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The Toscin Has Sounded: A Post-Mortem Examination of Privity of Warranty in Pennsylvania

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Comment

The Toscin Has Sounded:† A Post-Mortem Examination of Privity of Warranty in Pennsylvania

Scope

This comment will discuss the establishment and gradual erosion of the defense of lack of privity. Enmeshed in the doctrine of caveat emptor, the privity defense survived seventy-five years in the American law of negligence and another sixty years in assumpsit in Pennsylvania. Though not principally the subject of this comment, the privity defense's development, exceptions and eventual abolition in the tort area formed the foundation for its similar abolition in the contract area.

The tort and contract characteristics of the breach of warranty action have contributed substantially to the resolution of the privity issue. Both the implied and express aspects of the action will be set forth in order to build a framework upon which the Uniform Commercial Code's incursion into the privity arena may be discussed. The concepts of vertical and horizontal privity will be explored in depth in relation to their treatment by the Pennsylvania Supreme Court over the past decade.

Introduction

Recent Pennsylvania case law[1] has brought the Uniform Commercial Code's warranty of merchantability[2] within the burgeoning concept of strict liability in tort announced by section 402A.[3] In terms

† The reader's attention is directed to the Duquesne Law Review's inaugural article: Jaeger, *Privity of Warranty: Has the Toscin Sounded?*, 1 Duq. L. Rev. 1 (1963).

1. Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903 (Pa. 1974), *aff'g* 224 Pa. Super. 377, 307 A.2d 398 (1973); Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968).

2. Pa. Stat. Ann. tit. 12A, § 2-314 (1970) [hereinafter cited as Uniform Commercial Code or the Code].

3. Restatement (Second) of Torts § 402A (1965) [hereinafter cited as section 402A], was adopted by the Pennsylvania Supreme Court in Webb v. Zern, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966). Section 402A provides:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the

of the foreseeable plaintiff, defective product[4] and recompensable damages, the statutory[5] and decisional[6] warranties have begun to merge.[7] The "jurisprudential eclipse"[8] of these two theories is founded upon the Pennsylvania Supreme Court's recognition that policy considerations underlying these approaches are precisely the same: "the consumer's inability to protect himself adequately from

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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.

4. Under the strict liability and warranty approaches, emphasis is placed on proof of a defective product, not on the manufacturer's conduct. Weinstein, Twerski, Piehler, & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 429 (1974). Proving a defective product under section 402A or an unmerchantable good under the UNIFORM COMMERCIAL CODE § 2-314 is, in all practicality, an identical burden for the injured plaintiff. Rapson, *Products Liability Under and Beyond the U.C.C.*, 2 U.C.C.L.J. 315, 319-20 (1970).

5. UNIFORM COMMERCIAL CODE §§ 2-313 to -315.

6. Mitchell v. Miller, 26 Conn. Supp. 142, 143, 214 A.2d 694, 696 (1965).

7. Donovan, *Recent Development in Products Liability Litigation in New England: The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code*, 19 MAINE L. REV. 181, 233 (1967) [hereinafter referred to as Donovan]. Though strict liability and warranty eliminate privity and negligence as requirements of the product-related prima facie case, a substantial number of unresolved issues still remain. The statute of limitations problem is discussed in Murray, *Products Liability—Another Word*, 35 U. PITT. L. REV. 255, 260-74 (1973); Murray, *Pennsylvania Products Liability: A Clarification of the Search for a Clear and Understandable Rule*, 33 U. PITT. L. REV. 391, 416-22 (1972) [hereinafter cited as Murray]. In Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965), the author identified:

> [I]mportant questions which must be resolved before any liability, whatever it is called, can be imposed upon the manufacturer or seller: which potential plaintiffs are protected; which manufacturers and sellers have a duty; what kind of defect is sufficient and when must it exist; which parties bear what burdens of proof on the causation issue; what affirmative defenses are available to the defendant; what damages may the plaintiff recover; and, do the parties have power contractually to allocate the risk or modify remedies otherwise available?

Id. at 813.

8. *See* Littlefield, *Some Thoughts on Products Liability Law: A Reply to Professor Shanker*, 18 WESTERN RES. L. REV. 10 (1966); Shanker, *Pigeonholes, Privity, and Strict Products Liability*, 21 CASE W. RES. L. REV. 772 (1970); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 WESTERN RES. L. REV. 5 (1965).

defectively manufactuered goods; . . . the implied assurance on the part of the seller that his goods are safe; . . . [and] the superior risk-bearing ability of the manufacturer."[9] The issue of the plaintiff's standing to seek recovery in a product-related personal injury case has been identified as a matter of policy.[10]

Striking a balance between the interest of the consumer[11] in recovering damages for injuries suffered due to a defective product and the interest of the seller[12] in making a profit from the sale of the product is no simple task. Both sectors of the sales transaction have legitimate claims to judicial and legislative protection, for the seller's right to make a living and the individual's right to be free from physical intrusion are mainsprings of our democratic society. These rights have undergone adjustments as a consequence of a widespread solicitude for the vulnerable consumer[13] and a focus upon enterprise,[14] rather than individual, liability. The principle of caveat emptor has long been eroded by exceptions, such as a duty to reveal hidden defects, actions for fraud, and the creation of implied warranty.[15] The principle's force has been tempered by the widespread acceptance of the warranty/strict liability approach to recovery. In the area of implied warranty protection, judicial activity was directed toward the equalization of the opposing forces, as chronicled by Judge Wanamaker in the early 1920's:

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9. Kassab v. Central Soya, 432 Pa. 217, 230 n.6, 246 A.2d 848, 854 n.6 (1968).

10. Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903, 908 (Pa. 1974); Kassab v. Central Soya, 432 Pa. 217, 234, 246 A.2d 848, 856 (1968).

11. The term "consumer" will be used herein to generally refer to all those physically affected by defective goods. It will be utilized in the sense of a legal conclusion for the reasonably foreseeable injured consumer, user or affected party whether a purchaser or not.

12. The term "seller" will be used herein interchangeably with manufacturer, original seller, distributor, dealer, retailer, restaurant operator, contractor or any other individual fitting within the scope of the term "seller" as comprehended by section 402A.

13. Dickerson, *The ABC's of Products Liability—With A Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 440 (1969).

14. Justice Traynor's concurring opinion in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944), established the "risk-spreading" argument by recognizing the injured party's typical inability to cope with the overwhelming misfortune which had befallen him and the manufacturer's ability to insure against such a risk by distributing it among the purchasing public "as a cost of doing business." *See* Ehrenzweig, *Products Liability in the Conflict of Laws—Toward a Theory of Enterprise Liability under "Foreseeable and Insurable Laws": II*, 69 YALE L.J. 794 (1960); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV 791, 799-800 (1966) [hereinafter cited as Prosser, *The Fall*]; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1120-22 (1960) [hereinafter cited as Prosser, *The Assault*].

15. Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1958) [hereinafter cited as Gillam]; Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1940).

> It may be urged that this is a substantial modification of the old doctrine of caveat emptor, let the buyer beware. Is it not high time, however, that that doctrine should be somewhat modified; at least that it should have no higher place in the business life of a nation than the companion doctrine, "let the seller beware."
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> There is entirely too much disregard of law and truth in the business, social, and political world of to-day. I am using this term in its broad sense. Constitutions, statutes, sound legal and ethical principles are becoming little more than mere scraps of paper, not only between individuals, but among states and nations.
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> It is time to hold men to their primary engagements to tell the truth and observe the law of common honesty and fair dealing. Such a change, in my judgment, would not be so much in the line of revolution as in the line of reasonable reform. Honest men need not fear it; dishonest men should be kept in fear of it.[16]

Whether the scales have tipped beyond the balance sought by the drafters of section 402A is not the subject of this comment. An underlying assumption of this writer, as stated at the outset, is the fusion of the concepts of strict liability and warranty into a principle of consumer protection.

The acceptance of this principle necessitates the rejection of (1) negligence law's emphasis upon the wrongful conduct of the defendant and (2) sales law's requirement of privity.[17] These developments form the groundwork for a recovery based on proof of a defective product sold by one with the requisite duty to the plaintiff. Given the arguments for granting the consumer the protection of the implied warrant/strict liability cause of action, the logical relevance of the privity doctrine dissolves into the tort concept of foreseeability.

The confused court treatment of the judicially created[18] and legislatively bolstered[19] privity doctrine has reflected the varied philo-

16. Meyer v. Packard Cleveland Motor Co., 106 Ohio St. 328, 338-39, 140 N.E. 118, 121 (1922).

17. Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 807 (1965).

18. The common law rule of privity of contract can be traced to Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).

19. The UNIFORM COMMERCIAL CODE provides:

§2-318. Third Party Beneficiaries of Warranties Express or Implied

sophical orientations of the judges with respect to the socio-economic interrelations of the manufacturer, others in the distributive chain, the consumer, user, and those affected by the use of the goods.[20] For example, the application of privity of warranty to non-food cases[21] in Pennsylvania fell from a position of strength to seeming obliteration in the 1940's and 1950's.[22] However, by the mid-1960's the doctrine was again revived and flourishing.[23] This renewed viability was short-lived, for the recent lethal blows inflicted by the Pennsylvania Supreme Court have left the defense of lack of privity in practical ruin.[24] The following will serve as a post-mortem examination of the subject's history and remains.

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 in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

20. *See* Justice Eagen's opinion in Hochgertel v. Canada Dry Corp., 409 Pa. 610, 615-17, 187 A.2d 575, 578 (1963) (the employee of the purchaser "is a complete stranger to any contractual transaction involved"), *followed by* Miller v. Preitz, 422 Pa. 383, 391-92, 221 A.2d 320, 324-25 (1966) (Cohen, J.); *id.* at 395-96, 221 A.2d at 326-27 (Bell, C.J., concurring). *Compare* Miller v. Preitz *supra* at 411, 221 A.2d at 334 (Jones, J., concurring & dissenting), *with* Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968):

> As far back as 1931 the seeds of discontent were sown in the field of privity when Justice Cardozo said in Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445, 74 A.L.R. 1139 (1931): "The assault upon the citadel of privity is proceeding in these days apace." Since that historic decision the citadel has all but crumbled to dust in this area of product liability. Courts and scholars alike have recognized that the typical consumer does not deal at arm's length with the party whose product he buys. Rather, he buys from a retail merchant who is usually little more than an economic conduit. It is not the merchant who has defectively manufactured the product. Nor is it usually the merchant who advertises the product on such a large scale as to attract consumers. We have in our society literally scores of large, financially responsible manufacturers who place their wares in the stream of commerce not only with the realization, but with the avowed purpose, that these goods will find their way into the hands of the consumer. Only the consumer will use these products; and only the consumer will be injured by them should they prove defective. . . .

Id. at 227-28, 246 A.2d at 852-53 (Roberts, J.).

21. Miller v. Preitz, 422 Pa. 383, 394, 221 A.2d 320, 326 (1966) (Bell, C.J., concurring); *Id.* at 405, 221 A.2d at 331 (Jones, J., concurring & dissenting).

22. Mannsz v. MacWhyte Co., 155 F.2d 445, 449-50 (3d Cir. 1946); Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961); Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959).

23. Miller v. Preitz, 422 Pa. 383, 221 A.2d 320 (1966); Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963); Marcus v. Spada Bros. Auto Serv., 41 Pa. D. & C.2d 794 (C.P. Phila. Co. 1967); Kaczmarkiewicz v. J.A. Williams Co., 13 Pa. D. & C.2d 14 (C.P. Allegh. Co. 1957).

24. Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903 (Pa. 1974); Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968).

HISTORICAL DEVELOPMENT—*Winterbottom v. Wright*

Obviously intending to grossly oversimplify the subject, the late Dean Prosser wrote:

> The law of products liability began with the case of *Winterbottom v. Wright* . . . which has been described as a fishbone in the throat of the law.[25]

This "often cited, misinterpreted, and much maligned case"[26] involved multiple contractual obligations.[27] The defendant had leased a coach to plaintiff's employer. Under the terms of the lease defendant agreed to keep the coach in repair. While plaintiff, a coachman, was operating the coach, it broke down, hurling plaintiff from his seat[28] into the legal spotlight with over 130 years of diminishing radiance.

At the time the case was decided, negligence was not a clearly defined basis for liability since the distinction between tort and contract was blurred.[29] Plaintiff averred what would appear to have been tortious injury but he grounded liability on a breach of contractual duty.[30] In his demurrer the defendant argued that whenever a wrong arises out of a breach of contract, only a party thereto may bring suit.[31]

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25. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 641 (4th ed. 1971) [hereinafter cited as PROSSER], *citing* Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).

26. Donovan, *supra* note 7, at 183. Professor Gillam chronicled:

> The sad history of *Winterbottom v. Wright* is a testimonial to the force of precedent, but otherwise it challenges the vital processes of the common law. The case led the "law of negligence . . . into a wilderness of single instances," in which escape was sought from the relentless pursuit of an archaic principle based upon "doubtful policy," springing from "an inherent fallacy" and supported by only a "gloss of authority." The critical literature of the law condemns it unanimously and vehemently; the bench is more cautious, but, apart from the initial opinion, little judicial support of the case is to be found. For all this, the privity rule is not yet dead; it may be that nothing less than the sovereign power of the legislature will suffice to make its quietus. Roman experience suggests the possible fruitfulness of this approach.

Gillam, *supra* note 15, at 150.

27. A lease and repair contract with the owner of the mail coach; an independent contract with the plaintiff's employer to provide horses and coachmen; and the plaintiff's employment contract. 152 Eng. Rep. at 402-03.

28. *Id.* at 403.

29. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 318.5, at 1039 (1956); Donovan, *supra* note 7, at 183.

30. 152 Eng. Rep. at 403.

31. Now it is a general rule, that wherever a wrong arises merely out of the breach of a contract . . . the party who made the contract alone can sue. . . . If the rule were

In sustaining the defendant's demurrer, the court noted that plaintiff's emphasis on *Langridge v. Levy*[32] was misguided,[33] thus, leaving the plaintiff without basis for recovery.[34] With the focus of the demurrer upon defendant's contractual obligation and the spectre of "an infinity of actions" looming large in the court's mind, Lord Abinger stated what has been quoted innumerable times:

> There is not privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.[35]

Baron Alderson also concerned himself with placing a limit on those who are entitled to sue under those circumstances,[36] while Baron Rolfe found that the defendant only had a duty to the one with whom he contracted, *i.e.*, the plaintiff's employer.[37] Though Lord Abinger mentioned "this action in tort" the decision turned on the issue of the defendant's contractual liability.[38]

Thus, *Winterbottom* held that no action could be maintained upon a contract by one who was not a party to it.[39] Recognition that the case was decided solely in contract, however, did not come for over sixty years[40] and was not judicially established in England until 1932.[41] During this period of universal misapprehension by English

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otherwise, and privity of contract were not requisite, there would be no limit to such actions. If the plaintiff may, as in this case, run through the length of three contracts, he may run through any number or series of them; and the most alarming consequences would follow the adoption of such a principle.

Id.

32. 150 Eng. Rep. 863 (Ex. 1837).

33. 152 Eng. Rep. at 404. (The plaintiff in Langridge v. Levy was successful in recovering for a knowing, false representation by the seller who had knowledge of the intended use of the article by both the buyer and his sons).

34. *Id.* at 405.

35. *Id.*

36. *Id. See also* Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 209 (1905) [hereinafter cited as Bohlen]. He maintained that although rights of persons not in privity cannot be enlarged by contract, neither could they be restricted.

37. 152 Eng. Rep. at 405.

38. *Id.* at 405; Gillam, *supra* note 15, at 133.

39. Gillam, *supra* note 15, at 133.

40. Bohlen, *supra* note 36, at 284.

41. M'Alister v. Stevenson, [1932] A.C. 562 (Scot.).

and American courts, the case was considered to stand for the proposition that a party seeking recovery in contract *or* tort for injuries resulting from the defective condition of goods must be in privity of contract with the one against whom he seeks to maintain an action.[42]

By the turn of the twentieth century, there was majority support for the requirement of privity to bring an action in tort or contract against the manufacturer, contractor, or vendor, notwithstanding the unpersuasive rationale of *Winterbottom*. The doctrine's general acceptance, despite the weakness of its legal underpinnings,[43] would seem to indicate a socio-economic, rather than legal, justification for adherence to the privity defense.[44] Courts protected the manufacturer from the potential hardships[45] of being held accountable for injuries to every consumer, however contractually or geographically remote, by characterizing such injuries as unanticipated and remote. The combination of judicial inertia and the continuance of the favored status accorded to manufacturing in its infancy eventually lost its effect when a marketing system developed with concomitant layers of middlemen; utilization of the media to promote sales replaced the direct sales approach; and it became generally recog-

42. Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 868-69 (8th Cir. 1903); PROSSER, *supra* note 25, at 641; Gillam, *supra* note 15, at 133. *See, e.g.*, Simone v. John J. Felin & Co., 35 Pa. D. & C. 645, 649 (C.P. Phila. Co. 1939).

43. Bohlen, *supra* note 36, at 289-310.

44. *Cf.* 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 2.1, at 24 (1965).

45. PROSSER, *supra* note 25, at 642; *cf.* Doyle v. South Pittsburgh Water Co., 414 Pa. 199, 199 A.2d 875 (1964), in which a private water company was held liable for negligent maintenance and inspection of fire hydrants in the vicinity of the plaintiff's home which was consumed by flames as a result of the hydrant's inoperability at the time of the fire. The defendant company contended, *inter alia*, that it had no duty to the plaintiff, but rather to the municipality, with whom it had contracted to perform its services. In a lengthy response, the Court per Justice Musmanno, cited Justice Cardozo's decision in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), and stated:

> Throughout the entire history of the law, legal Jeremiahs have moaned that if financial responsibility were imposed in the accomplishment of certain enterprises, the ensuing litigation would be great, chaos would reign and civilization would stand still. It was argued that if railroads had to be responsible for their acts of negligence, no company could possibly run trains; if turnpike companies had to pay for harm done through negligence, no roads would be built; if municipalities were to be financially liable for damage done by their motor vehicles, their treasuries would be depleted. Nevertheless liability has been imposed in accordance with elementary rules of justice and the moral code, and civilization in consequence, has not been bankrupted, nor have the courts been inundated with confusion.

414 Pa. at 218-19, 199 A.2d at 884.

nized that strict adherence to the rule promoted harsh results in the individual case.[46]

The Fall of Privity in Tort

The general rule of liability of the original party only to his immediate buyer was "easiest to attack . . . where it was extended farthest: in tort."[47] The foreseeability of the injured consumer, a criteria not recognized by the *Winterbottom* court, became readily cognizable. This emerging recognition led to the acceptance of the manufacturer's tort duty to a third person affected by the former's conduct.[48]

Prior to judicial acceptance of foreseeability, a barrage of exceptions to the privity doctrine[49] developed, foreshadowing a change in social philosophy. The first exception was for inherently dangerous products and soon found judicial acceptance in England[50] and the United States.[51] The privity doctrine was also found to be inapplicable to cases of willful injury,[52] fraud,[53] or where the manufactured article had been supplied by the invitor for uses by business invitees on the former's premises.[54]

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46. Kassab v. Central Soya, 432 Pa. 217, 228, 246 A.2d 848, 853 (1968); Prosser, *supra* note 25, at 641-42; Donovan, *supra* note 7, at 184; Gillam, *supra* note 15, at 138.

47. Gillam, *supra* note 15, at 138.

48. Prosser, *supra* note 25, at 642; Russell, *Manufacturers' Liability to the Ultimate Consumer*, 21 Ky. L.J. 388, 401 (1933) [hereinafter cited as Russell].

49. *See* Gillam, *supra* note 15, at 152-55, wherein the author compiled twenty-nine techniques by which the courts have avoided the privity doctrine.

50. Citing Langridge v. Levy, 150 Eng. Rep. 863 (Ex. 1837), the concept of inherent danger was recognized by defendant's counsel in Winterbottom v. Wright, 152 Eng. Rep. 402, 404 (Ex. 1842). Though the court distinguished *Langridge* by reason of the "distinct fraud" and the defendant's knowledge of the ultimate users, the inherently dangerous distinction was established nine years later. Longmeid v. Holliday, 155 Eng. Rep. 752, 755 (Ex. 1851).

51. In Thomas v. Winchester, 6 N.Y. 397 (1852), a drug manufacturer mislabeled a jar of bellodonna as dandelion and sold it to a second druggist who sold it to a third, from whom it was purchased by plaintiff's husband. Mrs. Thomas's reaction to the drug was severe rather than recuperative (the medicine was prescribed by her doctor and administered by her husband). Her negligence action against the manufacturer was successful. The court distinguished her case from *Winterbottom* since the "natural and almost inevitable consequence" of the druggist/manufacturer's negligence was "death or great bodily harm . . . the defendant's negligence put human life in imminent danger." *Id.* at 409.

52. Gillam, *supra* note 15, at 140.

53. Liability without the requirement of privity for fraudulent representation by the manufacturer was explicated in Langridge v. Levy, 150 Eng. Rep. 863 (Ex. 1837).

54. Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 870-71 (8th Cir. 1903); Gillam, *supra* note 15, at 140 & n.75.

The inherently dangerous exceptions had two branches: one originating in *Thomas v. Winchester*[55] and the other finding its basis in *Langridge v. Levy*.[56] As this exception developed, its scope spread from medicines,[57] to food and beverages[58] and to a wide variety of products, though not without considerable debate.[59] The exception received increasing judicial acceptance until *MacPherson v. Buick Motor Co.*.[60] In *MacPherson*, the court shunned reliance on the "verbal niceties" of the inherently dangerous exception and based the defendant manufacturer's liability squarely upon a responsibility to the consumer to use reasonable care to avoid injury to him when danger from negligent manufacture is reasonably foreseeable.[61] *MacPherson* and its progeny established the rule that the manufacturer is liable in tort to a consumer who may reasonably be expected to suffer injury from a defectively manufactured product.[62] Justice Cardozo broadly declared that there was no place for privity in the law of negligence,[63] signaling the passing of the negligence defense of privity and the emergence of the rule of foreseeability.[64]

WARRANTY—A CURIOUS HYBRID OF TORT AND CONTRACT

The evolution from *MacPherson* to strict liability in tort has been recounted many times and is not the subject of this comment. At

55. 6 N.Y. 397 (1852). *See* Elkins, Bly & Co. v. McKean, 79 Pa. 493, 502 (1875).

56. 150 Eng. Rep. 863 (Ex. 1837). The distinction between the *Thomas* exception and the *Langridge* exception is that the former pertains to imminently dangerous articles which cause harm resulting from the defendant's negligence, while the latter refers to knowing misrepresentation of the imminently dangerous article's qualities. Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 870-71 (8th Cir. 1903).

57. Thomas v. Winchester, 6 N.Y. 397 (1852).

58. The courts generally recognized a special responsibility on the part of the "purveyor of victuals for human consumption." Prosser, *The Assault*, *supra* note 14, at 1103-10.

59. PROSSER, *supra* note 25, at 642; Gillam, *supra* note 15, at 140.

60. 217 N.Y. 382, 111 N.E. 1050 (1916). MacPherson sued for injuries, alleging the manufacturer's negligent failure to make a reasonable inspection of the automobile which collapsed when a wheel crumbled.

61. Finding the *Thomas* principle applicable to more than poisons, explosives and other things which normally operate as "implements of destruction," the *MacPherson* court held the manufacturer to a duty of due care to the ultimate purchaser. 217 N.Y. at 389-90, 111 N.E. at 1053.

62. PROSSER, *supra* note 25, at 642-43; Donovan, *supra* note 7, at 186; Gillam, *supra* note 15, at 142; Prosser, *The Assault*, *supra* note 14, at 1100-03.

63. 217 N.Y. at 390, 111 N.E. at 1053. *Accord*, Henderson v. National Drug Co., 343 Pa. 601, 611, 23 A.2d 743, 749 (1942); Donovan, *supra* note 7, at 185-86.

64. The concept of foreseeability is embodied in RESTATEMENT (SECOND) OF TORTS § 395 (1948). *See also* Jeanblanc, *Manufacturer's Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Russell, *supra* note 48, at 399-400.

this point, what is important is that the fortress surrounding the requirement of privity in negligence had fallen in 1916,[65] and by 1931: "The assault upon the citadel of privity [was] proceeding in [those] days apace."[66] The vestiges of *Winterbottom v. Wright* remaining after Justice Cardozo's assault can be succinctly phrased: where there is not privity of contract, there can be no breach of warranty.

An action for breach of warranty originally sounded solely in tort. It was an action upon the case to recover for a breach of assumed duty. Until 1689, the action was akin to deceit for it redressed a wrong flowing from a fraudulent misrepresentation. The action retained its tort character, though it would then lie for a false, though innocent, affirmation of fact. By 1797, the breach of warranty was still referred to as a form of fraud, despite recognition of the express warranty for fifty years as a term of the contract of sale and twenty years as a basis upon which an action in assumpsit would lie for its breach.[67] As assumpsit began to overshadow tort as the basis for a breach of warranty action, the issue became a matter of contract interpretation to determine the parties' intentions: Was there such a positive representation of fact, as intended by the parties, which induced the bargain?

Williston has criticized such focus upon the agreement as unnecessary since the express warranty was imposed by law.[68] The suggestion that warranties were imposed by law, independent of the seller's intention, found quick judicial acceptance. The law of implied warranty grew as reputable sellers increasingly assumed responsibility for the sale of defective goods and society began to impose this obligation on the seller who could then distribute the loss to the consuming public. Breach of warranty became more than a breach of contract, for both an action in tort and contract could be maintained by the injured consumer.[69]

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65. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

66. Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931).

67. For extensive treatment of the historical development see Ames, *History of Assumpsit*, 2 HARV. L. REV. 1 (1888); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943) [hereinafter cited as Prosser, *The Implied Warranty*].

68. 1 S. WILLISTON, SALES OF GOODS §§ 196, 197 (rev. ed. 1948) [hereinafter cited as 1 S. WILLISTON]. PROSSER, *supra* note 25, at 635, wrote:

> But the obligation is imposed upon the seller, not because he has assumed it voluntarily, but because the law attaches such consequences to his conduct irrespective of any agreement; and in many cases, at least, to hold that a warranty "is a contract is to speak the language of pure fiction."

69. 1 S. WILLISTON, *supra* note 68, § 197.

A "curious hybrid, born of the illicit intercourse of tort and contract, unique in the law,"[70] warranty survived this "legal miscegenation"[71] to produce legitimate offspring: the original decisional tort form of action[72] and the statutory express and implied warranties associated with the contract.[73] The problem with such a delineation is that the two are not truly separate animals, as verified by their similar genetic structure. Further, the two result in the same obligation to the seller, which is imposed not because of any voluntary assumption, but because the law attaches such consequences to his undertakings.[74]

Practically speaking, this hybrid action for breach of warranty has benefited procedurally from its tort nature. The courts have allowed the more liberal tort rule of damages, permitted recovery for wrongful death,[75] abated a cause of action which did not survive the death of the wrongdoer,[76] and shortened the period of limitation.[77] Substantively, its tort character has been utilized to cause the infusion of notions of misrepresentation (whether innocent or not); the consumer's reliance upon the retailer's knowledge, skill or judgment; and implied assertions of the character of the goods into the law of implied warranty.

Upon the premise that the tort character of the action is not only procedurally but substantively important to the parties, a strong argument can be made to extend warranty protection beyond the confines of technical privity.[78] With respect to this proposition, Prosser declared:

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70. PROSSER, *supra* note 25, at 634.

71. Note, *Necessity for Privity of Contract in Warranties by Representation*, 42 HARV. L. REV. 414, 415 (1929).

72. The action can be maintained without proving intentional misrepresentation or negligence. Gillam, *supra* note 15, at 127. *See* Prosser, *The Assault*, *supra* note 14, at 1126. This writer views the decisional warranties as the precursors of strict liability in tort (section 402A).

73. UNIFORM COMMERCIAL CODE §§ 2-313 to -315.

74. PROSSER, *supra* note 25, at 634; 1 S. WILLISTON, *supra* note 68, § 197, at 507.

75. PROSSER, *supra* note 25, at 635; Gillam, *supra* note 15, at 127.

76. Gosling v. Nichols, 59 Cal. App. 2d 442, 139 P.2d 86 (1943).

> The gravamen of a cause of action for breach of an implied warranty that food is fit for human consumption is the personal injury which results, and the action "sounds in tort." The cause of action is not ex contractu. Therefore, the plaintiff's cause of action abated upon the defendant's death which "occurred prior to the time the action was ready for rendition of a final judgment."

Id. at 444, 139 P.2d at 87.

77. PROSSER, *supra* note 25, at 635.

78. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 414, 161 A.2d 69, 100 (1960); Gillam, *supra* note 15, at 145-49.

> The conclusion from all this is obvious. If warranty is a matter of tort as well as contract, and if it can arise without any intent to make it a matter of contract, then it should need no contract; and it may arise and exist between parties who have not dealt with one another.[79]

Underlying Prosser's logic was his general dissatisfaction with establishing strict liability in the law of sales. Supported by Justice Traynor[80] and a growing number of advocates,[81] Prosser disputed the relative merit of a warranty action in contract to perform the function for which strict liability in tort was developed. To sustain his argument that an action for breach of warranty under the law of sales carries far too much luggage in the way of undesireable complications, Prosser compiled a comprehensive enumeration of the burdensome elements of such a product-related personal injury cause of action.[82] Amidst this impressive enumeration, however, it must not be forgotten that the "contractual classification" of warranty has brought considerable benefits to injured consumers. The defendant's escape routes through proof that he is not guilty of misrepresentation, fraud or negligence, or that the plaintiff is guilty of contributory negligence or unjustifiable reliance, are no longer open.[83]

"With the sweet, however, has come the bitter — the acrid concept of privity."[84] Privity, along with other intricacies of sales law was designed specifically to facilitate the commercial relationship between the buyer and seller. By making consumer protection dependent upon it, the status of third parties to the contract is left unprotected.[85]

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79. Prosser, *The Assault*, *supra* note 14, at 1127.

80. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Greenman v. Yuba Power Prods. Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (concurring opinion); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

81. Donovan, *supra* note 7, Gillam, *supra* note 15; Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 S. CAL. L. REV. 30 (1965); Noel, *Products Liability of Retailers and Manufacturers in Tennessee*, 32 TENN. L. REV. 207 (1965).

82. Prosser, *The Assault*, *supra* note 14, at 1127-34.

83. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A.L. REV. 281 (1961) [hereinafter cited as Ezer].

84. *Id.* at 322.

85. Prosser, *The Assault*, *supra* note 14, at 1128-29, 1133.

PRIVITY—GENERALLY

Privity is a conclusory term representing the doctrine which requires an injured plaintiff to establish a contractual relation with the defendant as a prerequisite to recovery of damages caused by defective goods. The doctrine was merely a shorthand expression of the facts and circumstances from which the court could infer a particular relationship between the parties. Hence, for the manufacturer to have been found liable, his responsibility must have derived from the contract or warranties arising out of the sales transaction. In particular, the protection of warranties extended only to the parties in privity of contract. Privity of warranty, created, and developed for the "horse and buggy"[86] age of *Winterbottom v. Wright*, though an anachronism in its own time,[87] has at long last been placed in a well-deserved resting place — the shelves of the law library.

The decision in *Winterbottom v. Wright* revealed the court's solicitude for manufacturers, protecting them from a multiplicity of suits by finding that no duty was owing the injured plaintiff. However, the circuity of actions which this barrier of privity necessitated could not have been the result Lord Abinger was seeking. In place of the supposed "infinity of actions" and consequent injustice worked upon the manufacturer, the redress for injury-causing defective goods now could only be reached through a series of successful lawsuits back through the marketing chain. The question of duty merges with the concern over multiplicity when viewed from the perspective of foreseeability. The manufacturer only owes a duty of care to those whom an ordinary and reasonably prudent man should foresee would be injured by his defective goods. The manufacturer would escape responsibility in those cases where the court would choose to find that the plaintiff was unforeseeable, and thus multiplicity could be controlled.

Couched in terms of duty, the Pennsylvania courts have clearly enunciated the relevant issues regarding privity:

(1) vertical privity—"from whom does the warranty run?"[88]

86. Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. REV. 551 (1941).

87. Jaeger, *Privity of Warranty: Has the Toscin Sounded?* 1 DUQ. L. REV. 1, 2 (1963) [hereinafter cited as Jaeger].

88. Salvador v. Atlantic Steel Boiler Co., 224 Pa. Super. 377, 379, 307 A.2d 398, 400 (1973).

(2) horizontal privity—"to whom does the warranty run?"[89]

VERTICAL PRIVITY—FROM WHOM DOES THE WARRANTY RUN?

Vertical privity involves the various members of the distributive chain[90] who buy to resell the goods, ending with and including the ultimate purchaser. Under this doctrine a purchaser of a product injured as a result of a breach of warranty, only had a cause of action against his immediate seller of the defective product. It may very well be that the immediate seller contributed little if anything to the plaintiff's injuries, except to the extent of acting as a conduit for the passage of the defective goods to the purchaser. The series of sales involved in the distributive chain, each conceptually being made only to the immediate buyer, has tended to create a barrier preventing any legal connection between remote, though vertical, parties to a lawsuit. Whether this vertical insulation was created by the manufacturers in an attempt to withdraw from liability, or whether it was simply accepted as a welcomed consequence of a necessary marketing practice, is immaterial. The recognition that the established manufacturing, marketing and finance mechanism is a continuum, not a series of unrelated and individual acts, has decidedly influenced the legislative and judicial trend to the buyer.[91]

Professor Murray has asked "who can be sued?" Prior to Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968), his answer for breach of warranty actions in Pennsylvania

> was simple enough: in the human consumption cases, the purchaser may sue any party upward (vertically) in the distributive chain. In non-consumption cases, he was relegated to an action against his immediate seller.

Murray, *supra* note 7, at 395.

Justice Jones, in his concurring and dissenting opinion, first asked "who can be sued," Miller v. Preitz, 422 Pa. 383, 399, 221 A.2d 320, 328 (1966), and the *Miller* court responded in substantially the same manner as Professor Murray outlined above. 422 Pa. at 391-92, 221 A.2d at 324-25.

89. Salvador v. Atlantic Steel Boiler Co., 224 Pa. Super. 377, 379, 307 A.2d 398, 400 (1973). Professor Murray has asked "who can sue?" Prior to *Salvador*, his answer for breach of warranty actions in Pennsylvania was more restrictive than his response to the question of "who can be sued."

> [I]n the human consumption cases, while the purchaser could sue any seller on a warranty theory, he alone could bring the action. In the non-consumption cases where the actual purchaser was limited to the immediate seller (retailer), he alone could bring the action.

Murray, *supra* note 7, at 395-96.

Justice Jones, in his concurring and dissenting opinion in *Miller*, first asked "who can sue," 422 Pa. 383, 399, 221 A.2d 320, 328 (1966), but the *Hochgertel* court had previously settled the issue as Professor Murray observed above. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 614-15, 187 A.2d 575, 578 (1963).

90. UNIFORM COMMERCIAL CODE § 2-318, Comment 3.

91. Gillam, *supra* note 15, at 150. Indicative of legislative and judicial reflection of the

Therefore, the relevant consideration for solving the vertical privity issue becomes a matter of the manufacturer's status and obligations founded in law: "who, besides the immediate seller, is liable to the consumer for injuries caused by the defective product?"[92]

Horizontal Privity—To Whom Does the Warranty Run?

Horizontal privity, on the other hand, focuses on the injured third-party, not the defendant. The suit originates from a position lateral to the relevant sale by the retailer or reseller. Technically, the term relates only to the third party's suit against the last purchaser's immediate seller.[93] Be that as it may, the term as used herein will encompass both horizontal and diagonal privity. The latter concept is descriptive of the third party's action against those higher than the immediate seller in the marketing chain. Though some find diagonal privity a relatively more important element of the doctrine than horizontal privity,[94] the term's use appears to be unnecessary, but analytically correct. It has been utilized in some law review articles but not mentioned by the Pennsylvania courts.[95] Instead, they have taken a legitimately mechanical approach to third-party recovery by treating the issues of vertical and horizontal privity separately. A final clamber up the marketing ladder can only be attempted after the issue of horizontal privity has been re-

social climate, public policy arguments countered the principles of privity and caveat emptor. Originally imposed as a safeguard for developing industry, the concept of privity, has of necessity, been weakened with the increasing strength of industry. There has been a growing realization that industrialization and commercialization have tended to create a disparity in the bargaining power and pecuniary ability between the manufacturing/marketing enterprise and the individual purchaser. Hence, the need for consumer protection gave rise to the creation of implied warranties which presaged the abatement of the once viable defense of lack of privity.

92. Kassab v. Central Soya, 432 Pa. 217, 232, 246 A.2d 848, 855 (1968).

93. Ezer, *supra* note 83, at 326-27.

94. *Id.* at 323. After defining vertical and horizontal privity, Donovan, *supra* note 7, wrote:

> Diagonal privity is the catch-all term covering the remaining suits brought by the buyer or a "beneficiary of his questionable largess," not against the last reseller but against someone on a higher plane in the distributive chain, generally the manufacturer.

Id. at 218.

95. The term was not used in Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968); Miller v. Preitz, 422 Pa. 383, 221 A.2d 320 (1966); Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963); Salvador v. Atlantic Steel Boiler Co., 224 Pa. Super. 377, 307 A.2d 398 (1973).

solved.[96] Utilizing a judicially created theory[97] or statutory authority,[98] the courts have placed an injured party, other than a purchaser, in the same legal position as the purchaser in order to establish horizontal privity by determining: "Who, besides the purchaser, has a right of action against the manufacturer or seller of a defective product?"[99]

Erosion of the Privity Defense—Introduction

Despite the Third Circuit's pronouncement in 1946 that the requirement of privity of warranty had been "obliterated" from Pennsylvania law,[100] vertical privity's formal demise was not met until 1968.[101] As for horizontal privity, it was mortally wounded in the spring of 1974.[102] While by the mid-1960's the Pennsylvania courts had generally held that the injured party's right of recovery for breach of warranty in non-food cases was available only to the purchaser (or one of the specifically enumerated beneficiaries in section 2-318) against the last reseller,[103] the strength of that general rule had been riddled with exceptions.[104] These exceptions evidenced judicial dissatisfaction growing since the dragon of privity first raised its ugly head. However, this inescapable trend did not immediately lead the Pennsylvania Supreme Court to the conclusion that the public policy had begun to swing from the harshness of caveat emptor to the protection of the injured consumer.

Since the legal foundation for the demise of the privity doctrine lies in the policy manifest in its exceptions, an analysis of the major ones, for foodstuffs and express representation, would be instructive. As these exceptions have their conceptual ties to the character of the warranty, this discussion will also incorporate the distinction

96. Miller v. Preitz, 422 Pa. 383, 390, 221 A.2d 320, 324 (1966); Murray, *supra* note 7, at 395-96; *see* Note, *Products Liability: Employees and the Uniform Commercial Code, Section 2-318*, 68 Dick. L. Rev. 444 (1964).

97. *Salvador* extends the Uniform Commercial Code's § 2-318 warranty protection to employees. Prior to that section's enactment, courts used legal fictions to evade the doctrine of privity. *See* Gillam, *supra* note 15; text accompanying notes 52-54 *supra*.

98. Uniform Commercial Code § 2-318. Prior to *Salvador*, the Code extended the purchaser's warranty protection to his family, household or house guests.

99. Kassab v. Central Soya, 432 Pa. 217, 232, 246 A.2d 848, 855 (1968).

100. Mannsz v. MacWhyte Co., 155 F.2d 445, 450 (3d Cir. 1946).

101. Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968).

102. Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903 (Pa. 1974).

103. Miller v. Preitz, 422 Pa. 383, 394, 221 A.2d 320, 326 (1966) (Bell, C.J., concurring).

104. *See* cases and commentary cited notes 49-54 *supra*.

between express and implied warranties, a distinction initially relied upon by the courts as a means of limiting the scope of the doctrine's erosion.[105]

Erosion of the Privity Doctrine—Express Warranty

The courts seized upon the express nature of representations and advertisements in carving out an exception to the privity doctrine for these express warranties. As extensive advertising by all members of the marketing chain is a necessary concomitant of the mass marketing system, the early form of the exception has been easily molded into the context of today's consumerism.[106]

Until the enactment of the Uniform Sales Act in 1915,[107] Pennsylvania retained without substantial change the three hundred year old English law of express warranty.[108] As the lone follower of the repudiated English decision of *Chandelor v. Lopus*,[109] Pennsylvania required that the warrantor had to intend to warrant;[110] for no war-

105. Mitchell v. Rudasill, 332 S.W.2d 91 (Mo. Ct. App. 1960).

> A warranty is a statement or representation made by the seller of goods, contemporaneously with, and as a part of, the contract of sale, although collateral to the express object of it, having reference to the character, quality, or title of the goods, and by which he promises or undertakes to insure that certain facts are or shall be as he then represents them. A warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the treaty of sale, on which it is intended that the buyer shall rely in making the purchase; and there is authority for the proposition that any warranty derived from express language should be considered an express warranty. A warranty is implied when the law derives it by implication or inference from the nature of the transaction, or the relative situation or circumstances of the parties. Stated otherwise, an express warranty is one imposed by the parties to the contract, while an implied warranty is not one of the contractual elements of an agreement but is, instead, imposed by law.

Id. at 94-95.

106. *See* notes 129-32 *infra*. In *Salvador*, the supreme court observed:

> Our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use. We have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect.

319 A.2d at 907.

107. Law of May 19, 1915, No. 241, [1915] Pa. Laws 543 (repealed 1954) [hereinafter cited as Uniform Sales Act].

108. Jaeger, *supra* note 87, at 28.

109. 79 Eng. Rep. 3 (Ex. 1791). (Defendant Goldsmith presented a jewel as a precious stone; it was not. The Court of the Exchequer found no cause of action, holding this to be a bare affirmation).

110. McFarland v. Newman, 9 Watts 55, 60 (Pa. 1839); Borrekins v. Bevan & Porter, 3 Rawle 22, 45-46 (Pa. 1831).

ranty, express or implied, arose from the mere "naked averment of fact."[111] Further, the courts refused to imply a warranty from such an averment. The only implied warranty recognized was one of soundness of title.[112] Other constructive warranties were considered legally inconsistent with the virtues of the rule of caveat emptor. Rather, the wronged party's action was in deceit for willful misrepresentation of quality.[113] Although the modern trend was well established to the contrary,[114] by the end of the nineteenth century, the Pennsylvania Supreme Court still held that mere assertions of fact neither established a warranty nor were evidence of one.[115]

Following the enactment of the Uniform Sales Act, the Pennsylvania legislature defined express warranty as "any affirmation of fact or any promise" which naturally induced the buyer to purchase the goods in reliance thereon.[116] Section 12 defined express warranty by codifying the common law.[117] In so doing, this section eradicated the Pennsylvania view relating to the seller's intent.[118]

With respect to express warranty, it would seem that the requirement of privity should have remained irrevocably attached. The warranty obligations of the "seller" ran to the "buyer" in a context that undoubtedly would seem to refer only to the immediate parties to the sale. The definitional section[119] bolstered this interpretation which would appear to comport with the notion of an express warranty as arising from an agreement between the parties to the transaction. The nature of the seller's obligation was contractual, regardless of whether the positive affirmations were expressly incorporated

111. McFarland v. Newman, 9 Watts 55, 60 (Pa. 1839); Borrekins v. Bevan & Porter, 3 Rawle 22, 45 (Pa. 1831); 1 S. WILLISTON, *supra* note 68, at 511-12.

112. McFarland v. Newman, 9 Watts 55, 56 (Pa. 1839); Borrekins v. Bevan & Porter, 3 Rawle 22, 45 (Pa. 1831).

113. McFarland v. Newman, 9 Watts 55, 58 (Pa. 1839); Borrekins v. Bevan & Porter, 3 Rawle 22, 43, 45-46 (Pa. 1831).

114. 1 S. WILLISTON, *supra* note 68, § 201, at 514-17.

115. Holmes v. Tyson, 147 Pa. 305, 306-07, 23 A. 564 (1892).

116. UNIFORM SALES ACT § 12.

117. 1 S. WILLISTON, *supra* note 68, § 194, at 499.

118. *Id.* at 499-500. It also settled longstanding confusion resulting from the view that only a promise could be a warranty while an affirmation or representation was merely evidence of a warranty.

119. UNIFORM SALES ACT § 76(1), provided:

"Buyer" means a person who buys or agrees to buy goods, or any legal successor in interest of such person. . . . .

"Seller" means a person who sells or agrees to sell goods, or any legal successor in interest of such person.

into the contract.[120] One could assume that when the warrantor made the representations respecting the goods, he made them only with his buyer in mind. Such an analysis, however, would seem unpersuasive in both horizontal and vertical privity contexts since injury to a third party may be a foreseeable event.[121] Moreover, when the goods have been injected into the marketing chain by sale to a merchant, such as the wholesaler, nothing is more foreseeable than their resale to a consumer.

As far back as 1891, the Pennsylvania Supreme Court, in *Conestoga Cigar Co. v. Finke*,[122] founded a warranty of quality inuring to the benefit of a remote purchaser upon a tobacco sample tag which made a specific representation that it was stripped and sample warranted. The court held that explanatory evidence and usage of the trade were admissible to give meaning to the language on the tag to establish the scope of the express warranty.[123] Whether this specific representation situation may be viewed as an *actual* exception to the privity of warranty rule is inconsequential in light of the established case law.

The specific or express representation rule seems to have developed in Pennsylvania along both the usage of trade theory of *Conestoga Cigar* and the theory of public advertisement. Omitting discussion of trade custom and horizontal privity, the Third Circuit in *Mannsz v. Mac Whyte*,[124] recognized a right of action in the widow of a purchaser of defective goods against both the supplier and the manufacturer. In this diversity action, the *Mannsz* court purported to apply Pennsylvania law to the widow's breach of warranty action. The decedent purchased wire rope, supplied by one defendant and manufactured by the other. A manual published by the manufacturer was introduced into evidence, the contents of which were held to constitute an express warranty. Finding that these representations ran to the public, the court concluded that privity need not be established.[125] Although the court affirmed the lower

120. 1 S. WILLISTON, *supra* note 68, § 197, at 506-07.

121. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 413-14, 161 A.2d 69, 99-100 (1960).

122. 144 Pa. 159, 22 A. 868 (1891).

123. The court held that the tag was a guaranty of the tobacco's quality at the time of inspection and for six month's thereafter, for the benefit of any person into whose possession the tobacco had come. Though the court interpreted the tag as a contract, the issue resolved was the existence of a warranty. *Id.* at 172-73, 22 A. at 869.

124. 155 F.2d 445, 450-51 (3d Cir. 1946).

125. *Id.* at 449-51.

court's conclusion that the plaintiff was not entitled to recover because of insufficient evidence of breach of warranty,[126] its pronouncements with respect to privity and recognition of the third party's right of action left their indelible mark:

> We think it is clear that whether the approach to the problem be by way of warranty or under the doctrine of negligence, the requirement of privity between the injured party and the manufacturer of the article which has injured him has been obliterated from the Pennsylvania law.[127]

Seven years later, the Pennsylvania Supreme Court seemed to give some support to the express representation rule, but nevertheless distinguished *Mannsz* in a commercial case holding no warranty could be established.[128]

An analogous approach through which the plaintiff could find an avenue of escape from the privity doctrine was through proof of the manufacturer's advertising. This is the principle of "advertised-

126. The court found the representations in the manual constituted an express warranty of the wire rope's tensile strength and intended uses. The decedent's use of the wire rope for supporting a scaffolding was neither specified nor similar to those specified in the manual. There was no breach of warranty. *Id.*

Since a breach of warranty action for personal injuries is sufficiently analogous to a negligence action to recover for injuries inflicted by a defective product, the *Mannsz* court's determination with respect to privity was entirely necessary for the proper determination of the case. The negligence question of duty is the preliminary issue that must be considered before the trier of fact can decide whether there has been a breach of the defendant's standard of care *with respect to the plaintiff*. Likewise, the court's initial ruling with respect to the widow's protected status was essential to a subsequent holding of nonliability for not proving a breach of warranty.

127. *Id.* at 449-50.

128. Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A.2d 715 (1953). In *Silverman*, the plaintiff sued for breach of express warranty to recover for breakage of canning jars and resulting damage to other jars. The defective jars were ordered from the defendant jobber who sent the order to the sole sales agent of the manufacturer who shipped the jars directly to the plaintiff. Failing to succeed on a principal-agent theory, the plaintiff sought to hold the manufacturer's sole agent upon the *Mannsz* rationale for this commercial loss. The court held that in all the cases cited by the plaintiff, the manufacturer had conveyed or intended to convey some sort of representation of quality or fitness for particular use "by catalogue, manual, tags affixed to shipment, legend upon container, or by negotiation with the subpurchaser." *Id.* at 428, 100 A.2d at 718. Hence, the defendant manufacturer's agent prevailed on its motion for judgment *non obstante veredicto*.

The cruel twist of the case was that the plaintiff's verdict against the agent for $3220 damage was lost though the plaintiff's immediate seller succeeded in his action for the price of $720 for the defective goods sold. The court dismissed the plaintiff's plea that the result was a miscarriage of justice. *Id.* at 430-31, 100 A.2d at 719-20.

product-liability" which had its genesis in *Roberts v. Anheuser-Busch Brewing Ass'n*,[129] and attained national recognition in *Baxter v. Ford Motor Co.*[130] The advertising concept has equal applicability in both express and implied warranty cases. Apparently, the Pennsylvania Supreme Court has firmly established both prongs of the *Conestoga Cigar-Baxter* concept with respect to vertical privity for both implied and express warranty.[131] There seems to be little theoretical difficulty in extending the theory to "horizontal" plaintiffs, beyond those enumerated in Code section 2-318, and those already extended protection by the courts.[132]

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129. 211 Mass. 449, 98 N.E. 95 (1912). The court found no contractual relation between the injured plaintiff and the manufacturer of a health mixture. However, an action was maintainable in tort for injuries resulting from the "medicine" if the plaintiff relied upon representations made by the manufacturer through its advertisements. *Id.* at 451-52, 98 N.E. at 96. As an historical note, the court cited many cases, including Thomas v. Winchester and Langridge v. Levy, for the following rule:

> If the defendant made such representations as of its own knowledge, and put its mixture upon the market to come through wholesale and retail dealers to the ultimate consumers, who in reliance upon such representations bought and drank the mixture in the manner intended by the defendant, these representations must be regarded as continuous, intended to be accepted and relied on by all who finally should purchase the article for their own consumption. This rule often has been declared.

Id. at 451, 98 N.E. at 96.

130. 168 Wash. 456, 12 P.2d 409, *aff'd per curiam on rehearing*, 15 P.2d 1118 (1932), *aff'd on second appeal*, 179 Wash. 123, 35 P.2d 1090 (1934). The *Baxter* court held that statements made in Ford Motor Company catalogues and printed matter that the windshield was shatterproof were the basis for the manufacturer's liability without proof of negligence, scienter, or privity of contract. After extensively quoting from Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1915) (a food case), the *Baxter* court held the trial court in error for excluding Ford Motor Company's literature upon which the purchaser had a right to rely. 168 Wash. at 463, 12 P.2d at 412.

131. Kassab v. Central Soya, 432 Pa. 217, 227-28, 246 A.2d 848, 853 (1968) "Nor is it usually the merchant who advertises the product on such a large scale as to attract consumers."; Hochgertel v. Canada Dry Corp., 409 Pa. 610, 616, 187 A.2d 575, 578 (1963) "Further, in express warranties the purchaser or subpurchaser can rely thereon, for they are considered a part of the consideration for the purchase and are meant to be relied upon by the purchaser."

132. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

> The fact is that the dealer and the ordinary buyer do not, and are not expected to, buy goods, whether they be foodstuffs or automobiles, exclusively for their own consumption or use. Makers and manufacturers know this and advertise and market their products on that assumption; witness, the "family" car, the baby foods, etc. . . . With the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media. In such an economy it becomes obvious that the consumer was the person being cultivated. Manifestly, the connotation of "consumer" was broader than that of "buyer." He signified such a person who, in the reasonable contemplation of the parties to the sale, might be expected to use the product . . . .

As for express warranty, it may be stated that its principal development in the area of products liability has been the liability of manufacturers founded upon their express representations made in newspaper, magazine, radio and television advertisements, package labels and other disseminated literature.

Dean Prosser stated that more is required than mere "puffing"[133] or sales talk, though general assertions of quality and safety, such as those demonstrated and spoken by a television housewife washing dishes may be found by the jury to establish an express warranty.[134] Further requirements are the manufacturer's intention or expectation that the representations will reach the plaintiff, and the latter's reliance thereon, at least when he is using the product.[135] Prosser, however, finds it unnecessary for a plaintiff to rely on the representation when making the purchase. This view is consistent with the *Mannsz* court's disavowance of any legal consequence flow-

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Id. at 379, 161 A.2d at 80-81 (Francis, J.).

In Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903 (Pa. 1974), Justice Roberts stated that "a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use." *Id.* at 907. The observations of these two eminent justices, however, might not be extended to bystanders affected by the defective product's use since a bystander by definition is not "such a person who, in the reasonable contemplation of the parties to the sale might be expected to use the product," as was Mrs. Henningsen. 32 N.J. at 379, 161 A.2d at 80. And, the manufacturer may not be impliedly representing the safety of the product's intended use to an innocent bystander. 319 A.2d at 907. Nevertheless, the Pennsylvania Supreme Court's inclination to find the Code's warranty protection and section 402A "co-extensive," *id.*, should permit the courts to grant recovery to an innocent third party who may reasonably be expected to be affected by the defective goods. The public policy has demanded the compensation of one who is unable to protect himself from the manufacturer's defective product. Kassab v. Central Soya, 432 Pa. at 230 n.6, 246 A.2d at 856 n.6.

133. *Simplex commendatio non obligat*: Mere recommendation does not bind; *see* 1 S. WILLISTON, *supra* note 68, § 202, at 517-18.

134. Prosser, *The Fall*, *supra* note 14, at 836-37.

135. *Id.* at 835-38. Though one need not rely upon the seller's representations at the time of purchase, there must be reasonable reliance at the time of the product's use for the injured purchaser or consumer to recover for breach of express warranty.

Whether the "reliance" concept has been retained by the Code has been the subject of much speculation. Most of the speculation has centered around the meaning of "basis of the bargain" which § 2-314 has made the conceptual nexus that transforms statements into warranties. The comments to § 2-314 declare that "no particular reliance" is necessary to make particular affirmations of fact part of the basis of the bargain.

White and Summers rise above the confusion surrounding the concept of "basis of the bargain" to declare it a rebuttable presumption of reliance. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 277-79 (1972) [hereinafter cited as WHITE & SUMMERS].

White and Summers ask: "Can an advertisement form the basis of the bargain?" They conclude that though an advertisement can be a part of the "basis of the bargain," Comment 3 requires affirmations of fact to be made "during a bargain." Hence, the plaintiff's burden would include proof of reliance when making the purchase. *Id.* at 279-80.

ing from the plaintiff's failure to prove reliance when the decedent purchased the wire rope. However, it would seem that lack of proof of the decedent's knowledge of the contents of the manual which created the express warranty brought the case close to the limit of recovery allowable under section 402A.[136] As stated above, no breach of warranty could be found in *Mannsz*, and rightfully so. The manual which the decedent failed to read listed the intended uses for the wire rope. Neither those nor analogous uses included the suspension of the heavy load for scaffolding which the decedent had constructed. Hence, while the court reached a correct result, its decision was awkwardly founded upon negligence and non-privity breach of warranty cases.[137]

The superior court was the first Pennsylvania court to recognize the advertising concept of express representation. It stated the proposition that a manufacturer who by means of advertising extols his product in an effort to persuade the public to buy, may be liable for damages to the ultimate purchaser notwithstanding the total absence of privity.[138] In *Jarnot v. Ford Motor Co.*,[138.1] the plaintiffs, who were engaged in a trucking business, brought an action for breach of implied warranty of fitness for recovery of the value of a destroyed trailer and the cost of repairing the tractor. The tractor had been driven for a month and a half and 3000 miles when the steering mechanism failed, resulting in the above mentioned damage. Though this short period of use fell within the "Ford Motor Company Warranty" limiting the purchaser to replacement parts, the court held the express warranty non-exclusive.[139] Not bound by the restrictions of the express warranty, the court held that there existed an implied warranty of merchantability, and on this basis found for the plaintiff.

Two principles of importance emerged from the *Jarnot* decision.

136. Mannsz v. MacWhyte Co., 155 F.2d 445, 451 (3d Cir. 1946); *cf.* Jacobs v. Technical Chemical Co., 472 S.W.2d 191, 198-99 (Tex. Ct. App. 1971), *rev'd*, 480 S.W.2d 602, 605-06 (Tex. 1972). Query whether a plaintiff can recover under section 402A due to a product defective by reason of lack of warning if the plaintiff admits he would have disregarded the warning had it been attached to the product?

137. 155 F.2d at 450.

138. Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 429-30, 156 A.2d 568, 572 (1959).

138.1. *Id.*

139. *Id.* at 428-29, 156 A.2d at 571-72. Applying exclusively to repairs and replacement, the court held that since "Ford Motor Company Warranty" was not accepted expressly in lieu of all other warranties, an implied warranty of merchantability was not negated. *See* UNIFORM COMMERCIAL CODE §§ 2-316 to -317.

First, although not necessary to the decision, the court announced the "principle of advertised-product-liability" through which a court would be allowed to take notice of national advertising not appearing in the record.[140] Second, the court based its decision upon the naked statement that no privity need be shown in cases involving breach of implied warranties. Such a broad statement was not, however, supported by the cases upon which it claimed reliance: *Loch v. Confair*[141] merely held a warranty theory inapplicable where there had been no sale or contract of sale; *Silverman* was later deemed a perplexing reference;[142] the cases of *Conestoga Cigar* and *Mannsz* dealt with express warranties; and *Knapp v. Willys-Ardmore, Inc.*[143] was a factually similar, but nonprivity, case.[144]

Erosion of the Privity Doctrine—Implied Warranty

Until the Code's adoption, privity was generally a necessary but withering requirement of a breach of implied warranty action under the Uniform Sales Act. Intended as a codification of the common law, though it may to some extent have weakened the foundation of caveat emptor,[145] the Uniform Sales Act spoke in terms of the warranty obligations of the "seller" and the "buyer."[146] The extent to which the manufacturer or retailer was held to have made an implied warranty was narrowed to rather specific instances. The Uniform Sales Act provided for, *inter alia*: (1) implied warranties in sale by description or sample (more properly be called express warranties since they were based on the descriptive language of the parties) which tended to overlap the treatment of the implied warranty of merchantable quality; and (2) implied warranties of mer-

140. 191 Pa. Super. at 430, 156 A.2d at 572.

141. 361 Pa. 158, 63 A.2d 24 (1949).

142. Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A.2d 715 (1953); *see* Annot., 75 A.L.R.2d 39, 54 (1961). The annotation writer was perplexed by the *Jarnot* court's reference to *Silverman*, since he considered the latter court's reference to *Mannsz* an exception to the general privity doctrine.

143. 174 Pa. Super. 90, 100 A.2d 105 (1953).

144. Nevertheless, Prosser deemed the *Jarnot* decision one of the "seven spectacular decisions" which discarded the limitations of the warranty approach which traditionally allowed recovery only where the product was food, beverage or goods for intimate bodily use and the plaintiff was in privity with the defendant. *Prosser, The Assault*, supra note 14, at 1113.

145. 1 S. Williston, supra note 68, § 227, at 583.

146. *See* note 119 *supra*.

chantable quality and fitness for particular use, which are the subjects of the privity problem considered below.[147]

The Uniform Sales Act was restrictive in its approach for it provided that there was no implied warranty as to the quality or fitness for a particular purpose except as prescribed in the Act. Since these two warranties specifically refer only to the immediate buyer and seller, and since the Act by its terms renders them exclusive remedies, the privity wall was constructed to reach new heights.[148] The purchaser, without the aid of an established exception, could not proceed vertically up the marketing chain nor was protection provided horizontally to those who could have reasonably been expected to suffer injury due to the defective product.

Some have viewed the Uniform Sales Act as extending and liberalizing the common law of sales so as to soften the punch of the doctrine of caveat emptor.[149] Others have characterized it as restrictive, pointing to the ease of disclaimer, and the requirements of proof of reliance and prompt notice.[150] The implied warranties of merchantability and fitness for a particular purpose were imposed as a matter of law.[151] As the manufacturer withdrew from direct sales to the consumer, the imposition of implied warranties only upon the last retailer undoubtedly produced harsh results. A struggling merchant or an effectively shielded manufacturer (by reason of disclaimers and limitations of remedies) provided the injured party with little solace. In the area of implied warranties, where the law, not the parties, imposes the legal obligations, the barrier of privity did not seem justified. Hence, early in the reign of the doctrine, judicial ingenuity developed techniques to escape the confines of privity in those cases where the courts recognized that the dealer and the buyer did not necessarily buy the manufacturer's goods for their own exclusive use or consumption.

> Remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of

147. UNIFORM SALES ACT §§ 14, 15, 16. *See also* Peerless Elec. Co. v. Call, 82 Pa. Super. 550 (1924); 1 S. WILLISTON, *supra* note 68, § 223.

148. Donovan, *supra* note 7, at 193-94 & n.61.

149. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 371-72, 161 A.2d 69, 76-77 (1960).

150. Donovan, *supra* note 7, at 196-97; Jaeger, *supra* note 87, at 39-47.

151. MacPherson v. Buick Motor Co., 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916); Ebbert v. Philadelphia Elec. Co., 330 Pa. 257, 269, 198 A. 323, 329 (1938); A. CORBIN, CONTRACTS § 773 (1952) [hereinafter cited as CORBIN].

> the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon "the demands of social justice."[152]

By far the greatest success in the consumer's battle with the privity defense was in the field of food and beverages. As early as 1266, those engaged in selling food were held to a high degree of responsibility.[153] By virtue of this special obligation, an 1875 Pennsylvania case, as well as a great number of other nineteenth century cases in America, sustained an action for breach of warranty imposing strict liability upon the seller and manufacturer of the food.[154] Prosser observed that the protection of subpurchasers and third parties came as "the aftermath of a prolonged and violent national agitation over defective foods, which at times almost reached a pitch of hysteria."[155] Pennsylvania enacted a statute in 1889 which embodied the common law rule that the seller of articles of food for immediate human consumption owed a duty to sell food which was wholesome and fit for eating.[156] The supreme court in *Catani v. Swift & Co.*,[157] was an early leader in abolishing the requirement of vertical privity in cases of warranty of fitness of food stuffs. Supported by the fact that the pork in *Catani* and the Coca Cola in *Nock v. Coca Cola Bottling Works*[158] were sold in the original packages, the courts were able to conclude that the manufacturer represented the wholesomeness and suitability of the contents and the consumer had a right to rely upon such representations. These two decisions were founded upon the food statute of 1889,[159] but more fundamentally, upon notions of "social justice," which precluded the operation of the doctrine of privity. The force of caveat emptor had been decidedly repelled and a cause of action for breach of implied warranty *without privity* was created.[160] The logical extension of this doctrine beyond food and beverages was to be anticipated.

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152. Mazetti v. Armour & Co., 75 Wash. 622, 626-27, 135 P. 633, 635 (1913).

153. Section 402A, Comment b.

154. McNaughton v. Joy, 1 Week. N. of Cas. 470 (C.P. Pa. 1875) (plaintiff prevailed on an averment of "a very inferior quality" of foodstuffs to sustain an action in assumpsit apparently for property damage); Prosser, *The Assault*, *supra* note 14, at 1104 n.37.

155. Prosser, *The Assault*, *supra* note 14, at 1104-05.

156. Law of May 4, 1889, No. 84 [1889] Pa. Laws 87 (repealed 1943).

157. 251 Pa. 52, 95 A. 931 (1915).

158. 102 Pa. Super. 515, 156 A. 537 (1931).

159. Law of May 4, 1889, No. 84 [1889] Pa. Laws 87 (repealed 1943).

160. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 614-15, 187 A.2d 575, 578 (1963);

In Pennsylvania, as well as other jurisdictions, there were progressive steps from foodstuffs, to products intended for intimate bodily use, such as cosmetics,[161] drugs,[162] cigarettes,[163] clothing,[164] and then to a wide variety of products[165] upon which an implied warranty could be founded to protect the consumer *sans* privity. *Jarnot* and *Mannsz* appeared to conclude this logical sequence by which the doctrine had crumbled in Pennsylvania.

Uniform Commercial Code § 2-318—Erosion of the Privity Doctrine?

In 1953, Pennsylvania adopted the Uniform Commercial Code[166] which codified the sales law warranties. Express warranties were made to rest upon "dickered" aspects of the contract and implied warranties made to arise from the factual situation.[167] Product-related personal injuries may be redressed upon breaches of express warranties arising from an affirmation of fact or promise, description of the goods, or sample or model which is made part of the "basis of the bargain;"[168] implied warranties of merchantability;[169] and implied warranties of fitness for a particular purpose.[170] These warranties are extended beyond the immediate purchaser of the product "to any natural person who is in the family or household of his buyer or who is the 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 in person by breach of the warranty."[171] These third party beneficiaries are treated as if they are the immediate purchasers of the defective goods.[172]

Catani v. Swift & Co., 251 Pa. 52, 57, 95 A. 931, 932 (1915), "Public policy regards the public good . . . so as to promote the public welfare by holding producers and manufacturers to a duty to consumers to guard against diseased and poisonous meats. . . ."; Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942).

161. *E.g.*, Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

162. *Cf., e.g.*, Henderson v. National Drug Co., 343 Pa. 601, 23 A.2d 743 (1942).

163. *See* Jaeger, *supra* note 87, at 93-96; Prosser, *The Fall, supra* note 14, at 812-14.

164. *E.g.*, Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962).

165. *See* Jaeger, *supra* note 87, at 110-36.

166. Act of April 6, 1953, No. 1, [1953] Pa. Laws 3, *as amended* Pa. Stat. Ann. tit. 12A, 1-101 *et seq.* (1970).

167. Uniform Commercial Code § 2-313, Comment 1.

168. *Id.* § 2-313.

169. *Id.* § 2-314.

170. *Id.* § 2-315.

171. *Id.* § 2-318.

172. Miller v. Preitz, 422 Pa. 383, 390, 221 A.2d 320, 324 (1966). In his concurring and

The question arises: Does Code section 2-318 contract or expand the prior sales law? This is merely a determination of the status of the privity doctrine at the time of the Code's adoption. The heart of the controversy is really whether Code section 2-318 mandates the contraction or expansion of the prior sales law.

Section 2-318 is without a statutory predecessor[173] and its position in the Code "appears more as an afterthought than as a capstone of the Code's coverage of warranties."[174] Code section 2-318 was founded upon the tort concept of foreseeability and upon the more persuasive approaches which the courts had previously utilized to nullify the privity defense in a particular case. Agency principles,[175]

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dissenting opinion, Justice Jones quoted *Speidel, supra* note 17, at 815, for the proposition that the specifically enumerated third party beneficiaries in section 2-318 can enforce the express or implied warranties against, at the very least, the seller "as if they were the immediate purchasers." 422 Pa. at 404, 221 A.2d at 331. This interpretation is wholly consistent with the drafters' intentions as evidenced by section 2-318, Comment 2, which provides in pertinent part:

> 2. 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, thereby freeing any such beneficiaries from any technical rules as to "privity." . . . Implicit in the section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extends to him.

173. McNulty, *Products Liability and the Uniform Commercial Code: The Third Party Beneficiaries of Warranties is Alive and Well and Living in Illinois*, 51 CHI. B. REC. 339, 340 (1970) [hereinafter cited as McNulty]. Section 2-318 of the UNIFORM COMMERCIAL CODE was originally derived from the unenacted UNIFORM REVISED SALES ACT § 43, which evidently was not the subject of the compromise decisions which led to the restricted and enacted section 2-318. UNIFORM REVISED SALES ACT, § 43 (Proposed Final Draft No. 1, 1944) provided:

> A warranty extends to any natural person whose relationship to the buyer is such as to make it reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person or property by breach of the warranty. A seller may not exclude or limit the operation of this section.

Though no prior uniform statute can be found, a few individual jurisdictions had made previous legislative inroads on the concept of privity of warranty. *See* N.Y. LAW REVISION COMM'N STUDY OF THE UNIFORM COMMERCIAL CODE 413 (1955).

174. NcNulty, *supra* note 173, at 340.

175. Principally in food cases, the nonpurchasing injured plaintiff could have recovered if it could have been presumed or shown that the purchaser acted as the plaintiff's agent. Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961) (parents agent for infant); Mouren v. Great Atl. & Pac. Tea Co., 1 N.Y.2d 884, 136 N.E.2d 715, 154 N.Y.S.2d 642 (1956) (husband agent for wife); Bowman v. Great Atl. & Pac. Tea Co., 308 N.Y. 780, 125 N.E.2d 165 (1955) (one sister agent for another when purchasing with common funds); Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931) (wife agent for husband). However, as could be expected, considerable confusion, conflicting results and injustice surrounded the application of this principle. Comment, *On the Problem of Extension of Warranties Under the Uniform Commercial Code*, 1 CONN. L. REV. 369, 372 & n.16 (1968).

the logical fiction of a warranty running with the goods,[176] the assignment theory,[177] and the third party beneficiary doctrine[178] were effective judicial responses to the unjust results that follow from the application of the privity defense. These approaches and the various other legal subterfuges, through which the courts undertook to compensate the injured party when justice demanded, led to considerable uncertainty for the plaintiff. Consequently, the drafters of the Code proposed section 2-318. Its third party beneficiary theory,[179] combined with the concept of foreseeability, is the written expression of a legislative recognition of consumer vulnerability and the realities of the manufacturing, marketing and financing system which bring the product into use and consumption.

Section 2-318 does not utilize the essence of the common law third party beneficiary doctrine, the "intent to benefit" test. Rather, the section transcends the doctrine, extending protection to consumers where limitations of the common law test would fail him.[180] An analysis of third party beneficiary doctrine requires an understanding of the contract in question and the relationship of the parties to it. In any sales contract, as between the manufacturer and the retailer, the purchaser is a third party; as between the retailer and purchaser, all other persons are third parties. In the case of express warranties, the above third parties would acquire rights against the manufacturer or retailer, respectively, only to the extent that the retailer or purchaser intended some benefit to run to a third party by virtue of the sale.[181] Yet, it strains the doctrine to its limits to contend that such an intent is present in either the manufacturer-retailer, or retailer-purchaser contracts. In the former situation the manufacturer's only motivation is "his desire for the consideration given by the promisee,"[182] while the retailer only seeks the acquisition of the manufacturer's products for resale. Similarly in the latter

176. This fiction had its genesis in Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927), which drew an analogy to covenants running with the land.

177. Williston favored an "assignment" theory by which both express and implied warranties would be given to the assignee/subpurchaser who in turn would have the power to enforce the assignor's rights against the manufacturer. 1 S. WILLISTON, *supra* note 68, § 244.

178. *Id.* § 244(a).

179. The term is used in section 2-318's caption which is made part of the UNIFORM COMMERCIAL CODE by section 1-109.

180. 2 S. WILLISTON, CONTRACTS § 347 (3d ed. W. Jaeger 1959).

181. CORBIN, *supra* note 151, § 775.

182. *Id.* § 776. The various state and federal food, drug, cosmetic and other product safety regulations have modified, but not precluded this rationale.

situation, it is difficult to see how the retailer intends to benefit the purchaser's family and innocent bystanders.[183] Unless this strained application were accepted to establish the requisite privity,[184] recovery by the third party would be barred. To overcome these conceptual gymnastics, compelled by a desire to protect third persons, section 2-318 was enacted.

Section 2-318 is also helpful in overcoming the even greater conceptual hurdles presented by an attempt to apply the "intent to benefit" test to implied warranties. Since such warranties create rights by law and not by contractual terms, the intention of the contracting parties is irrelevant to the creation of rights and liabilities. Thus any attempt to assert rights by a third party based upon a purported intention of the parties would seem difficult to sustain. From this viewpoint, Code section 2-318 is appropriately labeled "Third Party Beneficiaries of Warranties Express or Implied." The drafters have acknowledged the doctrine's force and, in response to the needs of the consuming public and its fictitious nature in implied warranty situations, have appropriately substituted the concept of foreseeability and representative classes for the common law "intention to benefit" test.

Considerable controversy has ensued over the scope of the section because of the ambiguity raised by the comments as to whether the Code's protection was to extend solely to the specifically enumerated beneficiaries.[185] Such controversy raised the issue of the court's own power to expand or contract the existing law—whether section 2-318 *can* or *must* change the existing state privity doctrine?

Code section 2-318's inclusion of all products within its scope was clearly consistent with evolving Pennsylvania case law.[186] Its expansion of horizontal privity, though later criticized as confining,[187] was

183. With regard to the benefit to the innocent bystander, see the excellent discussion in Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916, 924-27 (1964).

184. La Mourea v. Rhude, 209 Minn. 53, 57, 295 N.W. 304, 307 (1940).

185. McNulty, *supra* note 173, at 341. Comment 2 limits the Code's warranty protection to those specifically enumerated in section 2-318 while Comment 3 indicates that the section's enumeration is not all-inclusive. Comment 3 "in a cryptic role of neutrality, pointed to the way for the addition of other beneficiaries by judicial determination." *Id.* Thus, the conflict between the section and its comment "made controversy inevitable from the outset." *Id.*

186. A general review of the negligence law in this area should lead one to this conclusion. *See* Mannsz v. MacWhyte, 155 F.2d 445 (3d Cir. 1946); Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959).

187. The holdings in Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961), *Mannsz*, and *Jarnot* seemed to have established Pennsylvania as a no-privity state. This would have

at the time of the Code's enactment likewise in harmony with the trend in that direction.[188] For example, a cause of action had already been established in a family member if the purchaser was acting as an agent for the injured party.[189] However, its restrictive treatment in terms of vertical privity did not comport with Pennsylvania's abrogation of the doctrine in certain instances.[190]

After the enactment of section 2-318, it became necessary for the courts to determine whether the listing of beneficiaries was intended to be exclusive or merely suggestive. This in turn would determine the courts' latitude in expanding horizontal privity to encompass those not specifically enumerated. The comments are ambiguous at best. Comment 2 states the purpose of the section: to give the enumerated beneficiaries the purchaser's warranties and thus free them from the technical privity rules.[191] This clarity is short-lived, for Comment 3 expresses the Code's neutrality beyond these beneficiaries: "Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties . . . extend to other persons. . . ."[192] This deference to the "developing case law" up to the early 1960's would appear to have incorporated into Pennsylvania law the erosion of the defense of lack of privity. Such erosion had been evident in *Mannsz, Jarnot* and *Thompson v. Reedman*[193] which used the food, beverage and intimate bodily use cases as precedent for the conclusion that the

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been Jaeger's conclusion had the *Hochgertel* case not come down while his article was in page proofs. For the development of the Pennsylvania law see Jaeger, *supra* note 87, at 4-31; *accord*, Simpson v. Powered Prod., Inc., 24 Conn. Supp. 409, 192 A.2d 555, (1963).

188. Pennsylvania Bar Ass'n Notes to PA. STAT. ANN. tit. 12A, § 2-318 (1970). *But see* Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961), where the court quoted section 2-318 and Comment 3 and concluded:

> It is too much of a leap, it seems, to classify a guest passenger in an automobile as a guest in the *home*. In that light, the question remains one of gleaning the rule from the "developing case law."

Id. at 121. After a discussion of the Pennsylvania warranty cases, the court concluded that the privity defense was and remained "obliterated" as the *Mannsz* court had declared fifteen years before. *Id.* at 124.

189. *E.g.*, Young v. Great Atl. & Pac. Tea Co., 15 F. Supp. 1018 (W.D. Pa. 1936) (wife agent for husband but not daughter for purchase of preserves containing a dead mouse); *see* note 175 *supra*.

190. Ezer, *supra* note 83, at 326. *Mannsz* and *Jarnot* were breach of warranty actions brought against the manufacturer.

191. UNIFORM COMMERCIAL CODE § 2-318, Comment 2.

192. *Id.* Comment 3.

193. 199 F. Supp. 120 (E.D. Pa. 1961). *Thompson* is briefly discussed at notes 187-88 *supra*.

law of Pennsylvania was in tune with the national trend away from privity of warranty to foreseeability.

Further, it remained to be determined whether the notable omission of any treatment of vertical privity in a section dealing with privity reform constituted a legislative bar to expansion in that area. More specifically, one must ask: Towards what was this language directed—vertical privity (those in the distributive chain); horizontal privity (those in more remote relation than the purchaser's family, household and guests); or combined aspects of the two? The drafters probably intended the third proposition since the delineation of vertical and horizontal privity as a judicial aid to the decision-making process (as opposed to merely descriptive terminology) was developed subsequent to the adoption of the official draft of Code section 2-318 and its comments in 1952 by the American Law Institute and the National Conference of Commissions on Uniform State Laws.

It appears that in their attempt to codify the various approaches the courts had taken to circumvent the defense of privity, the drafters inadvertently succeeded in reactivating the doctrine.[194] Although section 2-318 expressly invalidated the great bulk of the horizontal privity situations,[195] some have suggested that it stifled further development in this area,[196] interpreting its language as an indication of legislative intent to limit warranty protection exclusively to the enumerated beneficiaries.[197] It can be persuasively argued that Comment 3 is without legislative force and that the extension of warranties to the designated beneficiaries is a limitation upon the classes of persons entitled to such protection. "Further, it is not for [the court] to legislate or by interpretation to add to legislation, matters which the legislature saw fit not to include."[198] This view was initially adopted by the Pennsylvania Su-

194. Rapson, *Products Liability Under and Beyond the U.C.C.*, 2 U.C.C.L.J. 315, 316, 325 (1970).

195. Dickerson, *The ABC's of Products Liability — With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 449 (1969).

196. Ezer, *supra* note 83, at 327.

197. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 613-14, 187 A.2d 575, 577 (1963) (the legislature included the specifically enumerated beneficiaries to the exclusion of all other potential "horizontal" plaintiffs). *See* Henry v. Eshelman, 99 R.I. 518, 209 A.2d 46 (1965); Comment, *U.C.C. Section 2-318: Effect on Washington Requirements of Privity in Products Liability Suits*, 42 WASH. L. REV. 253, 258 (1966).

198. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 614, 187 A.2d 575, 577 (1963). The court quoted section 2-318 and Comments 2 and 3. It then stated that the plaintiff employee

preme Court which held that the limiting of the Code's warranties to the buyer, his family, household or houseguests impliedly prohibited warranty recovery, horizontally, to those not enumerated;[199] and vertically, even to those that were.[200] Other commentators[201] and state comments,[202] however, have identified this section as expressly dealing with horizontal privity only, leaving vertical privity to the developing case law, and have recognized the drafters' intention to leave unrestricted the number of potential plaintiffs.[203]

To understand such holdings, a quick review of section 2-318's history is helpful. The section's original approach was less restrictive. The Proposed Final Draft extended warranty protection along foreseeability lines to the designated beneficiaries "or one whose relationship to [the buyer] is such as to make it reasonable to expect that such person may use, consume or be affected by the goods."[204] Section 2-718 of the Proposed Final Draft allowed the last

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was not in the protected categories and that it is not for the court to legislate that which the general assembly had not included. *Id.* at 612-14, 187 A.2d at 577. Citing Comment 3, the *Hochgertel* court found "the Code was not intended to restrict the case law in this field . . . ." The court embarked upon a review of the Pennsylvania law in the vertical privity area and concluded that the employee was a "complete stranger" to the sales transaction and no case had extended warranty protection "beyond a *purchaser* in the distributive chain." *Id.* at 614-15, 187 A.2d at 578 (emphasis added); *accord*, Miller v. Preitz, 422 Pa. 383, 394-98, 221 A.2d 320, 326-28 (1966) (Bell, C.J., concurring).

199. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963) (denied recovery to an employee).

200. Miller v. Preitz, 422 Pa. 383, 221 A.2d 320 (1966).

201. WHITE & SUMMERS, *supra* note 135, at 327; Murray, *supra* note 7, at 397.

202. N.Y. U.C.C. § 2-318 (McKinney 1964) (The annotations following this section state "the Code enlarges the number of prospective plaintiffs in a warranty action but does not increase the number of potential defendants.").

203. UNIFORM COMMERCIAL CODE § 2-313, Comment 2 provides, in pertinent part:

> The provisions of Section 2-318 on third party beneficiaries expressly recognize this case law development within one particular area. Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

204. UNIFORM COMMERCIAL CODE § 2-318 (Proposed Final Draft, Spring 1950) provided:

> A warranty whether express or implied extends to any natural person who is in the family or household of the buyer or who is his guest or one whose relationship to him is such as to make it reasonable to expect that such 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.

Id. The comments pertinent to this language provided:

> 2. This section, following the dominant trend of judicial opinion developed in the light of modern distribution methods and the fact of group consumption, is intended to broaden the right and the remedy of the consumer in warranty, to free them from any technical rules as to "privity" and to make them, insofar as feasible, directly

reseller to implead his seller, and section 2-719 provided for a direct action against a prior seller subject to impleader. Since the 1952 version eliminated the broad horizontal language and the impleader and direct action provisions, it was reasonable to contend that the drafters intended to limit the warranty protection to those specified therein. Such a position, though supportable, was certainly not infallible. The problem with section 2-318 was that it attempted to codify the uncodifiable.[205] This would explain the section's present three official[206] and various state legislative alternatives[207] and judicial interpretations.[208]

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enforceable against the party ultimately responsible for any injury.

3. This section expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the basic test as to the extension of the seller's warranties to third parties is whether the person injured was in such a relationship to the buyer as could reasonably be expected to result in his use, handling or consumption of the goods in ordinary course, or was in the type of relationship which could reasonably be expected to result in his being affected by the breach of warranty. Thus, trespassers are not covered by the present section since their use is not in the ordinary course. On the other hand, employees of an industrial consumer are covered and the policy of this Article intends that neither the privity concept, nor any gaps in Workmen's Compensation Acts, nor any technical construction of 'employment' shall defeat adequate protection under this section.

4. This Article is intended to take the burden of defending cases from an intermediate seller by permitting him to implead his own seller and by providing, at the choice of the consumer, a direct action against the party ultimately responsible for the injury.

Id.

205. There was no thought that this section (2-318) was to set the maximum boundaries for the group of third parties who could recover when injured by defective goods. The Code had set the minimum coverage . . . .

R. NORDSTROM, LAW OF SALES 280 (1970).

206. In 1966, the section was amended to include three alternatives designed to fit the individual state's already developed case law. Alternative A is the original 1952 version of section 2-318.

Alternative B expands the class of beneficiaries to the full foreseeability scope:

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.

Alternative C not only encompasses all foreseeable injured persons, but it follows the modern trend and RESTATEMENT (SECOND) OF TORTS § 402A, by extending the rule to all injuries:

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 exlude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

207. Nineteen states have adopted "variations" from the Alternative A approach. R. ANDERSON, UNIFORM COMMERCIAL CODE 728-30 (1970); *Id.* at 497-98 (Supp. 1973).

208. 1 AMERICAN LAW OF PRODUCTS LIABILITY §§ 6:67-117, at 689-739 (R. Hursh ed. 1961); *Id.* §§ 6:68-115, at 474-502 (Supp. 1973).

The 1952 Final Draft added the word "seller's" before "warranty" and Comment 2 remarked that the section "rests primarily upon the merchant seller's warranty."[209] While this language may be read as indicating a restriction upon the choice of defendants to the last reseller,[210] some have argued that the Code intended to adopt a policy of vertical neutrality.[211] Indeed, Comment 3 supports this latter proposition in providing: "Beyond this, the section is neutral . . . on whether the seller's warranties, *given to his buyer who resells*, extend to other persons in the distributive chain."[212] It is submitted that, as a matter of policy,[213] the "seller" in section 2-318 may be used conceptually in the same manner as it is interpreted in the Restatment (Second) of Torts, Section 402A.[214]

Vertical Privity—Recent Pennsylvania Supreme Court Treatment

Recent Pennsylvania Supreme Court treatment of vertical privity can be found in the horizontal privity case of *Hochgertel v. Canada Dry Corp.*,[215] the horizontal and vertical privity case of *Miller v. Preitz*,[216] and the vertical privity case of *Kassab v. Central Soya*.[217] It should be noted that in the foregoing discussion the distinction drawn between vertical and horizontal privity was not expressly recognized by the court until *Kassab*. It is suggested, however, that only by such a conceptual delineation, even where the courts have failed to do so, can a true understanding of the subsequent development of the vertical and horizontal distinction be understood.

As will be discussed in the following section, the *Hochgertel* fact situation solely raised the issue of horizontal privity: Can an em-

209. Uniform Commercial Code § 2-318, Comment 2.

210. "A seller's warranty . . . extends to any natural person who is in the family or household of *his buyer* . . . ." Uniform Commercial Code § 2-318 (emphasis added).

211. Uniform Commercial Code § 2-313, Comment 2, notes that the express warranty section is limited to the warranties made by the seller to the buyer as a part of a contract for sale. However, the drafters intended to leave undisturbed the "case law growth" in this area. Donovan, *supra* note 7, at 220.

212. Uniform Commercial Code § 2-318, Comment 3 (emphasis added).

213. *See* note 234 *infra*.

214. "One who sells" applies to all sellers from the manufacturer to the last reseller and to nonsale situations. Donovan, *supra* note 7, at 233-38.

215. 409 Pa. 610, 187 A.2d 575 (1963).

216. 422 Pa. 383, 221 A.2d 320 (1966).

217. 432 Pa. 217, 246 A.2d 848 (1968).

ployee recover for personal injuries under a breach of warranty theory against one who sold goods to the plaintiff's employer? Despite the "horizontal" nature of the issue, the court, in attempted compliance with the suggestion in Comment 3 to follow the "developing case law," restated the law with respect to *vertical* privity. The court found vertical privity to be the established rule and cases involving foodstuffs to be mere exceptions, without stating whether these cases were indicative of a growing trend away from the rule. In the case of goods for human consumption, the constraints of privity were relaxed only with respect to subpurchasers.[218] Despite the fact that the issue theoretically called for a horizontal privity analysis, the court ignored such analysis and applied the aforementioned "vertical" rules, denying recovery on the basis that the warranty in question did not extend "beyond *a purchaser* in the distributive chain."[219]

Three years later, the supreme court in *Miller* extensively quoted the *Hochgertel* vertical privity findings[220] as precedent for what has been referred to as "excruciating judicial torsion."[221] *Miller*, decided the same day that section 402A was adopted to grant recovery to a similarly situated plaintiff,[222] clung to the strictures of privity in anomalously denying recovery to the party before it.[223] Prior to that day, the abrogation of the requirement of privity in a breach of warranty action would, in essence, have resulted in the creation of strict liability,[224] thus making recovery in a personal injury action depend upon whether the suit were brought in trespass for negligence or in assumpsit for breach of warranty.[225] With the adoption

218. 409 Pa. at 613-15, 187 A.2d 577-79.

219. Id. at 615, 187 A.2d at 578 (court's emphasis).

220. 422 Pa. at 391-92, 221 A.2d at 324-25, *quoting* 409 Pa. at 614-16, 187 A.2d at 578.

221. Bailey, *Sales Warranties, Products Liability and the U.C.C.: A Lab Analysis of the Cases*, 4 WILLIAMETTE L.J. 291, 318 (1967).

222. Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).

223. Since the breach of warranty and strict liability actions are based on identical policy considerations, the prevention of the *Miller* plaintiff from recovering while permitting the *Webb* plaintiff to recover under identical facts was an anomalous and unjust result. Kassab v. Central Soya, 432 Pa. 217, 230-31 n.6, 246 A.2d 848, 854 n.6.

224. Miller v. Preitz, 422 Pa. 383, 393, 221 A.2d 320, 325 (1966). Liability under section 402A "is hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitation through inconsistencies with express warranties." Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965).

225. As Justice Roberts indicated in his concurring and dissenting opinion, the majority agreed with the policy behind section 402A, but since the action was brought in assumpsit,

of 402A, however, this major roadblock to the abrogation of privity—disparate remedies with disparate burdens of proof[226]—was no longer a matter of legitimate concern.

The question of election of remedies, which had been repeatedly answered in dissimilar fashions by the Pennsylvania Supreme Court Justices, was finally settled in *Kassab*. The subjection of such injured plaintiffs as Hochgertel and Miller's administrator to the vicissitudes of proving the defendant's negligent conduct was an unfortunate consequence of unjustifiable judicial restraint, especially in light of an existing trend to the contrary.

In *Miller*, the infant decedent's aunt purchased a vaporizer-humidifier which shot boiling water onto the decedent's body causing his death. The product was purchased from a pharmacy owned by the defendant Preitz, distributed by the defendant Rexall Drug Company, and manufactured by the defendant Northern Electric Company. Because the administrator brought an action for breach of warranty, an action in assumpsit, the court would not allow recovery for wrongful death, an action in tort, but did sustain the warranty action under the survival statute.[227]

The court, per Justice Cohen, first discussed the horizontal privity issue, quoting section 2-318 and Comments 2 and 3. Though not delving into the perplexities of Comment 3, it found the decedent nephew within the "family" of the purchaser. As a result, the administrator was permitted to pursue his cause of action against the retailer pharmacy. This enabled the court to inquire whether those designated in Code section 2-318 could maintain an action against

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the *Miller* case would not be the proper one in which to adopt the section 402A trespass form of action. Justice Roberts suggested that the majority's reluctance "stems from a desire to maintain doctrinal purity and to compel adherence to strict forms of pleading." Miller v. Preitz, 422 Pa. 383, 415, 221 A.2d 320, 336 (1966).

226. Yentzer v. Taylor Wine Co., 414 Pa. 272, 276-77, 199 A.2d 463, 465 (1964) (Eagen, J., dissenting); Hochgertel v. Canada Dry Corp., 409 Pa. 610, 616, 187 A.2d 575, 579 (1963).

227. 422 Pa. at 385-87; 221 A.2d at 322. Under the Wrongful Death statute, the actionable wrong is "death . . . occasioned by unlawful violence or negligence . . . ." PA. STAT. ANN. tit. 12, § 1601 (1953). Hence, an action in assumpsit for breach of warranty is considered inappropriate. But under the survival statute, the decedent's cause of action survives him and may be brought by his personal representative "as though the decedent were alive." PA. STAT. ANN. tit. 20, §§ 3371, 3373 (Supp. 1974). Since the true nature of a breach of warranty action to recover for personal injuries caused by a defective product is in tort, the court's holding with respect to the different treatment accorded this statute is mere adherence to the strict forms of pleading. *See* DiBelardino v. Lemmon Pharmacal Co., 416 Pa. 580, 586, 208 A.2d 283, 286 (1965) (Roberts, J., dissenting).

remote sellers. Citing the vertical privity passage from the *Hochgertel* court, the court concluded:

> In light of the discussion and holding of *Hochgertel* it seems plain that under the developing case law decedent was not within the benefits of any implied warranties made by the remote sellers. This necessarily follows from the fact that he was not a purchaser.[228]

Professor Murray finds this conclusion incredible.[229] The *Miller* court laboriously arrived at the finding that the decedent was a member of the purchaser's family. Despite its prior finding of horizontal privity, the court seemed to base its failure to find vertical privity on an absence of horizontal privity![230]

The court's opinion is rather confused. In his conclusion, quoted above, Justice Cohen refers to the decedent's nonpurchaser status to find that he could not benefit from an implied warranty because of lack of vertical privity. Such discussion, however, is couched in terms of *horizontal* privity which he had already found to exist. Further, the *Hochgertel* holding, which the *Miller* court relied on, dealt only with the horizontal privity doctrine.[231] Hence, the *Miller* finding of lack of vertical privity was based upon a case which had not dealt with that concept. To compound matters, immediately following its "not-a-purchaser" conclusion, the *Miller* court stated: "Even if he were a 'purchaser' the product involved would not bring him within the rule that a 'purchaser' can sue a *remote* seller only in cases involving 'food, beverages, and like goods for human consumption.' "[232] The court's basis for such a restriction upon the type of product undoubtedly came from prior privity decisions in the area of foodstuffs. However, section 2-318 *was* and *is* susceptible of only one interpretation — it applies to all goods.

In their separate opinions in which they dissented from holding remote sellers not liable in nonfood cases, Justice (later Chief Justice) Jones considered the requirement of vertical privity illogical, while Justice Roberts opined that it elevated form over substance. Both preferred the approach offered by section 402A in product-related personal injury actions. Resolution of these varying views

228. 422 Pa. 392, 221 A.2d at 324-25.
229. Murray, *supra* note 7, at 404.
230. *Id.* at 405.
231. 422 Pa. at 392, 221 A.2d at 324-25, *quoting* 409 Pa. at 615, 187 A.2d at 578.
232. 422 Pa. at 392, 221 A.2d at 325.

respecting vertical privity came shortly in Justice Roberts' majority opinion in *Kassab*.[233] The plaintiff-appellants were cattle breeders who ordered cattle feed from defendant Pritts. In accordance with a formula provided by the plaintiffs, Pritts blended various ingredients which included "Cattle Blend" manufactured by defendant Central Soya. Shortly after the mixture was fed to the plaintiff's herd, cows "began to abort and the breed bull began behaving in a manner which tended to cast doubt upon his masculinity" — a rather distressing predicament for the owners of a herd of breed cattle. A chemical analysis revealed that the "Cattle Blend" contained stilbestrol, a synthetic hormone which is added to the feed of beef cattle to make them gain weight. Stilbestrol is not recommended for breed cattle since it accentuates female characteristics, including heat and abortions in cows and sterility in bulls. The trial court found as a fact that the feed contained stilbestrol, contrary to both the terms of the formula ordered and a federal regulation requiring a label to state that it should not be fed to breeding or dairy cattle.

The trial court believed expert testimony that the amount of stilbestrol in the feed would not have caused the abortions and sterility, and, accordingly, found no breach of contract. On appeal, the supreme court stated that, even absent proof of causation, the plaintiffs were at least entitled to nominal damages, for community knowledge of what their herd had eaten would greatly diminish the value of their property from breed cattle to beef cattle. Clearly the tainted feed constituted breaches of the implied warranties of merchantability and fitness for a particular purpose.

Central Soya argued that under the authority of *Miller*, it could not be held liable for breach of any implied warranty because it was not in vertical privity with the appellants. In overruling the vertical privity aspect of *Miller*, Justice Roberts reiterated the rationale that he and Justice Jones had expressed in their *Miller* dissents: Vertical privity shields from liability the party primarily responsible both for the defective product and the inducement that led to its purchase—the manufacturer.[234] Furthermore, preventing the plaintiff

233. 432 Pa. 217, 246 A.2d 848 (1968). As an aside, with respect to the vertical privity issue in *Miller*, Justice Roberts dissented from the majority opinion, per Justice Cohen. In *Kassab*, the majority, per Justice Roberts, overruled the *Miller* vertical privity holding, while Justice Cohen concurred in the result, but disassociated himself from the court's "abolition of the privity of contract doctrine in actions instituted for breach of warranty." *Id.* at 237, 246 A.2d at 858.

234. Justice Roberts eloquently stated his position as follows:

from proceeding directly against the remote seller or manufacturer will not insulate those defendants from liability in the absence of disclaimers and limitations of liability. As a matter of law, the remote party may be required to indemnify the last retailer.[235] Hence, the vertical privity defense simply exposes the injured party to the risk that his immediate seller may be financially unable to make the plaintiff whole and fosters "needless and bothersome circuity of actions."[236]

Foretelling the direction of products liability in Pennsylvania, Justice Roberts declared that section 402A and the Code must be co-extensive.[237] With regard to vertical privity, this declaration was based upon strong footing. Such perfect symmetry between warranty and strict liability, however, has yet to be achieved.

The *Miller* court had reasoned that by limiting horizontally those who benefited from the Code's implied and express warranties, section 2-318 impliedly prohibited any further relaxation of privity strictures vertically. The *Kassab* court, on the other hand, found the section silent as to the vertical privity problem. Either a reading of

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> [T]he typical consumer does not deal at arm's length with the party whose product he buys. Rather, he buys from a retail merchant who is usually little more than an economic conduit. It is not the merchant who has defectively manufactured the product. Nor is it usually the merchant who advertises the product on such a large scale as to attract consumers. We have in our society literally scores of large, financially responsible manufacturers who place their wares in the stream of commerce not only with the realization, but with the avowed purpose, that these goods will find their way into the hands of the consumer. Only the consumer will use these products; and only the consumer will be injured by them should they prove defective. Yet the law in Pennsylvania continued to permit these manufacturers to escape contractual liability for harm caused consumers by defective merchandise simply because the manufacturer technically did not *sell* directly to the consumer. There was no privity of contract between them. No one denied the *existence* of absolute liability under the code for breach of implied warranty. But this warranty ran not to the injured party, but rather to the middleman who merely sold to the injured party, thus ignoring commercial reality and encouraging multiplicity of litigation.

Id. at 227-28, 246 A.2d at 853.

235. *See* Frankel v. Lull Eng'r Corp., 334 F. Supp. 913 (E.D. Pa. 1971), *aff'd per curiam* 470 F.2d 995 (3d Cir. 1973); Neville Chem. Co. v. Union Carbide Corp., 294 F. Supp. 649 (W.D. Pa. 1968), *aff'd in part, vacated in part*, 422 F.2d 1205 (3d Cir. 1970), *cert. denied*, 400 U.S. 826 (1970); Greco v. Bucciconi Eng'r Corp., 283 F. Supp. 978 (W.D. Pa. 1967), *aff'd* 407 F.2d 87 (1969); Tronza v. Tecumseh Prod. Co., 253 F. Supp. 26 (W.D. Pa. 1966), *aff'd in part, vacated in part* 378 F.2d 601 (3d Cir. 1967); Note, *The Right to Indemnity in Products Liability Cases*, 1964 U. ILL. L.F. 614.

236. Miller v. Preitz, 422 Pa. 383, 419, 221 A.2d 320, 338 (1966) (Roberts, J., concurring and dissenting); *accord*, Kassab v. Central Soya, 432 Pa. 217, 234, 246 A.2d 848, 856 (1968).

237. Kassab v. Central Soya, 432 Pa. 217, 231, 246 A.2d 848, 854 (1968).

the section or Comment 3 could reinforce this holding. Whether looking to "developing case law" or "general principles of [contract] law,"[238] the court concluded that the same policies underlying the food cases supported the abandonment of the doctrine in cases of injury caused by all other products.[239] Thus, the vertical privity doctrine in Pennsylvania was forever laid to rest.

HORIZONTAL PRIVITY—RECENT PENNSYLVANIA SUPREME COURT TREATMENT

The uncertainty surrounding the horizontal privity defense in Pennsylvania was increased when Justice Roberts, in declaring the *Kassab* court's nonadherence to *Miller*, stated that "the Code sets an absolute limit on those injured parties who may seek shelter under the umbrella of a manufacturer's warranty . . . . "[240] The court thus pronounced that section 2-318's three categories of third party beneficiaries were the extent to which the court *could* permit the disregard of the strictures of horizontal privity.[241] This declaration by Justice Roberts was but a temporary departure from his *Miller* position that developing case law was intended to determine the ultimate scope of warranty protection[242] and a parting deference to the echos of the cry of judicial restraint.[243]

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238. UNIFORM COMMERCIAL CODE § 1-103.

239. 432 Pa. at 234, 246 A.2d at 856. In Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903 (Pa. 1974), the court summarized these policies:

> First, the public interest in the protection of human life justifies the imposition upon consumer products suppliers of full responsibility for harm resulting from use of the products. Second, as we have stated, the manufacturer by marketing and advertising the product impliedly represents that it is safe for the intended use and society should not allow him to avoid responsibility. Finally, multiplicity of actions will be avoided by permitting a direct action by the injured party against the manufacturer . . . .

Id. at 908 n.15.

240. 432 Pa. at 232, 246 A.2d at 855.

241. *See* Handy v. Uniroyal, Inc., 327 F. Supp. 596 (D. Del. 1971) (applying Pennsylvania law); Tucker v. Capitol Mach. Inc., 307 F. Supp. 291 (M.D. Pa. 1969).

Professor Murray wrote in his fine work in this area, published prior to the Pennsylvania Supreme Court decision in *Salvador*: "Under the present circumstances, however, *Hochgertel* lives on as an irrational shackle in the Pennsylvania products liability picture." Murray, *supra* note 7, at 402.

242. 422 Pa. at 417, 420-21, 221 A.2d at 337-39 (Roberts, J., concurring and dissenting).

243. Justice Cohen wrote that the majority completely lacked judicial restraint by overturning the long-established privity defense. He stated that the question was not the proper subject for review and was, accordingly, rather superficially treated by the parties. 432 Pa. at 237-40, 246 A.2d at 858-59. In response, Justice Roberts painstakingly established the vertical privity issue as one properly before the court. *Id.* at 225, 246 A.2d 851-52. *See generally* Murray, *supra* note 7, at 410-16.

Possibly, the greater deviation between section 2-318 and Comment 3 for horizontal privity may account for the court's less liberal treatment of that defense. More importantly, the question of duty to the injured party[244] is stretched to greater extremes as one moves along the horizontal plane. Nevertheless, the recent trend has extended protection beyond the designated class of third party beneficiaries.[245] The fact that the Code specifies those to whom the seller's warranty extends is not necessarily indicative of a legislative determination that more remote users, consumers or those affected by the goods, may not also benefit by the Code's warranty protection.

> This section expressly includes as beneficiaries within its provisions, the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law . . . . [246]

Since the comments are not the law, but rather aids in the interpretive process, Comment 3's assurance that "the section . . . is not intended to enlarge or restrict the developing case law" with respect to either horizontal or vertical privity is advisory at best. Comment 3's expressed reliance upon the "developing case law" would seem to be a distinct preservation of the earlier Spring 1950 Proposed Final Draft's concept of foreseeability.[247] The *Miller* court's consideration of the enumeration of beneficiaries as a limitation and Comment 3's language as precatory,[248] was short-lived. Justice Roberts, in his concurring and dissenting opinion in *Miller* and his later opinions in *Kassab* and *Salvador*, accepted the rationale proposed by Comment 3 and gave it the force of law.

In view of the Pennsylvania Supreme Court's initial handling of section 2-318 in *Hochgertel*, Justice Roberts' reliance on Comment 3 was not unwarranted. In *Hochgertel*, plaintiff bartender was injured by an exploding bottle of unopened soda water which was standing on the counter behind the bar. Since the product was

244. Miller v. Preitz, 422 Pa. 383, 424, 221 A.2d 320, 341 (1966) (Roberts, J., concurring and dissenting).

245. Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903, 905 n.9 (Pa. 1974).

246. UNIFORM COMMERCIAL CODE § 2-318, Comment 3.

247. *See* note 204 *supra* and accompanying textual discussion. White and Summers wrote that the explanation for the expansion by a comment of its section's scope is "partly political. When opponents of a draft section prevailed against the draftsman, the draftsman would sometimes revise the draft accordingly, but seek to preserve the old draft in the comments . . . . " WHITE & SUMMERS, *supra* note 135, at 12.

248. 422 Pa. at 393, 221 A.2d at 325.

bottled, sold and delivered by the defendant to the plaintiff's employer, a pure question of horizontal privity was raised: Did the well-established implied warranty of merchantability of foodstuffs extend to the employee of the purchaser?

Obviously, equipment and supplies purchased by an employer for use in his business will be handled by the purchaser's employee. However, the *Hochgertel* court analyzed the developing case law and concluded: "He is a complete stranger to any contractual transaction involved."[249] The employee could garner no aid from section 2-318, for the court concluded that the language clearly was intended to protect only those specifically enumerated. These conclusions were founded upon a misinterpretation of the drafters' intentions to defer to the "developing case law" as directed in Comment 3,[250] a misapprehension of Connecticut law,[251] an undue reliance upon vertical privity cases,[252] and a fallacious "inescapable conclusion from *Loch v. Confair.*"[253] Since the case apparently held that

249. 409 Pa. at 615, 187 A.2d at 578.

250. Murray, *supra* note 7, at 399-400, 402. Professor Murray suggests that Justice Eagen's paraphrase of Comment 3 in *Hochgertel* which deletes the word "developing" (409 Pa. at 614, 187 A.2d at 578) was indicative of the court's view that if the state's case law had gone beyond the enumerated beneficiaries prior to Code section 2-318's enactment then the section would not restrict the categories to those enumerated. But if the state's case law had *not* gone beyond those enumerated, then the section constituted the furthest extensions of the Code's warranty protection.

In *Salvador*, Justice Roberts apparently subscribed to Professor Murray's conception of Comment 3 ("to permit further judicial extensions of the three categories expressed in section 2-318 . . . . " Murray, *supra* note 7, at 402) when he declared:

> Though we must overrule *Hochgertel*, this is not an occasion when a court reexamines its precedents and finding them in error returns to a "correct" view. On the contrary, as we have said, when *Hochgertel* was decided it was clearly the appropriate accommodation between the law of torts and the law of contracts. Since then Pennsylvania products liability law has progressed, and demands of public policy as well as legal symmetry compel today's decision.

319 A.2d at 908.

251. The court cited Duart v. Axton-Cross Co., 19 Conn. Supp. 188, 110 A.2d 647 (1954) for the proposition that an employee was not within one of the categories specified in section 2-318. The court mistakenly thought the plaintiff in *Duart* was a maid in the buyer's home. Instead, she was a day cook in a fraternity house. That fact, of course, supported the court's decision. What detracted from its holding was the overturning of *Duart* in Connolly v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (1963) a month after *Hochgertel* was decided. In *Connolly*, a service station attendant was allowed recovery from the manufacturer of an automobile despite his lack of both horizontal and vertical privity.

252. The court relied upon the food and beverage cases cited in 409 Pa. at 614, 187 A.2d at 578, which were directed toward the vertical privity defense. Murray, *supra* note 7, at 400.

253. 409 Pa. at 615, 187 A.2d at 578, "[T]he inescapable conclusion from Loch v. Confair . . . is that no warranty will be implied in favor of one who is not in the category of a

one not in the distributive chain (a purchaser, subpurchaser or purchaser's designated beneficiaries) may not benefit from the Code's express or implied warranties, the case could easily be cited for its vertical privity aspects.

One year later in *Yentzer v. Taylor Wine Co.*,[254] the Pennsylvania Supreme Court signaled a trend toward the mitigation and eventual destruction of the forceful privity defense announced in *Hochgertel*. In *Yentzer*, the plaintiff employee was similarly injured by an exploding bottle, but was not denied recovery because of lack of privity between him and the bottler. The legally relevant distinction was that he personally purchased defendant's champagne on behalf of his employer. By labeling the plaintiff a "buyer" within the meaning of sections 2-103(1)(a) and 2-318, the court refused to extend *Hochgertel*'s rigid construction of section 2-318 to "the actual purchaser" despite the plaintiff's employee character.[255]

Justice Eagen, who authored *Hochgertel*, correctly viewed this holding as "a clear departure" from his opinion of the year before. In his dissent he bared the majority's logic: plaintiff purchased no interest in the goods; he was merely acting as an agent on behalf of his principal in whom the title and interest vested.[256]

However unsound the *Yentzer* holding may be, the virtues of social justice were allied with the majority. Though one can only speculate as to the arguments among the justices, a novel consideration was raised by Justice Eagen in his majority opinion in *Hochgertel* and his dissent in *Yentzer*: To allow the employee to recover would render the manufacturer a guarantor of his product.

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purchaser.". Actually, the court in Loch v. Confair, 361 Pa. 158, 63 A.2d 24 (1949), held in that vertical privity case, that the plaintiffs could not sustain an action for breach of warranty for injuries resulting from a bottle which exploded as the plaintiff took it from the supermarket shelf. Since the plaintiffs could not prove a contractual relationship (the accident happened prior to purchase), no warranty existed. "Why the *Hochgertel* court felt that this case was authority for the proposition that only actual purchasers could sue as contrasted with those in horizontal privity with such purchasers remains a mystery." Murray, *supra* note 7, at 400-01.

254. 414 Pa. 272, 199 A.2d 463 (1964).

255. Since plaintiff was a buyer, he was within the distributive chain and the recognized vertical privity food cases which permitted recovery by remote parties. *Id.* at 274-75, 199 A.2d at 464.

256. *Id.* at 275-76, 199 A.2d at 464-65. In his concurring and dissenting opinion in *Miller*, Justice Roberts observed that "adherence to the dictates of privity" in the practically identical cases of *Hochgertel* and *Yentzer* made the plaintiffs' rights of recovery "turn upon the completely irrelevant fact of who purchased the product." 422 Pa. at 417 n.3, 221 A.2d at 337 n.3.

His fear of the spectre of absolute liability is hardly justified by the extension of warranties to foreseeable plaintiffs. The question of duty is by no means the end point of a products liability trial. To the contrary, it is merely the beginning. The established elements of a products liability trial[257] render the fear of absolute liability archaic. One is reminded of "the most absurd and outrageous consequences" which concerned Lord Abinger in his disposition of *Winterbottom v. Wright*.

A second, though weak, signal of the changing attitude of the Pennsylvania Supreme Court emanated from *Nederostek v. Endicott-Johnson Shoe Co.*[258] The court, per Justice Roberts, reversed the lower court's judgment on the pleadings for the defendant despite the plaintiff's mere allegation that the shoes which caused the plaintiff's injury were supplied by his employer who purchased them from the defendant's reseller. The court, finding the trial court in error because it improperly resorted to "depositions" to rule for the defendant, refused to summarily bar recovery by the plaintiff on the basis of *Hochgertel*, simply because he was a non-purchaser employee.

The problem in *Nederostek* was the connotation to be given to the word "supplied." Obviously without a purchase by the employee, the plaintiff's cause of action would have to fail since it would fall squarely within *Hochgertel*. Again, the Pennsylvania Supreme Court was quick to afford an individual the protected status which it at first confined to those specified in section 2-318. In *Nederostek*, it was not the court's conclusion that the employee was protected which made the case significant, but its finding that the plaintiff was not necessarily denied protection as a matter of law.

The *Miller* court continued this trend toward a relaxed attitude concerning horizontal privity when, recognizing the remedial nature of section 2-318 and the varied connotations of the word "family," it concluded that it could not give the term an unduly restrictive meaning. Hence, the court permitted the administrator to pursue his cause of action against the retailer defendant with the proviso that he must also satisfy the foreseeability requirement of section 2-318: Not only must the nephew be in the buyer's family, but it must also be "reasonable to expect that such person may use, con-

257. *See* Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325 (1971).

258. 415 Pa. 136, 202 A.2d 72 (1964).

sume or be affected by the goods . . . . "[259] This "factual and objective question" was required to be met by proof of such factors as "the remoteness of the family relation, the geographical connection between the buyer and the member of his family, and the nature of the product."[260] Professor Murray remarked that though these criteria are "lawyerlike and create a workable test," they in actuality mask the court's dissatisfaction with the *Hochgertel* decision.[261]

Disagreeing with the majority's strict interpretation of section 2-318, Justice Jones, in his concurring and dissenting opinion, observed that the court's ad hoc method for determining whether an individual falls within one of the section's categories is "unnecessary, impractical and unsound."[262] Justice Jones preferred, and this writer subscribes to, an approach which permits the "developing case law" of Pennsylvania to determine the extent of its warranty protection.

Since *Kassab* nullified the vertical privity defense soon after its reestablishment in *Miller*, the consequent uncertainty surrounding *Hochgertel*'s affirmation of the horizontal privity defense obligated the Pennsylvania Supreme Court to make a pronouncement with respect to the rule's continued viability. In the spring of 1974, the Pennsylvania Supreme Court, per Justice Roberts, seized the opportunity to clarify this aspect of Pennsylvania's products liability law in *Salvador v. Atlantic Steel Boiler Co.*[263] Overruling *Hochgertel*, the Court appeared to write the final pages in the history of privity of warranty. Although it is clear that the employee is by no means the endpoint along the horizontal plane, the horizontal privity issue still exists in some form.

In *Salvador*, the plaintiff allegedly suffered a considerable loss of hearing as a result of an exploding steam boiler manufactured by the defendant and sold by the retailer defendant to the plaintiff's employer. With the elimination of vertical privity by *Kassab*, the horizontal privity question paralleled the issue raised in *Hochgertel*

259. 422 Pa. at 390, 221 A.2d at 324, *quoting* UNIFORM COMMERCIAL CODE § 2-318.

260. *Id.*

261. Murray, *supra* note 7, at 404. "The opinion is an illustration of how courts attempt to do justice by squeezing meritorious cases into acceptable categories."

262. Miller v. Preitz, 422 Pa. 383, 403, 221 A.2d 320, 330 (1966). Section 2-318 "permits the developing case law in each jurisdiction to determine *how far* the extension of the warranties may go *or* whether *any* privity requirement should be retained." *Id.* at 405, 221 A.2d at 331.

263. 319 A.2d 903 (Pa. 1974), *aff'g* 224 Pa. Super. 377, 307 A.2d 398 (1973).

eleven years before. Finding *Kassab*'s rationale equally applicable to both privity defenses, the superior court, per Judge Cercone, rejected the manufacturer's preliminary objections that the plaintiff was without standing to maintain his action for breach of implied warranty.

The supreme court agreed with Judge Cercone's assessment of *Kassab's* impact. Subsequent to the *Hochgertel* decision, section 402A and its accompanying social policy had been adopted by the Pennsylvania Supreme Court, and Pennsylvania's law of products liability had made substantial advances in the area of consumer protection.[264] To have eliminated privity in *Hochgertel* would have made the manufacturer a "guarantor" of his product and would have led to "harsh and unjust results."[265] By the time of the *Salvador* decision, however, it was obvious that injustice to plaintiffs would likewise result from the retention of the requirement.

If one were to ask *why* the plaintiff would suffer so dramatically from an adverse decision by the court, a superficial answer would be forthcoming: "To permit the result of a lawsuit to depend solely on the caption atop plaintiff's complaint is not now, and has never been, a sound resolution of identical controversies."[266]

Interestingly, while the co-extensive recovery theory was sufficient to resolve the privity issue, its adoption has left in its wake a perplexing and unresolved issue. Professor Murray has suggested that the adoption of the co-extensive theory requires a uniform period of limitations for a product-related personal injury action under both section 402A and the Code.[267] Indeed, *Salvador* presented this issue, for the plaintiff had filed a summons in assumpsit some three years, ten months and seven days after the injury-producing explosion. By that time the two year personal injury statute of limitations applicable to actions for strict liability in tort had run.[268] While the superior court implied by citing *Gardiner v. Philadelphia Gas Works*,[269] that the Code's four year statute of limitations[270] was appl-

264. *Id.* at 908.

265. *Id.* at 907.

266. Kassab v. Central Soya, 432 Pa. 217, 229, 246 A.2d 848, 853 (1968).

267. Murray, *Products Liability—Another Word*, 35 U. PITT. L. REV. 255, 260 (1973).

268. PA. STAT. ANN. tit. 12, § 34 (1953).

269. 413 Pa. 415, 197 A.2d 612 (1964).

270. UNIFORM COMMERCIAL CODE § 2-725. The four-year period commences when the cause of action has accrued, which is at the moment of the breach, "regardless of the aggrieved party's lack of knowledge of the breach . . . . " *Id.* In Rufo v. Bastian-Blessing Co., 417 Pa.

icable to this breach of warranty case,[271] the supreme court, on appeal, did not deal with the issue.

Ironically, the "legal symmetry" which Justice Roberts sought to achieve in *Kassab* and *Salvador*, in actuality, has produced the "anomalous situation" which he desired to avoid.[272] Since *Salvador* reached the supreme court on preliminary objections in the nature of a demurrer, it is not inconceivable that the supreme court justices will once again find *Salvador* argued before them on the issue of statute of limitations. This should bring the court to the realization that the establishment of a co-extensive relationship between strict liability in tort and breach of warranty in product-related personal injury litigation will demand strenuous legal research and attention to all facets of products liability.

Observations

Parting reference to the Code's express extension of its warranty protection to the designated beneficiaries and Justice Roberts' "absolute limit" language in *Kassab* entails little theoretical grappling. The former, in accordance with the manifest intention of the drafters, is not binding, and the latter was obviously an imprecise statement in clear contradiction with his concurring and dissenting opinion in *Miller*.

As a consequence of the adoption of strict liability in Pennsylvania, the manufacturer has been charged with full responsibility for his products' safety. Both Restatement (Second) of Torts, Section 402A and the Code make the manufacturer a guarantor of his products, and are founded upon overlapping policies. "Why then should the mere fact that the injured party is not himself the purchaser deny recovery?"[273] *Kassab* plainly answers that it should not. *Salvador* concurs.

107, 113 & n.3, 207 A.2d 823, 826 & n.3 (1965), the court stated that the period runs, not from the date of the occurrence of the accident, but from the time delivery of the goods was tendered. Whatever logical connection must invariably exist between tender of delivery and the typical personal injury situation defies explanation. To find "substantial change," the absence of which must be proven by the plaintiff in his cause of action under section 402A, from the mere passage of time is a *non sequitur*.

271. Salvador v. Atlantic Steel Boiler Co., 224 Pa. Super. 377, 386, 307 A.2d 398, 403 (1973).

272. Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903, 907-08 (Pa. 1974); Kassab v. Central Soya, 432 Pa. 217, 229-31, 246 A.2d 848, 853-54 (1968).

273. Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903, 907 (Pa. 1974).

The difficulty with abolishing horizontal privity upon the identical rationale which brought about the passing of its vertical counterpart is that in reality the two can be distinguished. They are simply brothers, not twins. *Kassab*'s solid foundation will not support full elimination of the horizontal privity defense.

Undoubtedly *Salvador* was correctly decided. Under usual circumstances, a manufacturer expects his machinery and materials to be used by the purchasing employer's employees, who would be the ones susceptible to personal injury from a defectively manufactured product. With regard to any implied warranty, the employee stands in the shoes of his employer.[274] Indeed, the conception of an employer in its corporate form receiving personal injuries is ludicrous. Accordingly, as a matter of public policy and accommodation to section 2-318, the employee must be considered a member of the employer's "industrial family."[275]

Whether the same conclusion can be reached for individuals further along the horizontal plane remains unresolved. Merely to state that horizontal privity was weakened by *Salvador* does not solve the issue with respect to non-employee bystanders,[276] recipients of services,[277] passengers in automobiles[278] and airplanes,[279] rescuers,[280] non-purchasing customers,[281] donees,[282] lessees of goods,[283] bailees,[284] ten-

274. Speed Fastners, Inc. v. Newson, 382 F.2d 395, 398 (10th Cir. 1967) *noted* in both *Salvador* and *Kassab*; *accord*, 2 AMERICAN LAW OF PRODUCTS LIABILITY § 10:22, at 378 (2d ed. 1974).

275. Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 347, 353 P.2d 575, 581, 5 Cal. Rptr. 863, 869 (1960).

276. *E.g.*, Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (1965); Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965). *See* Note, *Strict Liability and the Bystander*, 64 COLUM. L. REV. 916, 924-27 (1964); Note, *Piercing the Shield of Privity in Products Liability—A Case for the Bystander*, 23 U. MIAMI L. REV. 266 (1968).

277. *E.g.*, Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); Graham v. Bottenfield's Inc., 176 Kan. 68, 269 P.2d 413 (1954); Gimino v. Sears, Roebuck & Co., 308 Mich. 666, 14 N.W.2d 536 (1944).

278. *E.g.*, Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961).

279. *E.g.*, Public Adm'r v. Curtiss-Wright Corp., 224 F. Supp. 236 (S.D.N.Y. 1963); Seigel v. Braniff Airways, Inc., 204 F. Supp. 861 (S.D.N.Y. 1960); Middleton v. United Aircraft Corp., 204 F. Supp. 856 (S.D.N.Y. 1960).

280. *E.g.*, Guarino v. Mine Safety Appliance Co., 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969).

281. *E.g.*, Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964); Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956); Loch v. Confair, 361 Pa. 158, 63 A.2d 24 (1949).

282. *E.g.*, Blarjeske v. Thompson's Restaurant Co., 325 Ill. App. 189, 59 N.E.2d 320 (1945); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); *cf.* Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962), *aff'g* 198 F. Supp. 78 (D. Hawaii 1961) (borrower). *See also* Nemela v. Coca-Cola Bottling Co., 104 S.W.2d 773 (Mo. Ct. App. 1937).

283. *E.g.*, Simpson v. Powered Prods., Inc., 24 Conn. Supp. 409, 192 A.2d 555 (1963);

ants,[285] vendees of realty,[286] trespassers,[287] thieves,[288] unborn children[289] and other potential plaintiffs which has long plagued negligence law. Following the judicial treatment of the duty question in negligence law would not be unwarranted. The public policy issues raised by the duty question necessarily entail step-by-step advances as a requisite to achieving a socially and economically just scheme which fairly balances the competing interests involved in compensating products-related injuries.

Through the adoption of section 2-318, the legislature has cast a sales act into the arena of tort recovery. Consequently, sales law must embrace the concept of the foreseeable plaintiff which had previously been confined to negligence law. Professor Murray's "any contemplated injured party"[290] or Justice Roberts' "foreseeable ambit of expectation"[291] standards would meet the requirements of the societal interest in compensating the plaintiff who "it is reasonable to expect . . . may use, consume or be affected by the goods."[292]

The *Salvador* court declared that the Code was not dispositive of this issue of horizontal privity, obliquely basing its conclusion on the rationale in *Kassab*. As prescribed by Comment 3, the determination of the vertical and horizontal privity issues was gleaned from the "developing case law."[293] And, subsequent horizontal inquiries by the Pennsylvania courts will similarly be guided by the progression of law in tune with the demands of public policy. With respect

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Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); *cf.* Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965).

284. *E.g.*, Heilman v. Hertz Corp., 306 F.2d 100 (5th Cir. 1962).

285. *E.g.*, Fakhoury v. Magner, 25 Cal. App. 3d 58, 101 Cal. Rptr. 473 (1972). *But see* Barry v. Ivarson, Inc., 249 So. 2d 44 (Fla. Ct. App. 1971).

286. *Cf.* Pollard v. Saxe & Yoles Dev. Co., 43 U.S.L.W. 2094 (Cal. Aug. 20, 1974); Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 360 P.2d 897, 12 Cal. Rptr. 257 (1961).

287. *See* note 204 *supra*, at Comment 3.

288. All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay . . . .

PA. CONST. art. 1, § 11.

289. *E.g.*, Harley v. General Motors Corp., 97 Ga. App. 348, 103 S.E.2d 191 (1958).

290. This concept, as well as other thought-provoking issues, especially the application of the Code's statute of limitation, were discussed by telephone conversation with Professor Murray early in September, 1974.

291. Miller v. Preitz, 422 Pa. 383, 415, 221 A.2d 320, 336 (1966) (concurring and dissenting).

292. UNIFORM COMMERCIAL CODE § 2-318.

293. Salvador v. Atlantic Steel Boiler Co., 319 A.2d 903, 905, 908 (Pa. 1974); Kassab v. Central Soya, 432 Pa. 217, 232-34, 246 A.2d 848, 855-56 (1968).

to horizontal privity, the specification of the third party beneficiaries in section 2-318 is obviously no longer exclusive. The enumeration is merely excess baggage which appears to be an innocuous vestige of the citadel of privity. However, a pernicious quality lingers, for the section applies only to "injuries in person" as opposed to (1) Alternative C to section 2-318 which follows the modern trend of strict liability "in extending the rule beyond injuries to the person" to any injury resulting from a breach of warranty[294] and (2) section 402A which allows recovery "for physical harm thereby caused to the ultimate user or consumer, or to his property . . . . "

This legislative disclaimer of property damage and economic loss with respect to the purchaser's family, household and house guests is totally incongruous with the Code's commercial context. Admittedly, enumerated or unenumerated nonprivity plaintiffs should not be entitled to recover for economic loss unless those damages resulted from circumstances which the manufacturer or other seller had or should have reasonably contemplated.[295] However, the drafters' fear of allowing the nonprivity plaintiff to recover property damages is unfounded in reality, for both personal and property damage arise out of commonly foreseeable circumstances.[296]

To make the plaintiff's recovery stand upon any foundation other than foreseeability in a case of product-related injury would produce unjust and inconsistent results. Presently, in actions for breach of warranty, the *purchaser* can recover for all nonspeculative harm caused by the defective product;[297] the section 2-318 *enumerated*

294. *See* note 206 *supra*; UNIFORM COMMERCIAL CODE § 2-318, Comment 3.

295. WHITE & SUMMERS, *supra* note 135, at 324, 334 (accepting the doctrine of Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854)).

296. "Many non-privity plaintiffs who today seek recovery for property damage now find themselves in much the same position as those who seek recovery for personal injury." WHITE & SUMMERS, *supra* note 135, at 332.

At the present time, the trend in Pennsylvania is to minimize any distinction between personal injury, property damage and economic loss in both strict liability and breach of warranty approaches. In an unreported opinion, Lockhart Iron & Steel Co. v. Cyclops Corp., Civil No. 3424 January Term, 1974 (C.P. Allegh., Pa., July 18, 1974), the court, per Louik, J., interpreted a parenthetical comment by Justice Roberts in *Kassab* with respect to this very point. Justice Roberts considered not only personal injury and property damage, as expressly included in section 402A, but "all of the harm" recompensable in strict liability in tort. Kassab v. Central Soya, 432 Pa. 217, 231 n.7, 246 A.2d 848, 854-55 n.7. Though noting that some of the judges in *Miller* and Webb v. Zern considered economic damages solely recompensable under the Code, Judge Louik cited Justice Roberts' opinion and footnote 7 to deny the defendants' preliminary objection that plaintiff may not recover his sole claim of economic loss under section 402A.

297. UNIFORM COMMERCIAL CODE §§ 2-714 to -715.

beneficiaries can recover for only their personal injuries.[298] The issue arises as to the extent of permissible recovery by *unenumerated* beneficiaries. Incredibly, it would seem that nothing would preclude the *unenumerated* from being able to recover to the same extent as a purchaser, since they are not constrained by the section's limitation to recovery for personal injuries. This, however, would reach an absurd result by allowing certain members of the horizontal plane the right to greater recovery than others simply because they were *not* expressly granted protection by the legislature. To afford the unenumerated greater protection by virtue of their originally unprotected character is another "anomalous situation" which the Pennsylvania Supreme Court has sought to avoid in the law of products liability. By granting the plaintiffs in *Kassab* rights of action for economic harm and implying that in the appropriate case property damage would also be recompensable, the court has placed the vertical nonprivity plaintiffs in the same status as the purchaser. Whether this rationale will again be utilized for enumerated and unenumerated plaintiffs along the horizontal plane is yet to be resolved.

Either legislative abrogation of section 2-318, allowing section 402A to rightfully preempt the field of products liability, or legislative adoption of Alternative C would accomplish a result consistent with the demands of social policy. In the absence of such activity, the courts should pursue the Pennsylvania Supreme Court's declared purpose to make recovery for products-related injuries under either section 402A or the Code co-extensive.

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298. *Id.* § 2-318, Alternative A maintains the distinction between property damage and personal injury. *See Id.* Comment 3; WHITE & SUMMERS, *supra* note 135, at 332-33.