Marquette Law Review

Volume 47
Issue 2 *Fall 1963*

Article 4

Products Liability: The Privity Requirement in Wisconsin

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COMMENTS

PRODUCTS LIABILITY: THE PRIVITY REQUIREMENT IN WISCONSIN

I. INTRODUCTION

Prompted by the dicta enunciated in the recent Wisconsin case of *Strahlendorf v. Walgreen Co.*,[1] plus the recent adoption of the Uniform Commercial Code in Wisconsin,[2] this comment will attempt to point out the practical effect of abrogating or modifying the privity requirement in products liability cases. Although there is no paucity of law review articles in this area, there appears to be little analysis peculiar to Wisconsin law.

A. *Negligence and Warranty*

Negligence and warranty are descendants of the old common law action, trespass on the case.[3] The former continued to follow the path of tort law while the latter branched onto the path of contract. In many respects both actions reveal their common heredity in that what affects one, in time, generally affects the other. Although most of the controversy today concerns privity in warranty cases and the bulk of this comment preponderates thereon, this author feels that a brief history of privity in negligence, both nationally and in Wisconsin, will help the reader to parallel the development of both areas.

B. *Putting Wisconsin in Perspective*

The classic case of *Winterbottom v. Wright*[4] is credited with giving birth to the rule that a manufacturer is not liable for negligence to a remote vendee or other third person with whom he had no contractual relations. This decision took hold in various jurisdictions across the United States[5] and was eventually applied in the early Wisconsin[6] case of *Zieman v. The Kieckhefer Elevator Mfg. Co.*[7] In that case, the defendant manufacturer had installed a faulty elevator which resulted in injury to the plaintiff. Because there was no privity between the two the court denied plaintiff recovery.

The harsh doctrine of *Winterbottom* was ameliorated in the New York case of *Thomas v. Winchester*[8] when the court engrafted the "*inherently* dangerous instrumentality" exception. The seed of *Thomas* blossomed into the famous rule enunciated by Justice Cardozo in *Mac-*

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[1] 16 Wis. 2d 421, 114 N.W. 2d 823 (1963).
[2] Wis. Laws 1963, ch. 158 (effective July 1, 1965).
[3] PROSSER, TORTS 493 (2d ed. 1955), citing Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888).
[4] 10 M & W 109, 152 Eng. Rep. 402 (Exch. 1842).
[5] See Annots., 164 A.L.R. 569 (1946) and 74 A.L.R. 2d 1095 (1960).
[6] For a more thorough discussion of Wisconsin cases in this area see Wickam, *Products Liability in Wisconsin*, 29 MARQ. L. REV. 20 (1945).
[7] 90 Wis. 497, 63 N.W. 1021 (1895).
[8] 6 N.Y. 397, 57 Am. Dec. 455 (1852).

Pherson v. Buick Motor Co.[9] That case widened the interpretation to *"imminently* dangerous instrumentality," so as to include anything which might reasonably imperil life and limb when negligently made. Following the trend of these cases was *Flies v. Fox Bros. Buick Co.*[10] In that case the plaintiff was injured when an automobile driven by defendant Johnson ran into her, due to ineffective brakes. Johnson had purchased the car from the defendant-retailer, Fox Bros. The court reversed a judgment dismissing plaintiff's complaint as to Fox Bros. After stating the general rule of *Winterbottom* the court said:

> To this [general rule] an exception has long been recognized with reference to products which are inherently and normally dangerous. . . .[11]

In the years following *MacPherson* the "imminently dangerous instrumentality" exception had been interpreted so broadly by so many courts that the original rule of *Winterbottom* has been virtually eclipsed.[12] All doubts as to Wisconsin's position were finally laid to rest in *Smith v. Atco.*[13] That case involved a mink rancher whose purchase of a solution in which to dip his nesting boxes resulted in the death of many mink and a decrease in quality of those that survived. An action was brought in negligence against both the manufacturer and the supplier, neither of whom were in privity with the plaintiff. Justice Currie speaking for a unanimous court declared:

> We deem that the time has come for this court to flatly declare that in a tort action for negligence against a manufacturer, or supplier, whether or not privity exists is wholly immaterial. The question of liability should be approached from the standpoint of care to be exercised by the reasonably prudent person in the shoes of the defendant.[14]

Thus, after a century, the body of law generated by *Winterbottom v. Wright* has had its jurisprudential bones picked clean so that all that remains (at least in Wisconsin) is a legal skeleton of another era.

III. Implied Warranty—The Privity Requirement

A. *Introduction*

The scope of this comment is not broad enough to encompass all of the fine distinctions between the various types and subclasses of warranties.[15] The discussion will presume the typical case: a breach of an implied warranty by a manufacturer, resulting in damage to a user who

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[9] 217 N.Y. 382, 111 N.E. 1050 (1916).
[10] 196 Wis. 196, 218 N.W. 855 (1928).
[11] *Id.* at 383, 218 N.W. at 857.
[12] See Annot., 74 A.L.R. 2d 1189 (1960).
[13] 6 Wis. 2d 371, 94 N.W. 2d 697 (1959).
[14] *Id.* at 383, 94 N.W. 2d at 704.
[15] See Uniform Sales Act §§12-16 and Uniform Commercial Code §§2-312 to 2-318.

is not in privity with the manufacturer, and the various means of handling the privity requirement.

B. *Wisconsin's Position*

The dicta in the recent case of *Strahlendorf v. Walgreen Co.*[16] makes Wisconsin's future position in this area one of pure speculation. That case involved an infant who sustained an eye injury as a result of being struck by a toy airplane launched by her five year old brother, Butchie. The toy was purchased for Butchie by his grandmother from the defendant, Walgreen Co. Butchie managed to get his hands on the toy even though his father, thinking it too dangerous, prohibited him from playing with it. The action was based on negligence and breach of an implied warranty. Although the court disposed of the implied warranty issue by finding that the toy was not an inherently dangerous instrumentality as alleged in the complaint, it took the opportunity to state some enlightening dicta:

> When this court declared by 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 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.[17]

A brief, but forceful, dissent was written by Justice Hallows. He advocated abrogating privity in implied warranty cases involving inherently dangerous instrumentalities which he believed the toy to be.[18]

Thus, excluding the provision of section 2-318 of the Uniform Commercial Code, Wisconsin's position in products liability cases involving breach of an implied warranty is clear: privity is absolutely required.

C. *Putting Wisconsin in Perspective*

As to the necessity of privity in breach of implied warranty cases, the courts have taken one, or a combination of, five basic positions:

1. Absolute necessity of privity;
2. No privity needed in food cases;
3. No privity needed when product is inherently dangerous;
4. Uniform Commercial Code, sections 2-318 and 2-607(5); and
5. No privity needed whatsoever, accomplished either by statute or an artifice of legal fiction.

The first four plus the statutory means of the fifth meet the problem of privity in a more straightforward manner than those jurisdictions em-

[16] Note 1 *supra.*
[17] *Id.* at 435, 114 N.W. 2d at 831. See also RESTATEMENT (SECOND), TORTS §402-(a) (Tent. Draft No. 7, 1962).
[18] *Id.* at 436, 144 N.W. 2d at 831.

ploying legal fiction. The subsequent analysis will proceed within these five strata, citing style cases in each, a parallel Wisconsin case—if there be one, the policy underlying each, and the consequences to the manufacturer.

1. *Absolute Necessity of Privity*

The policy of a strict privity requirement was part of the *laissez faire* attitude adopted during the Industrial Revolution when the manufacturer-purchaser transaction at arm's length was the rule rather than the exception.[19] With the advent of complex marketing structures, its rationale as a legal principle in the vertical channel[20] of distribution from manufacturer to consumer has to a large extent disappeared.

Wisconsin's strict adherence to the privity requirement is part of a waning majority across the nation. An example of this doctrine is found in *Cohan v. Associated Fur Farms, Inc.*[21] The usual manufacturer-retailer-purchaser chain in that case concerned adulterated mink food. A demurrer by the manufacturer to the purchaser's complaint was sustained because privity was lacking. Another style case is that of *Kennedy-Ingalls Corp. v. Meissner.*[22] In that case a defective apron injured an employee of the A. O. Smith Corp. The apron was purchased from Kennedy who in turn had purchased from the manufacturer's agent, Meissner. In reversing the trial court, the supreme court allowed A. O. Smith to intervene in an action by Kennedy against the manufacturer for breach of warranty, reasoning that otherwise Smith would be barred from bringing a subsequent action for breach of warranty. The court stated:

> Smith cannot institute such an action [breach of warranty] in its own right because of the lack of privity between it and the defendants [manufacturer].[23]

The dicta of *Strahlendorf* seems to indicate that the citadel of a strict privity requirement in Wisconsin is beginning to crumble.[24]

2. *No Privity Needed in Food Cases*

It is in the area of injury due to human consumption of deleterious food products that privity has been dealt its sharpest blow. Eighteen states have abolished privity on one theory or another in such cases and have imposed a strict liability standard.[25] Other states have resorted to various fictions, but the strict liability approach seems to most candidly solve the problem. One of the typical cases in this area is that of *Jacob*

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[19] Murphy, *Medieval Theory and Products Liability,* 3 B. C. L. REV. 29, 30 (1961).
[20] See illustration 1 in text *infra.*
[21] 291 Wis. 584, 53 N.W. 2d 788 (1951).
[22] 5 Wis. 2d 100, 92 N.W. 2d 247 (1958).
[23] *Id.* at 109, 92 N.W. 2d at 252.
[24] Prosser, *Assault Upon the Citadel,* 69 YALE L. J. 1099 (1960).
[25] PROSSER, TORTS 508-09 (2d ed. 1955).

E. Decker & Sons, Inc. v. Capps.[26] which held the manufacturer strictly liable for marketing defective sausage although no negligence was found. The theory was simply one of public policy. But the majority, including Wisconsin, still clings to the privity requirement. The leading case in Wisconsin is *Prinsen v. Russos.*[27] The plaintiff suffered from trichinosis after eating ham purchased by a third person in plaintiff's party. Plaintiff sued in breach of implied warranty of fitness for use and common law negligence. There being no finding of negligence and no privity between the litigants, plaintiff was denied recovery.

The policy argument in this area is obvious: nowhere is a person more subject to injury by a latent defect than in situations involving food. Thus it is very likely that Wisconsin's first relaxation of the privity requirement will be in this area.[28] But because there are many other products whose defects are equally undetectable and injurious as food, logic seems to compel either a greater abrogation of privity or a sounder premise to substantiate an exception in the food area alone.[29] However, the fabric of the law has had the acid of illogic spilled on it before.

In a vertical situation,[30] privity is not as effective a shield to the manufacturer as one might at first think. As a practical matter, the purchaser will usually sue the retailer from whom he bought the product. The retailer will then turn around and sue the manufacturer for breach of warranty. Where the purchaser sues the manufacturer directly a settlement out of court is generally less harmful than the adverse publicity of a law suit, even though the manufacturer could use the privity requirement as a technical defense.

3. *No Privity Needed When the Product is Inherently Dangerous*

Rapidly emerging as a landmark case in this area is *Henningsen v. Bloomfield Motors, Inc.*[31] Plaintiff-wife was injured while driving an automobile purchased by her husband from defendant-dealer. Breach of an implied warranty of merchantability was found, and the requirement of privity was dispensed with. The rule was stated by the court:

> Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then so-

[26] 139 Tex. 609, 164 S.W. 2d 828 (1942).
[27] 194 Wis. 142, 215 N.W. 905 (1927).
[28] UNIFORM COMMERCIAL CODE, Notes of Decisions 161-62, citing Adams v. Scheib, 75 Pa. Dauph. 158 (1961):
> The developing case law is to the effect that in cases involving food or other articles for human consumption a buyer's right of action for breach of warranty is not restricted to his immediate seller, but where the article in question is other than food, the buyer must show privity of contract in order to maintain assumpsit against a remote vendor.

[29] See discussion of Henningesen. v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69 (1960) in text *infra.*
[30] See illustration 1 in text *infra.*
[31] Henningsen v. Bloomfield Motors, Inc., *supra* note 29. See also 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY 406-410, 418-423 (1961).

> ciety's interests can only be protected by eliminating the requirement of privity between the maker and his dealer and the reasonably expected ultimate consumer.[32]

The next question is just how broad the court's idea of the "reasonably expected ultimate consumer" will be. The court seemingly adopted the tort standard of forseeability when it stated:

> . . . rigid concepts of privity [may be relaxed] when third persons, who in the *reasonable contemplation of the parties* to a warranty *might be expected* to use or consume the product sold, are injured by its unwholesome or defective state.[33] [Emphasis added.]

Wisconsin might have joined the ranks of *Henningsen* had the majority in *Strahlendorf* found the toy an inherently dangerous instrumentality, but Justice Hallow's recruiting was to no avail. If the court should impregnate Wisconsin's body of sales law with the seed of an "inherently dangerous instrumentality" exception or its equivalent, there will be one inevitable result: expansion. One need only look back as far as *MacPherson* for a tailor-made analogy.

4. *Uniform Commercial Code, Sections 2-318 and 2-607(5).*

> Section 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 a person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.[34]
> Section 2-607(5) . . . Notice of Claim or Litigation to Person Answerable Over.
> Where the buyer is sued for breach of warranty or other obligation for which his seller is answerable over
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> > (a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.[35]

The discussion of the problems in this area can perhaps best be illustrated by resorting to the "horizontal-vertical" dichotomy.[36] Horizontal privity concerns claims by persons other than the buyer against

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[32] Henningsen v. Bloomfield Motors, Inc., *supra* note 29, at 81.
[33] *Id.* at 100.
[34] UNIFORM COMMERCIAL CODE §2-318 (1962).
[35] UNIFORM COMMERCIAL CODE §2-607(5) (1962).
[36] Neuman, *The Uniform Commercial Code and Greater Consumer Protection Under Warranty Law,* 49 KENT. L. J. 240, 260-68 (1960-61).

the buyer's vendor. Vertical privity involves claims of a subvendee against the manufacturer. Section 2-318 concerns the former, section 2-607(5) the latter.

Horizontal Privity	*Vertical Privity*
Vendor-defendant	Vendor-defendant
↓	↓
Vendee → User-plaintiff	Vendee
	↓
	Subvendee-plaintiff

ILLUSTRATION No. 1

a. *Horizontal privity*

Section 2-318 of the Uniform Commercial Code is significant only as to its impact on horizontal privity. One may wonder why the drafters limited the scope of protection to only family, household, and guests personally injured and not to other logically foreseeable victims such as pedestrians injured in automobile cases,[37] and also, why property damage is not covered. It seems the drafters have compromised between a strict privity requirement on the one hand and a broader foreseeability test on the other by adopting the "family, household, and guest" trio. Standing alone, the last sentence of this section can be misleading. The comments state that the seller may disclaim any and all warranties allowed under section 2-316[38] and *his* buyer's remedies for breach may

[37] Note that an earlier draft of §2-318 used the words "one whose relationship to him [the buyer] is such as to make it reasonable to expect that such person may use, consume or be affected by the goods. . . ." UNIFORM COMMERCIAL CODE §2-318 (May, 1949 Draft). For a discussion advocating the 1949 Draft, see James, *Products Liability*, 34 TEX. L. REV. 194 n. 10 (1955)

[38] UNIFORM COMMERCIAL CODE §2-316: *Exclusion or Modification of Warranties*

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course

be limited by applying sections 2-718 and 2-719.[39] The drafters state:

> The purpose of this section is to give the buyer's family, household and guests the benefit of the same warranty which the buyer received in the contract of sale. . . .[40]

So the protection afforded a member of the family or household, or a guest is dependent on the original seller-purchaser transaction. Although the ameliorating significance of this section on Wisconsin sales law can be readily seen by applying it to our *Prinsen v. Russos*[41] fact situation,

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of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

[39] UNIFORM COMMERCIAL CODE §2-718: *Liquidation or Limitation of Damages; Deposits.*

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds
   (a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or
   (b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes
   (a) a right to recover damages under the provisions of this Article other than subsection (1), and
   (b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

UNIFORM COMMERCIAL CODE §2-719: *Contractual Modification or Limitation of Remedy.*

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,
   (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and
   (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

[40] UNIFORM COMMERCIAL CODE §2-318, comment 2.

[41] 194 Wis. 142, 215 N.W. 905 (1927).

where a purchaser shares the goods with his guest who is subsequently injured by the defective product (in that case infected ham), it appears that there are still several large holes through which a seller may escape.

b. *Vertical privity*

Section 2-318 expressly refuses to abrogate or reform the vertical requirement. As comment 3 states:

> Beyond this [family, household, guest], the section is neutral and is not intended to enlarge or restrict the developing case law in whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

Section 2-607(5) also skirts any revision in the vertical requirement, but does contribute some procedural relief to a sued buyer. The effect of this section is to make determinations of fact in the first suit (subvendee v. vendee) *res judicata* in the second suit (vendee v. vendor) if the vendor does not come in and defend in the first suit after notice by the vendee.[42] Because of the Wisconsin impleader statute,[43] this section of the Code will have limited effect, but there are two important differences. One, the Code provision allows the sued buyer to bring in his seller in a summary fashion; whereas in an impleader situation under the Wisconsin statute, it is generally within the discretion of the court whether or not the third party seller need be brought in.[44] Secondly, section 2-607(5) appears to dispense with jurisdictional problems which might have to be hurdled under the Wisconsin impleader statute.[45] It seems, then, that in vertical privity cases the manufacturer is insulated from ultimate liability only when the vendee (middleman retailer or wholesaler) is judgment-proof. But, as a matter of fact, most manufacturers must stand behind their retailers or else lose valuable marketing outlets. And, as stated before, the expense of settlement is often less damaging than the adverse publicity of a lawsuit.

5. *No Privity Needed Whatsoever Due to Statute or Legal Fiction*

a. *Statutory abrogation of privity*

In 1957, Georgia enacted the following statute:

> The manufacturer of any personal property sold as new property either directly or through wholesale or retail dealers, or any other person, shall warrant the following to

[42] Neuman, *supra* note 36, at 265.

[43] WIS. STAT. §260.19(3) (1961). A defendant, who if he be held liable in the action, will thereby obtain a right of action against a person not a party may apply for an order making such person a party defendant and the court may so order.

[44] Gordon, *Third-Party Impleader in Wisconsin*, 35 MARQ. L. REV. 108, 111 (1951). *But see*, Kennedy-Ingalls v. Meissner, 5 Wis. 2d 100, 108-09, 92 N.W. 2d 247, 252 (1958), where the court stated:

> . . . there is a limitation to such rule [that court's discretion governs] and that it does not apply to a situation where parties seeking intervention "have such intereest in the subject matter of the controversy as require them to be parties for their protection.

[45] WIS. STAT. §§262.04, .05, .08 (1961).

> the ultimate consumer, who, however, must exercise caution when purchasing to detect defects, and provided there is no express covenant of warranty and no agreement to the contrary:
>
> (1) The article sold is merchantable and reasonably suited to the use intended.
>
> (2) The manufacturer knows of no latent defects undisclosed.[46]

The constitutionality of this statute was challenged in *Bookholt v. General Motors Corporation*[47] as violative of due process by interfering with liberty of contract. The court dispensed with the defendant's contention by stating that an "implied warranty is a legal and not a contractual obligation. . . ."[48] The court interpreted the statute by declaring:

> . . . unless there is an agreement to the contrary, a manufacturer of personal property offered for sale to the public as new property must warrant that he has manufactured such property to conform to the minimum standards therein set out.[49]

The later case of *Diamond Alkali Co. v. Goodwin*[50] interpreted the statute as allowing the manufacturer to expressly disclaim all warranties. This interpretation could render the statute a dead letter. A further narrowing took place in *Revlon, Inc. v. Murdock*[51] wherein an employee of the purchaser who was injured by the explosion of a bottle of nail polish was held not to be an "ultimate consumer."

In 1962, Virginia enacted the following statute:

> Lack of privity between 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. . . .[52]

No case has yet construed the statute but it appears to be broader than the Georgia statute in that a foreseeability test is used rather than the words "ultimate consumer."

With the recent adoption of the Uniform Commercial Code, it is doubtful that Wisconsin will legislate specifically on the privity requirement. As in most states, the problems of privity will probably continue to rest on judicial interpretation.

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[46] GA. CODE ANN. §96-301 (1957). For a discussion of the cases interpreting this Georgia statute see 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, at 430-31 (1961).

[47] 215 Ga. 391, 110 S.E. 2d 642 (1959).

[48] *Id.*, 110 S.E. 2d at 644-45.

[49] *Id.*, 110 S.E. 2d at 645.

[50] 100 Ga. App. 799, 112 S.E. 2d 365 (1959).

[51] 120 S.E. 2d 912 (Ga. App. 1961).

[52] VA. CODE ANN. §8 654.3 (Supp. 1962), discussed in Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982 (1962).

b. *Legal Fiction Circumventing Privity*

Constrained by the erroneous premise that warranty is distinctly contractual in nature,[53] the courts have been torn between satisfying public policy and at the same time straining to adhere to strict contractual rules of law. Although several theories have been advanced and accepted in individual cases,[54] the following have emerged as the "four horsemen" in punching holes in the privity defense. To supply vertical privity, the retailer has been designated the agent[55] of the consumer; to supply horizontal privity the buyer has been designated the agent of the user. The late Professor Williston advocated the assignment theory[56] whereby the purchaser passes his "warranty right" as a chose in action to a sub-assignee who may then assert it against the original seller. The third party beneficiary doctrine is credited with impressing the drafters of the Uniform Commercial Code so as to be included in section 2-318.[57] The fault lies in the fact that frequently neither the original buyer nor seller knows who the "beneficiary" actually is or will be. This theory has also seemingly kidnapped the tort concept of foreseeability, but as evidenced by the "family, household, guest" limitation it refuses to extend the concept to its logical conclusion. Another widely accepted fiction has been borrowed from property law: the warranty "runs with the product."[58] But this theory is applicable only where there is vertical privity because only a subvendee would have "title." The neighbor who borrows a lawnmower and is injured by some defect in its construction would have no remedy. Although in the battle of individual cases the ingenuity of counsel and court must be commended, it appears that the arsenal of legal fictions has been virtually exhausted. As Prosser points out:

> There is no need to borrow a concept from the concept law of sales; and it is "only by some violent pounding and twisting" that "warranty" can be made to serve the purpose [strict liability to the consumer] at all.[59]

IV. Conclusion

Because the vistas of reform in the area of privity in products liability cases are so broad, it is difficult to even generally predict what avenues of reasoning will appeal to the Wisconsin courts and/or legislature. But it is probably safe to say that a looser privity requirement

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[53] 1 Frumer & Friedman, Products Liability 376-82 (1961). Prosser, Torts 493 (2d ed. 1955).

[54] Twenty-nine such fictions have been condensed by Gillam, *Products Liability in a Nutshell*, 37 Ore. L. Rev. 119, 153-55 (1957).

[55] Young v. Great A. & P. Tea Co., 15 F. Supp. 1018 (W.D. Pa. 1936).

[56] 1 Williston, Sales §244 (rev. ed. 1948).

[57] Mouren v. Great A. & P. Tea Co., 139 N.Y.S. 2d 375 (App. Div. 1955). See Neuman, *supra* note 36, at 262.

[58] Williams v. Paducah Coca-Cola Bottling Co., 343 Ill. App. 1, 98 N.E. 2d 164 (1951).

[59] Prosser, *op. cit. supra* note 24, at 1134.

is eventual and desirable both from the viewpoint of legal analysis and public policy. The Wisconsin legislature has supplied the wedge by adopting the Uniform Commercial Code. The pressure will have to be applied by the courts.

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