo had been married for forty-two years when Martin filed an action for legal separation and division of the estate, and Stella counterclaimed for legal separation. Both causes of action were dismissed on the trial court's finding of condonation, but Martin was given leave to amend his complaint to seek partition of jointly owned assets in land and joint bank accounts valued at $430,000. In that complaint, Martin alleged as follows:

> The plaintiff contributed approximately 80% toward the acquisition of the foregoing described property and real estate, and the defendant contributed approximately 20% thereof. The title to such property was placed in joint name for purposes of convenience and was not intended to transfer actual ownership. The division of ownership should be in proportion to the con-

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[18] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612 (1958); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. 2d 409 (1932); Foley v. Coca-Cola Bottling Co. of St. Louis, 215 S.W. 2d 314 (Mo. Ct. App. 1948).

[19] 194 Wis. 142, 215 N.W. 905 (1927).