

agreement with Studebaker at an unprofitable price, when on the surface it appears that neither a business benefit nor a possible price discrimination in violation of the Robinson-Patman Act can thereby result, seems entirely unreasonable. Thus, when dealer-wide offers continued and where there was an implication of a secret dealing between the defendants, such facts provide an instance where the requirement of actual purchase should be waived.²⁵ Rather, it is suggested that the plaintiff need only establish that it would have become a purchaser at the special lower price offered to its competitor.

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Uniform Commercial Code—Products Liability—Requirement of Privity in the Breach of Warranties.—*Wilson v. American Chain & Cable Co.*¹—Action to recover damages for personal injuries sustained by the plaintiff when thrown from a rotary lawn mower into the path of its revolving blade, as the machine came to a sudden stop when striking an incline. The machine was manufactured by the defendant and had been purchased from a local dealer by the plaintiff's father. Separate theories of liability were pleaded and bottomed on the alleged negligence of and breach of warranty by the manufacturer. It was not specified whether the warranties allegedly breached were express or implied. The defendant moved to dismiss the action as to breach of warranty on the ground that there was no privity of contract between the defendant and the injured party. The plaintiff moved to strike, asserting that in Pennsylvania a lack of privity is not a defense to a suit by a subpurchaser or members of his family against a manufacturer on breach of warranty principles. **HELD:** The defense of lack of privity could not, under Pennsylvania law, be stricken, where there was no showing as to whether the warranty was implied or express, and where no showing had been made as to whether the manufacturer had intended either an express or implied warranty to flow through the conduit of a contractual chain to a subpurchaser and his family.

The Uniform Commercial Code states that a *seller*² impliedly war-

²⁵ It has been held that it was not necessary for a customer to make a purchase at the discriminatory higher price: "in order to attain the status of a competing purchaser under the Act, as its failure to do so was directly attributable to defendant's own discriminatory practice." *American Can Co. v. Bruce's Juices Inc.*, 187 F.2d 919 (5th Cir. 1951).

¹ 216 F. Supp. 32 (E.D. Pa. 1963).

² Section 2-103 of the UCC defines "seller" as "a person who sells or contracts to sell goods." However, it would appear that this definition is broad enough to encompass suits against the manufacturer, even though he is not the immediate seller. Professor Del Duca in his article *Extension of Warranty Protection Under Section 2-318*, appearing in the B.C. U.C.C. CO-ORD (1963) 415, suggests: "In sustaining the son's cause of action against the manufacturer, the court *could* have ruled that since the purchaser-father had warranty protection against the manufacturer this warranty protection also extended to the beneficiary-son by virtue of Section 2-318." (Emphasis supplied.) The case under analysis was *Allen v. Savage Arms Corp.*, 52 Luz. L. Reg. R. 159 (Pa. 1962). Thus one is confronted with a manufacturer, a wholesaler and a

rants that the goods sold are merchantable and fit for the intended purpose.³ Unless this implied warranty is specifically excluded,⁴ it applies as between seller and purchaser. Under an implied warranty count, the purchaser need only prove that his injury resulted from reasonable use or exposure to the goods. He need not prove that the seller was negligent. If the person injured by the alleged defective goods was not the purchaser, but was in the purchaser's family or household or a guest in his home and would reasonably be expected to use or be affected by the goods, the Uniform Commercial Code extends the implied warranty received by the purchaser, and any express warranties that the purchaser may have received, to the injured party.⁵ However, when, as here, the suit is by the purchaser or a member of his household against a party that is not the *immediate* seller, the absence of contractual privity may, in a given jurisdiction, be determinative. The Code is neutral on this point, leaving the applicable state law and cases to resolve the question.⁶

The states which allow the imposition of the defense of lack of privity hold that since there was no contractual obligation between a manufacturer and the retail buyer or between a seller and a person other than the retail buyer, who does not come within the class protected by Section 2-318 of the Code, the implied warranty of merchantability and fitness does not extend to the injured person. This of course assumes that the manufacturer, in the former case, did not give an express warranty to the ultimate consumer,

retailer all involved in the goods that eventually come into the hands of the retail buyer. This is the so-called "vertical line" of distribution. The goods, now in the hands of the retail buyer, may also pass to a sub-buyer, a successor, a guest, a relative, a member of the household, etc., before the defective goods result in injury to someone. This is the so-called "horizontal line" of distribution.

³ Uniform Commercial Code (UCC), Section 2-314. (1) "Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . . (2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and . . . (c) are fit for the ordinary purposes for which such goods are used; and . . . (f) conform to the promises or affirmations of fact made on the container or label if any."

⁴ UCC Section 2-316(2) "to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous."

⁵ *Id.* at Section 2-318 "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.*" (Emphasis supplied.) Comment 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.' It seeks to accomplish this purpose without any derogation of any right or remedy resting on negligence."

⁶ *Id.* at Section 2-318, Comment 3 "Beyond this, the section 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."

and that the retailer, in the latter instance did not warrant that the express or implied warranties given by him to the buyer would extend to any other person. In the present case, the plaintiff did not assert that any express warranty was given by the manufacturer to the retail buyer, and thus the court's ruling against plaintiff's motion to strike the defense of lack of privity must be read within this narrow factual framework. Counsel for the plaintiff based his motion to strike the manufacturer's defense of lack of privity on the ground that the defense of lack of privity in an implied warranty action had been abolished in Pennsylvania. The court's response was less than unequivocal: "We cannot say . . . that lack of privity is not a valid defense under Pennsylvania law."⁷

The defense of lack of privity had its origin in 1842 in the English case of *Winterbottom v. Wright*,⁸ and was subsequently adopted by almost all American jurisdictions in actions based both upon negligence and breach of warranty. The tide began to turn in 1916 with the *McPherson v. Buick*⁹ case, where it was held that an injured remote purchaser could sue a negligent manufacturer. Today almost every jurisdiction has followed the *McPherson* case in this regard.¹⁰ The Supreme Court of Pennsylvania in the case of *Henderson v. National Drug Co.*¹¹ approved the doctrine enunciated in the *McPherson* decision: "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else."¹²

While it is apparent that plaintiff, in the present case, can sue the manufacturer on a negligence count without proof of privity between the parties, there are strong doubts as to the adequacy of this remedy. The burden of proof is generally on the plaintiff, and this may prove to be beyond his reach—even when aided by such things as the *res ipsa loquitur* doctrine and extensive discovery procedures. He must not only prove that the mower

⁷ Supra note 1, at 35.

⁸ 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

⁹ 217 N.Y. 382, 111 N.E. 1050 (1916).

¹⁰ Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)* 69 Yale L.J. 1099, 1103-10 (1960). The author comes to the conclusion that the *McPherson* doctrine has been adopted in all but two states; Hursh, *Am. Law of Prod. Liab.* § 6:15, p. 533. See also note 13 to this text, p. 533, stating, "As a consequence of the dissatisfaction with the rule, many exceptions to it have been drawn . . . and it has been entirely repudiated in many jurisdictions . . . including the jurisdiction in which it was established. . . ." In support of this statement the note cites *Am. Law of Prod. Liab.* § 6:57, pp. 629-630 discussing the *Winterbottom* case, and citing *M'Alister v. Stevenson* (Eng) 1932 [AC] 562 (HL), frequently cited as the *Donoghue Case*; *Frumer & Friedman, Prod. Liab.* § 5.01, p. 14; § 16.03(2), pp. 378-382.

¹¹ 343 Pa. 601, 23 A.2d 743 (1942); See also, *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888, 891 (E.D. Pa. 1962): "Lack of privity does not bar Duckworth's claim for yet another reason. The jury found that Ford's negligence . . . was a proximate cause of the accident, and it is well settled that privity of contract is not required in an action against a manufacturer based on negligence. *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Foley v. Pittsburg Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949); *Restatement, Torts*, §§ 395, 396." See 1 *Williston, Sales* § 244(a)-(f) (Supp. 1960).

¹² *Id.* at 611, 23 A.2d at 749.

was defective or unsafe, but also that the manufacturer was negligent in this regard. One is not necessarily the concomitant of the other.

The landmark case on the issue of the privity requirement in a warranty action is the decision by the Supreme Court of New Jersey in *Henningsen v. Bloomfield Motors, Inc.*,¹³ where the plaintiff bought an automobile from a local dealer which he gave to his wife. While driving the car, she was injured as the result of an accident caused by a defect in the steering mechanism. There was clearly a lack of any privity between the manufacturer of the car and the injured plaintiff, and thus the action was based on a breach of implied warranty of merchantability and fitness. In sustaining the plaintiff's contention the court stated:

It is important to express the right of Mrs. Henningsen to maintain her action in terms of a general principle. To what extent may lack of privity be disregarded in suits of such warranties? . . . By a parity of reasoning, it is our opinion *that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent.* It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty. . . . Those persons must be considered within the distributive chain.¹⁴ (Emphasis supplied.)

There have been Pennsylvania decisions which, in effect, follow the reasoning of the *Henningsen* case. The 1946 case of *Mannsz v. MacWhyte*,¹⁵ a circuit court of appeals decision applying Pennsylvania law, involved the question of privity as regards a warranty action by individuals other than the purchasers against the manufacturer of the defective goods. In that opinion the court said:

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.*¹⁶ (Emphasis supplied.)

¹³ 32 N.J. 358, 161 A.2d 69 (1960).

¹⁴ 32 N.J. at 388, 161 A.2d at 100. A similar result was reached in Kansas in the case of *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501, 504 (10th Cir. 1959). There the court stated:

The question arises as to whether an implied warranty ran to Berneice, privity between her and Goodrich being absent. . . . Under the law of Kansas an implied warranty is not contractual. It is an obligation raised by the law as an inference from the acts of the parties or the circumstances of the transaction and it is created by operation of law and does not arise from any agreement in fact of the parties. The Kansas decisions are in accord with the general rule laid down in the adjudicated cases. And under the Kansas decisions *privity is not essential where an implied warranty is imposed by the law on the basis of public policy.* (Emphasis supplied.)

¹⁵ 155 F.2d 445 (3d Cir. 1946).

¹⁶ *Id.* at 449, 450.

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Privity of contract in suits against manufacturers to recover for personal injury arising out of a breach of warranty seemed also to be abolished by decisional law in Pennsylvania. The Pennsylvania Superior Court, a court of intermediate state-wide appellate jurisdiction, in the case of *Jarnot v. Ford Motor Co.*,¹⁷ said:

A person, who after the purchase of a thing, has been damaged because of its unfitness for the intended purpose may bring an action in assumpsit against the manufacturer based on a breach of implied warranty of fitness; and proof of a contractual relationship of privity between the manufacturer and the purchaser is not necessary to impose liability for the damage.¹⁸ (Emphasis supplied.)

In the case of *Thompson v. Reedman*,¹⁹ the United States District Court for the Eastern District of Pennsylvania followed the lead, and in fact went one step further than did *Jarnot*. In *Jarnot*, the action was brought by a purchaser in the distributive chain, while in the *Thompson* case, the action for personal injuries was brought by a guest in the car that was driven by the purchaser. The court, while finding Section 2-318 of the Uniform Commercial Code inapplicable, nevertheless held that lack of privity would not preclude the plaintiff from recovering for breach of warranties of merchantability and fitness.²⁰ It is noteworthy in this regard that courts in other jurisdictions had similarly concluded that the requirement of privity in warranty cases had been abolished in Pennsylvania.²¹

If this had been the status of the decisional law in Pennsylvania on this issue, it would appear that the court in the present case had reached an erroneous result in refusing to strike the defense of lack of privity. However, in 1962 the Supreme Court of Pennsylvania handed down its opinion in the case of *Hochgertle v. Canada Dry Corp.*,²² where, unlike *Jarnot*, the injured party was not a buyer in the distributive chain but rather an employee in the purchaser's business. The court held that *the absence of a contractual relationship between the parties barred recovery in a suit for breach of warranty* since the remedy in such cases had been extended only to persons injured by unwholesome food or other articles for human consumption. The court stated:

In no case in Pennsylvania has recovery against the manufacturer for breach of an implied warranty been extended beyond a purchaser in the distributive chain.²³ (Emphasis supplied.)

¹⁷ 191 Pa. Super. 422, 156 A.2d 568 (1959).

¹⁸ Id. at 430, 156 A.2d at 572.

¹⁹ 199 F. Supp. 120 (E.D. Pa. 1961).

²⁰ Id. at 121. The plaintiff tried to bring himself within the coverage of § 2-318. However the court held that: "Plaintiff argues that, since a 'guest in his home' is covered, then a guest in an automobile should be similarly covered. . . . [I]t seems more consistent with the plain meaning of words to understand the comment as leaving this present situation at large. It is too much of a leap it seems to classify a guest passenger in an automobile as a guest in the home."

²¹ *McQuaide v. Bridgeport Brass Co.*, 190 F. Supp. 252 at 254 (D. Conn., 1960); *Mull v. Colt Co.*, 31 F.R.D. 154, 170 (S.D.N.Y. 1962).

²² 409 Pa. 610, 187 A.2d 575 (1963).

²³ Id. at 615, 187 A.2d at 578.

The Supreme Court of Pennsylvania has, in effect, stated that the Federal cases which appeared to abolish the requirement of privity have gone too far.

The court rested its decision on the further ground that recovery in the case of implied warranties is based on the fact that the implied warranty forms part of the consideration and flows from the manufacturer to the purchaser through the "conduit of a contractual chain." This is clearly an inconsistency in terms, for, to abuse the obvious, if the warranties were part of the consideration, then they would be express warranties and could not be implied, for it is assumed in the latter instance that the parties did not rely on them, in concluding their bargain.^{23a}

With the decision in *Hochgertle* and its effect on the present case, the Pennsylvania courts have taken a backward step through the pages of judicial progress. No one will deny the complete change in the structure of our present day economy over that which existed when the courts initially accepted the doctrine of privity.²⁴

As one court has said it:

Even the doctrine of privity, which is the main stumbling block to extending a remedy to consumers generally . . . against a seller or manufacturer . . . has itself been used to extend the remedy to others than the buyer . . . through various expedients . . . such as (a) the theory of a third party beneficiary, or (b) the agency theory, or (c) some other fiction to establish a relationship between the injured consumer and the seller or manufacturer.²⁵

^{23a} Considering for a moment the situation of the plaintiff in the present case—he finds himself in a precarious position. He must overcome the defense of lack of privity by showing that the manufacturer by express warranty (if one exists) intended a warranty to flow through the "conduit of a contractual chain" to the purchaser and his family. If he can prove the former (warranty to the purchaser) but not the latter (warranty extended to members of purchaser's family) he will not succeed, at least on the warranty count. It is the opinion of this writer that § 2-318 of the UCC does not include a manufacturer in the word *seller*, as used in that section. Neither is there any case interpreting that section of the Code which has come to that conclusion. Section 2-103 of the UCC defines "seller" as ". . . a person who sells or contracts to sell goods." Thus to say that a manufacturer fits within this definition would be stretching the point, to say the least. As Comment 3 of Section 2-318 states: "Beyond this, the section is neutral. . . ." However, Professor Del Duca in his article, *Extension of Warranty Protection Under Section 2-318*, published in the B.C. U.C.C. CO-ORD. 415, infers that the word *seller* as used in § 2-318 is broad enough to include "manufacturer" within its definition. On pages 428-29 the author stated: "In sustaining the son's cause of action against the manufacturer the court *could* have ruled that since the purchaser-father had warranty protection against the manufacturer *this warranty protection also extended to the beneficiary-son by virtue of Section 2-318.*" (Emphasis supplied.) The case involved was *Allen v. Savage Arms Corp.*, 52 Luz. L. Reg. 159 (Pa. 1962).

²⁴ 3 B.C. Ind. & Com. L. Rev. 259 (1962) "[A] person harmed by a product could recover for breach of warranty only from his immediate vendor. Although this may have been adequate during the period preceding the industrial revolution, it proved inadequate when industry expanded to a point where manufacturer and consumer, while at remote ends of a long and complex chain of distribution were brought together as a theoretical buyer and seller by modern advertising and marketing practices."

²⁵ *Chapman v. Brown*, 198 F. Supp. 78, 102 (D. Hawaii 1961).

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Indeed, "these exceptions have reached a place in the law where they have almost, if not completely swallowed up the so-called 'rule.'"²⁶

Dean Prosser, in a recent article on the subject, has concluded that seven "spectacular decisions" all decided during 1958 and 1959 completely abolished privity as a requirement for recovery in breach of warranty actions against remote vendors. He stated:

Seven such cases, in so short a time, may very well be . . . a trend. . . . [T]hey give the definite impression that the dam has busted, and those in the path of the avalanche would do well to make for the hills.²⁷

Professor Del Duca in his article on Extension of Warranty Protection Under Section 2-318, states: "Dean Prosser's 1960 prediction of future 'spectacular decisions' augmenting those of 1958 and 1959 has already been substantiated by at least ten such cases. . . ."²⁸

The text writers in the field, along with recent opinions²⁹ and legislation³⁰ in some of the states have brought to light the inappropriateness and injustice of the defense of privity in our present day economy. It is hoped that the remaining "privity" states through their courts or legislatures will take heed of a remark made by Daniel Webster many years ago. "When the mariner has been tossed for many days in thick weather, and on an unknown sea, he naturally avails himself of the first pause in the storm, the earliest glance of the sun, to take his latitude, and ascertain how far the elements have driven him from his true course."³¹ Nevertheless, it has been

²⁶ Hursh, *Am. Law of Prod. Liab.* § 6:16, p. 536.

²⁷ Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1099, 1113 (1960). The seven cases referred to are: *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 *Mich.* 120, 90 *N.W.2d* 873 (1958); *Continental Copper Steel Indus. v. E. C. "Red" Cornelius Inc.*, 104 *So. 2d* 40 (Fla. 1958); *B. F. Goodrich Co. v. Hammond*, 269 *F.2d* 501 (10th Cir. 1959); *Jarnot v. Ford Motor Co.*, *supra* note 17; *Peterson v. Lamb Rubber Co.*, 343 *P.2d* 261 (Cal. App. 1959); *Hinton v. Republic Aviation Corp.*, 180 *F. Supp.* 31 (S.D.N.Y. 1959).

²⁸ *B.C. U.C.C. CO-ORD.* 415, 438 (1963).

To be added to this ever expanding group of ten cases is a recent Connecticut case, *Simpson v. Powered Prods., Inc.*, 24 *Conn. Supp.* 409, 192 *A.2d* 555 (1963), involving a plaintiff who rented a powered golf cart from Gerardi, who had in turn purchased it from a retailer-distributor, who in turn had purchased it from the manufacturer. Plaintiff was injured when the back rest of the cart broke. The court held that since the golf cart was intended for use by the public in the same manner in which plaintiff used it, it would be illogical to allow Gerardi to recover from the retailer and deny a similar right to plaintiff.

²⁹ *Supra* notes 13, 15, 17, 19, 27 and 29.

³⁰ *Supra* note 24. Significant in this regard is the fact that the legislature of Georgia has enacted a statute which, in effect, abolishes the requirement of privity in actions based on a breach of warranty. See *Ga. Code Ann.* § 96-307 (1958).

Warranty of manufacturer to ultimate consumer.

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

1. The article is merchantable and reasonably suited to the use intended.

³¹ Webster's second speech on Foot's resolution.

the purpose of this note to emphasize that Pennsylvania waters have not, as yet, been calmed; and that reconciliation of seemingly conflicting cases can only come on a jurisdiction to jurisdiction, court to court basis, with the ultimate result often turning on the intricacies of the factual framework.

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