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Section 2-318 of the UCC: the Sleeping Giant

William Michael Karnes*

THE ACCEPTANCE, APPLICATION, AND DEVELOPMENT of Section 2-318 of the Uniform Commercial Code¹ has caused more trouble and confusion than the appearance of Darwin's theory of evolution in Tennessee.² Overlooking the obvious possible solution of amending Section 2-318, most states have retained a written but unexercised statute and thereby compelled courts to stretch, bend and squeeze breach of warranty into the realm of strict liability in tort. Section 402A of the *Restatement (Second) of Torts* reads:

§ 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 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.

Although Section 402A of the *Restatement (Second) Torts* and Section 2-318 in an amended form may ultimately achieve similar results, why plod through the privy quagmire or circumvent it with strict liability in tort when Section 2-318 in an amended form will provide a statutory route which will alleviate the vexation?

Growth and Development

Prior to the twentieth century, the manufacturer-seller dealt face to face with the consumer. With the onslaught of mass production, there arose the need for a middleman retailer to facilitate the manufacturer's sale to the ultimate consumer. Because the privy requirement of con-

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¹ The Uniform Commercial Code (1968 version) hereinafter referred to as "the Code" or "the UCC."

² *Scopes v. State*, 152 Tenn. 424, 278 S.W. 57 (1925); 154 Tenn. 105, 289 S.W. 363 (1927).

tracts provided insulation for manufacturers and sellers³ from liability for defects in products, a crisis began to evolve within the law of sales. Since the law of sales failed to deal with the supervention of the retailer, Justice Cardozo held in *McPherson v. Buick Motor Company*,⁴ that a manufacturer is strictly liable in tort regardless of privity.

The door was now opened for consumer protection by applying strict liability in tort. State supreme courts, recognizing the need for prompt action in the area of unwholesome food, confused tort and warranty by cloaking consumer recovery under the guise of "public policy."⁵

In *Jacob E. Decker & Sons, Inc. v. Capps*,⁶ Jacob E. Decker & Sons, Inc. manufactured, packaged and sold sausage to a retail merchant in Texas. The Capp family purchased and consumed the sausage which was contaminated, and as a result one of the children died and the other members became seriously ill. The jury found that neither the manufacturer nor the consumers were negligent, but the Supreme Court of Texas held the manufacturer liable "under an implied warranty imposed by operation of law as a matter of public policy."⁷

Since the application of tort liability to unwholesome food, strict liability in tort has exploded into almost every sphere of manufacturing and sales.

In 1964, the Fifth Circuit Court of Appeals extended the doctrine of the *Decker* case in *Putman v. Erie City Manufacturing Co.*⁸ The defendant company, a Pennsylvania corporation, assembled a wheel chair and sold it to a Texas retail druggist who in turn rented the wheel chair to Mr. Putman. While Putman was using the chair, a wheel came off as the result of a defective fork stem and Putman refractured both his legs.

By applying *Erie Railroad Co. v. Tompkins*,⁹ the Circuit Court felt the Supreme Court of Texas would in all probability have extended liability in the present situation and declared the manufacturer and assembler of a rented wheel chair strictly liable in tort to the injured plaintiff.

It should be noted, however, that the *Restatement (Second), Torts* instead of being a restatement of general law in the United States is

³ *Gearing v. Berkson*, 223 Mass. 242, 11 N.E. 785 (1916) (adulterated pork chops); *Lebourdais v. Vitrified Wheel Co.*, 194 Mass. 341, 80 N.E. 482 (1907) (Warranty does not run with goods).

⁴ *McPherson v. Buick Motor Company*, 217 N.Y. 382, 11 N.E. 1050 (1916).

⁵ *Jacob E. Decker & Sons, Inc., v. Capps*, 139 Tex. 609, 164 S.W. 2d 828 (1942); Prosser, *Law of Torts*, § 97 p. 673 (3rd ed. 1964), summary of policy argument.

⁶ *Jacob Decker & Sons, Id.* at 828.

⁷ *Id.* at 829.

⁸ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

⁹ *Putnam v. Erie City Manufacturing Co.*, 338 F. 2d 911 (5th Cir. 1964).

really a prognostication of what the law is to become.¹⁰ At present, tort products liability runs the gambit from animal food¹¹ to permanent wave solutions¹² to vaccines.¹³

Inadequate Legislation Caused Confused Application

With the adoption of Article 2 of the UCC, the tort approach to product liability cases has been modified. This article has arisen to fill the void between contract and tort in the law of sales; since Article 2 mingles contract law and tort law, it is *sui generis*.

After the code was adopted, confusion arose in the application of Section 2-318 and in its relationship to tort. In Pennsylvania, for example, confusion arose in *Miller v. Preitz*¹⁴ when the court could not reconcile vertical and horizontal privity¹⁵ with Section 2-318¹⁶ of the Code. The majority opinion stated that an infant who was scalded to death by a defective vaporizer was not in privity with the manufacturer or seller since his aunt had purchased the vaporizer. The court went on to state that even the aunt could not have sued the remote manufacturer-seller for breach of warranty because the purchaser could only sue the remote manufacturer-seller in cases involving goods for human consumption. In such instances, strict liability in tort must be applied to circumvent the requirement of privity of contract in warranty actions. Thus, the court interpreted Section 2-318 as being very restrictive and expressly listing exceptions to the privity requirement.

Two years later, the *Miller* case requirement of vertical privity of contract was overruled in *Kassab v. Central Soya*.¹⁷ Here the court

¹⁰ Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. Det. L.J. 343, 344 (1965).

¹¹ McAfee v. Cargill Inc., 121 F. Supp. 5 (S.D. Cal. 1954).

¹² Rogers vs. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612 (1958).

¹³ Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

¹⁴ *Miller v. Preitz*, 422 Pa. 383, 221 A. 2d 320 (1966): Defective vaporizer purchased by aunt caused death of nephew living next door.

¹⁵ "Vertical privity exists where the actual purchaser proceeds against his remote vendor. His direction is upward, through the series of sales which culminated in his purchase. Horizontal privity on the other hand, begins with the user of the product and ends with the ultimate purchaser. The user's movement is across as he attempts to reach the legal position occupied by the purchaser." Swartzkopf, *Products Liability: Employees and the Uniform Commercial Code*, 68 Dick L. Rev. 444, 446 (1963).

¹⁶ Purdon's Penna. Stats. Ann., Title 12A (1964). Section 2-318, Third Party Beneficiaries of Warranties Express or Implied.

Alternative A

"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."

¹⁷ *Kassab v. Central Soya*, 432 Pa. 217, 246 A. 2d 848 (1968). Allowed purchaser of defective cattle feed to recover against remote manufacturer under § 2-318.

reinterpreted Section 2-318 and decided that the "natural person who is in the family or household of his buyer, or who is a guest in his home"¹⁸ provided limitations to recovery under horizontal privity. The court reasoned that Section 2-318 was silent and did not set any limitations upon recovery under vertical privity. Referring to the Code's comment¹⁹ permitting freedom of developing case law, the court declared that a purchaser could recover against a remote seller. However, the court clearly reiterated that the *Kassab* case in no way expanded recovery pertaining to a person who was in horizontal privity.

The *Kassab* case is an excellent example of employing case law to expand a statute to its limits without legislating. However, neither the Pennsylvania Supreme Court nor any other state supreme court may expand consumer protection under the Code in states which persist in retaining Section 2-318, Alternative A.²⁰ Consider for example, Ohio, which has retained but not used this statute. The Ohio Supreme Court, shackled by the privity morass, recognized a tort action based on breach of implied warranty. In *Lonzrick v. Republic Steel Corp.*,²¹ a subcontractor's ironworker was injured on a construction site when certain defective steel joists which had been sold by the defendant to the general contractor collapsed. Since Section 2-318 Alternative A is so restrictive, the plaintiff was compelled to pursue a cause of action in tort for breach of implied warranty of fitness for use. As long as Section 2-318 Alternative A is retained, courts will be compelled to provide an injured consumer with a tort remedy or else no remedy at all.

If At First You Don't Succeed . . .

In view of developing case law in the area of products liability, the drafters of the Code subsequently provided Alternatives B²² and C to Section 2-318. These alternatives are meaningless unless they are adopted by state legislatures. Alternative C is of sufficient import so as not to be relegated to a footnote:

¹⁸ *Supra* n. 16.

¹⁹ "Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." UCC § 2-318, Cmnt. 3.

²⁰ *Supra* n. 16.

²¹ *Lonzrick v. Republic Steel Corporation*, 6 Ohio St. 2d 227, 218 N.E. 2d 185 (1966).

²² Section 2-318, Third Party Beneficiaries of Warranties Express or Implied.

Alternative B

"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 warranty. A seller may not exclude or limit the operation of this section."

SECTION 2-318. THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS OR IMPLIED.

Alternative C.

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

As stated before, Article 2 of the Code intended to complement, rather than supplant, tort law in the area of sales. However, Section 2-318 may supersede Section 402A of the *Restatement*. This purpose is explicitly mentioned in the comments to the Section.²³

Alternative C, being a hybrid of torts and contract is a statutory declaration of strict products liability.

The power to solve the privity dilemma lies unused in the hands of many state legislatures. Since Section 2-318, Alternative A has not adequately dealt with the privity problem, state legislatures should develop Section 2-318. States such as Ohio,²⁴ Pennsylvania,²⁵ New York,²⁶ and Illinois²⁷ lack any case law development of the section beyond its narrow confines elicited by the Supreme Court of Pennsylvania. The conclusion is that state courts are at a loss to apply Section 2-318 until state legislatures untie their hands.

Eliminating Privity

Rather than adopt the 1962 Official Text of Section 2-318 of the UCC which did not include Alternatives B and C, the state legislature of Virginia foresaw the problems which would plague courts and plaintiffs. Since the Virginia Supreme Court of Appeals was strictly adhering to the privity requirement, except cases dealing with sealed food containers²⁸ and inherently dangerous products,²⁹ the state legislature adopted their own version of Section 2-318 titled: "When Lack of Priv-

²³ "The third alternative goes further, following the trend of modern decisions as indicated by Restatement of Torts 2d § 402A (Tentative Draft No. 10, 1965) in extending the rule beyond injuries to the person.

²⁴ Ohio Rev. Code, Ann., Title 13, § 1302.31 (1962).

²⁵ *Supra* n. 15.

²⁶ McKinney's Consolidated Laws of New York Ann., Book 62½, Part I, § 2-318 (1964).

²⁷ Smith-Hurd Illinois Annotated Statutes, Chapter 26, § 2-318 (1963).

²⁸ *Swift & Co. v. Wells*, 201 Va. 213, 110 S.E. 2d 203 (1959).

²⁹ *General Bronze Corp. v. Kostopulos*, 203 Va. 66, 122 S.E. 2d 548 (1961).

ity No Defense In Action Against Manufacturer or Seller of Goods.”³⁰ The result of this legislation was the imposition of strict products liability under the Code “if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.”³¹

In 1967, The District Court of Maryland stated in *Debbis v. Hertz Corp.*,³² that Section 2-318 of the UCC enacted in Maryland in 1964 eliminated the privity requirement only with regard to a buyer’s family, household, and guests. In this case, Mrs. Debbis was suing for the wrongful death of her husband whose automobile was struck from the rear by an automobile with defective brakes which had been leased to a third party by the defendant corporation. The District Court stated that the plaintiff had to amend her complaint and pursue an action in tort rather than breach of an implied warranty of fitness. The court reasoned that the lack of privity between the plaintiff’s deceased husband and the defendant lessor precluded her from pursuing the breach of warranty action.

The state legislature, in an effort to rectify the restriction of their statute, amended Section 2-318 in 1969 by adding the words “of any other ultimate consumer or user of the goods or person affected thereby,”³³ to the first sentence. As a result, recovery for breach of warranty is no longer hampered by the privity requirement which has insulated manufacturers and remote sellers for over a century and a quarter.³⁴

Attempted Efforts To Find A Solution

The other solution to Section 2-318, Alternative A is to follow the examples set by California and Utah. When the UCC was adopted by the California State Legislature in 1963, Section 2-318 was not

³⁰ Code of Virginia, § 8.2-318. When Lack of Privity No Defense in Action Against Manufacturer or Seller of Goods.

“Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods; . . .” (Effective June 30, 1962).

³¹ *Id.* Cf. Wyoming Statutes § 34-2-318 (1969 Cumulative Supplement) for similar legislation.

³² *Debbis v. Hertz Corp.*, 269 F. Supp. 671 (D. Md. 1967).

³³ Annotated Code of Maryland Title 8B, § 2-318. Third Party Beneficiaries of Warranties Express or Implied.

“A seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home or any other ultimate consumer or user of the goods or person affected thereby 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.” (1969 Cumulative Supplement).

³⁴ The privity-of-contract doctrine is considered to have materialized in the case of *Winterbottom v. Wright*, 10 M & W 109, 152 Eng. Rep. 402 (Ex 1842).

enacted. The comment following the omission stated that the Section "in its present form"³⁵ was not suitable and would be "a step backward"³⁶ from the developing case law on products liability. When Utah adopted the Code in 1966, it omitted Section 2-318 without comment as to why it was deleted.³⁷

Thus, California and Utah have chosen the *Restatement (Second), Torts* approach in imposing strict products liability. In 1962, the Supreme Court of California abolished the privity requirement by declaring in *Greenman v. Yuba Power Products*,³⁸ that the manufacturer of a defective combination power tool was strictly liable in tort for the injuries sustained by the user.

Was this decision a "choice" between a sales remedy and a tort remedy, or was it really a question of strict liability in tort or no liability at all? Was not the Supreme Court of Ohio subsequently faced with a similar "choice" of tort liability or no liability in *Lonzrick v. Republic Steel Corp.*³⁹ because of the insufficiency of Section 2-318, Alternative A?

Conclusion

The means to alleviate the tort-contract dichotomy is present in Alternatives B and C of Section 2-318 of the Code. The legal fictions and public policy arguments may be reduced to statutory reality if state legislatures would seize the initiative and recognize breach of warranty in the law of sales.

California's argument for not enacting Section 2-318⁴⁰ is no longer valid since the subsequent addition of alternatives B and C to Section 2-318. Either alternative or a reasonable facsimile would greatly enhance and facilitate case law development in products liability. Since Utah was prompted to omit Section 2-318 without any explanation, that state should now seize the opportunity to enact an alternative to Section 2-318 for the purpose of codifying and facilitating consumer protection.

For those states retaining the original draft of Section 2-318, the only way to disperse the resultant confusion is to amend and clarify the source of the trouble. "The law cannot be defective in dispensing justice."⁴¹

³⁵ It should be noted that "in its present form" referred to section 2-318 without Alternatives B and C which were subsequently added by the drafters of the Code.

³⁶ West's Ann. Cal. Codes, Commercial § 2-318, Cmmt 1.

³⁷ Utah Uniform Commercial Code, 70A-2-318 (1966).

³⁸ *Greenman v. Yuba Power Products*, 27 Cal. Rptr. 697, 377 P. 2d 897 (1962).

³⁹ *Supra* n. 21.

⁴⁰ *Cf. Supra* n. 35 and n. 36.

⁴¹ *Lex deficiere non potest in justitia exhibenda*. Black's Law Dictionary, p. 1054, (4th Ed. Rev. 1968).