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Products Liability: Employees and the Uniform Commercial Code, Section 2-318

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PRODUCTS LIABILITY: EMPLOYEES AND THE UNIFORM COMMERCIAL CODE, SECTION 2-318

Throughout the history of Anglo-American law, courts have been hesitant to hold a defendant to a duty which would unduly restrict either his personal freedom or his economic well-being. The law has always encouraged the expansion of business. This encouragement has had as a by-product a certain amount of injustice to the consumer.

The scope of this Note is to examine the basis of protection afforded the non-buyer third party injured by a defective product where it is reasonably foreseeable that he would use or be affected by the product. Specifically, the Note contemplates an examination of the ability of an injured employee of the purchaser to maintain an action against the seller under the Uniform Commercial Code.

THE PRIVITY REQUIREMENT-TORT

In the days of face-to-face dealing, uncomplicated products and knowledgeable buyers, the prevalent philosophy was *caveat emptor*—let the buyer beware. This philosophy was both fair and necessary to the continued existence of the infant manufacturers then extant. But the courts did place certain basic duties on the seller. At an early date, the courts held that where a seller represented his goods to be something which he was aware they were not, the buyer had a right to rescind the transaction.[1] A duty not to defraud was thus implied by law in every sales transaction. A duty to refrain from negligent manufacture was created in a similar manner. However, every duty must have a limit.

In *Winterbottom v. Wright*,[2] an 1842 English case, the injured driver of a mail coach was not permitted to sue the manufacturer of the alleged defective coach. Although the action was in contract, later courts seized upon the holding as an effective method of restricting the manufacturer's duty in negligence actions. The duty would run no farther than those with whom the defendant had actually contracted.[3] Over the years, the rule became riddled with exceptions as public policy began to favor the consumer.[4]

In 1916 the landmark case of *MacPherson v. Buick Motor Co.*[5] ended this development, making the law of negligent manufacture the same as the law in other negligence areas. Justice Cardozo held that the manufacturer of a motorcar whose wheel disintegrated while being driven by the ultimate purchaser,

1. Cross v. Gardner, 1 Show. 68, 89 Eng. Rep. 453 (1689).
2. 10 M & W 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (1842).
3. *Id.* at 112, 152 Eng. Rep. at 405; Patterson, *Manufacturer's Statutory Warranty: Tort or Contract?*, 10 MERCER L. REV. 272 (1959).
4. Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 140 (1958).
5. 217 N.Y. 382, 111 N.E. 1050 (1916).

had a duty of reasonable care under the circumstances to refrain from negligent manufacture resulting in a foreseeable injury.[6] As a result of the *MacPherson* decision, the privity requirement in tort has been abrogated.[7] The courts have realized that a duty may extend beyond the contract. However, an action in tort still requires that the plaintiff prove the defendant was negligent. The drawback seems to be that corporate defendants are now much larger and the productive process more complex. The task of obtaining such proof is often impossible, despite such plaintiff aids as *res ipsa loquitur*, greater weight is given to circumstantial evidence, and general jury sympathy.[8]

THE PRIVITY REQUIREMENT-CONTRACT

A contract action for damages incurred through the use of a defective product generally revolves around an alleged breach of warranty. The modern theory is that both express and implied warranties are contained in the agreement of sale. This proposition in its later stages of development derives from both the Uniform Sales Act[9] and the Uniform Commercial Code.[10] If the warranty is contained in the contract, then the hornbook rule, that only parties to the contract may seek to enforce it,[11] would lead to the conclusion that to maintain a breach of warranty action the plaintiff must be in privity of contract with the defendant. This conclusion is codified to some extent in the Uniform Sales Act, which only speaks in terms of "buyer" and "seller," in the section on remedies for breach of warranty.[12]

To fully understand the present day law of warranties, one must be aware that an action for breach of warranty was originally in tort.[13] The courts at first required an express warranty and the proper form of action was trespass on the case.[14] Implied warranties of title were added later.[15] The first reported warranty action in assumpsit did not appear until 1778.[16] Implied warranties of quality did not appear until *after* the warranty actions were completely absorbed by assumpsit.[17] The American courts assumed that an assumpsit action was the proper form of action for both express and implied warranties.[18]

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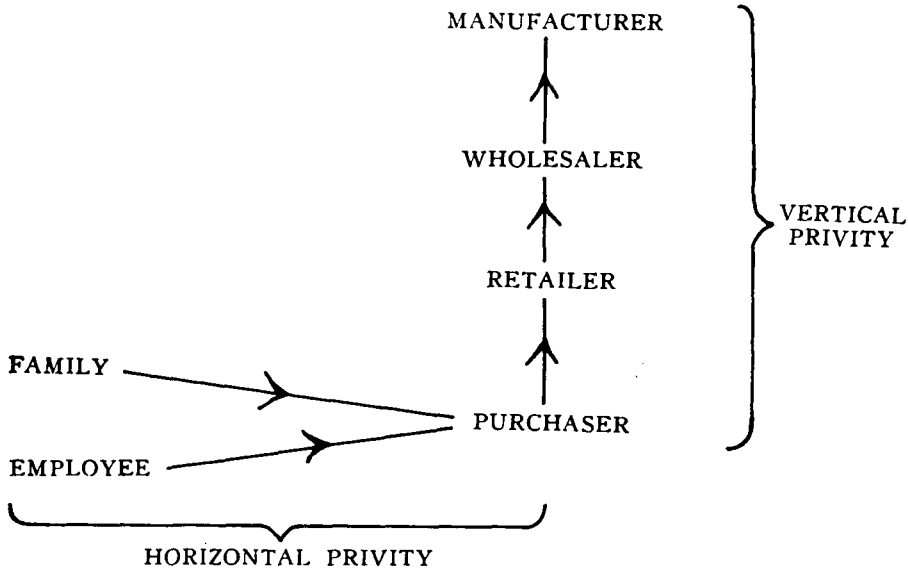
6. *Id.* at 386, 111 N.E. at 1056.
7. RESTATEMENT, TORTS § 395 (1934).
8. Gillam, *op. cit. supra* note 4, at 142.
9. UNIFORM SALES ACT § 12, 15.
10. UNIFORM COMMERCIAL CODE § 2-314, 2-315.
11. 2 WILLISTON, CONTRACTS § 347 (3d ed. 1959).
12. UNIFORM SALES ACT § 69.
13. See Ames, *History of Assumpsit*, 2 HARV. L. REV. 1 (1888).
14. Chandelor v. Lopus, Cro. Jac. 4, 79 Eng. Rep. 3 (1606-07).
15. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 120 (1943).
16. Stuart v. Wilkins, 1 Doughl. 18, 99 Eng. Rep. 15 (1778).
17. Prosser, *op. cit. supra* note 15; Holcombe v. Hewson, 2 Campb. 391, 170 Eng. Rep. 1194 (1810); Gardiner v. Gray, 4 Campb. 144, 171 Eng. Rep. 46 (1815).
18. Everston Exr's v. Miles, 6 Johns. 138 (N.Y. 1810).

Until the adoption of the Uniform Sales Act[19] in Pennsylvania, that state consistently refused to imply the warranty of quality in a contract of sale.[20] Chief Justice Gibson realized that the implied warranty had no home in contract.

> Now it is not, and cannot be, a wholesome interpretation which involves a party in engagements he never dreamed of contracting, or to which he expressly refused to assent . . . the parties themselves put no such meaning on their discourse, as did the court. . . . [21]

It would seem that both the duty to refrain from negligence and the duty imposed by the warranty of quality are implied by law. The scope of the duty in both areas was once measured by the contractual distance from seller to buyer. Only in tort have the courts been able to see that duty is more than a mere contractual relationship.

To simplify the problem, the privity requirement may be divided into vertical and horizontal privity.[22] Vertical privity exsits where the actual purchaser proceeds against his remote vendor. His direction of suit 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.



19. Pa. Laws 1953, 543.
20. McFarland v. Newman, 9 Watts 55 (1939).
21. *Id.* at 58.
22. Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. Rev. 281, 323 (1961).

To illustrate, assume A purchases a defective air rifle from a retailer, R, for his son, B. When B is injured by the rifle and desires to proceed against the manufacturer, M, he has two barriers confronting him. He must first move laterally and put himself in a position to utilize A's warranty. Once he has fulfilled this horizontal requirement, he must still move vertically against M. B may have to content himself with an action against R if the vertical privity requirement in the jurisdiction is at all strict. R may then proceed against W, the wholesaler, and W against M. Assuming that R is not judgment-proof, the only problem created by the vertical privity requirement is the resulting circuity of actions necessary to reach M, the real wrongdoer. The purchaser may always find a defendant, if only his immediate vendor. But the horizontal privity requirement often completely precludes the injured party from his warranty action. Since the implied warranty is part of the contract and the plaintiff is not a party thereto, having given no consideration, he may not sue on the warranty. The injured employee faces this barrier.

EMPLOYEES AND THE UNIFORM COMMERCIAL CODE SECTION 2-318

Section 2-318 of the Uniform Commercial Code was designed to alleviate the injustice created by the horizontal privity requirement. It provides:

> 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.[23]

An earlier draft of section 2-318 shows that a revision was made, presumably to insure adoption of the Code by those states whose case law may have prevented its adoption. This draft extended the benefit of the buyer's warranty to "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. . . ."[24]

The present section 2-318 has been called both an expansion and a contraction of prior law.[25] It was expanded to include all products and contracted to include only those categories listed.

Pennsylvania courts have long recognized an exception in the vertical privity requirement where products are sold for human consumption.[26] The Supreme Court of Pennsylvania, however, has been careful to restrict the

23. UNIFORM COMMERCIAL CODE § 2-318.

24. UNIFORM COMMERCIAL CODE, May, 1949 Draft; James, *Products Liability II*, 34 TEXAS L. REV. 192 (1955).

25. Simpson v. Powered Prods. of Mich., Inc., 24 Conn. Supp. 409, 192 A.2d 555 (1963).

26. Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915).

plaintiffs to purchasers only.[27] Kansas extended its food exception to the vertical privity requirement to hair preparations, permitting a beauty shop customer to bring suit against the manufacturer of a hair tint.[28] Missouri has allowed recovery by a remote purchaser against a manufacturer for injuries from "articles dangerous to life, if defective" in a case where plaintiff was injured by the use of a dishwashing product.[29]

In short, the privity requirement in contract actions prior to the Uniform Commercial Code appeared to be moving toward extinction. At least one-third of the American jurisdictions had departed from the strict privity rule.[30] Until the enactment of the Code, there seemed to be nothing to prevent a step-by-step movement toward recovery on a warranty theory by a non-purchaser injured by a product intended for his use.

Industrial equipment and supplies are purchased expressly for use by an employee in the productive process. Employees must handle many different instrumentalities, some with moving parts. If defective, the equipment may be a hazard to the life or health of the employee.

Green v. Equitable Powder Mfg. Co.[31] is a typical non-Code employee product liability case. Plaintiff was injured by the delayed explosion of dynamite purchased by his employer for use in the construction business. The court denied the contract action because the parties were not in privity, but permitted plaintiff to proceed on a negligence theory because the injury was "foreseeable." In effect, the court was saying that the law would imply no duty in the contract, but would find a duty in tort, since it was reasonable to expect that he would be injured. Plaintiff thus had to supply proof of negligence. It would seem that the nature of the product in this instance would make the burden of proof even greater than it ordinarily is.

Many courts have managed, through the use of fictions, to find that plaintiff and defendant are in privity. Accordingly it has been held that the warranty runs with the goods;[32] the warranty inures to the benefit of the consumer;[33] the advertisements of the manufacturer were either unilateral offers to contract[34] or express warranties to the consumer;[35] that the consumer was a third-party beneficiary;[36] or that the purchaser acts as the agent of the

27. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963).
28. Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954).
29. Worley v. Proctor and Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W.2d 532 (1952).
30. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 614, 187 A.2d 575, 578 (1963); Prosser, *Assault on the Citadel*, 69 YALE L.J. 1099, 1108 (1960).
31. 94 F. Supp. 126 (W.D. Ark. 1950).
32. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).
33. Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939).
34. Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (1893).
35. Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960).
36. Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928); James,

injured party.[37] These fictions would appear to provide a necessary solution, but they often sacrifice clarity of the legal principle.

A significant extension of warranty protection to the employee occurred in the California case of *Peterson v. Lamb Rubber Co.*[38] Here, an employee was injured when an abrasive wheel disintegrated. The wheel was one of many purchased by the employer for use by plaintiff in the productive process. Although the case arose prior to the adoption of the Code, the court in allowing the action on a contract theory, was quick to seize upon and approve plaintiff's argument that he was part of his employer's "industrial family,"[39] thus aligning California case law with the "family or household" provision of section 2-318. The court held that plaintiff was in privity with defendant because "[p]rivity denotes mutual or successive relationship to the same thing or right of property. . . ."[40]

In *Vallis v. Canada Dry Ginger Ale, Inc.*,[41] a restaurant employee was permitted to sue the manufacturer of an exploding bottle. The court cited *Peterson* for the proposition that the parties were in privity. The *Vallis* case was decided in California before the Code was adopted. When the *Vallis* case is compared with a Pennsylvania case decided under the Code, the restrictive effect of section 2-318 becomes apparent. In *Hochgertel v. Canada Dry Corp.*,[42] a bartender was unsuccessful in his attempt to recover for injuries sustained by an exploding bottle. The Pennsylvania court refused to allow the action on a warranty theory because the bartender was not one of the classes of beneficiaries permitted to recover under section 2-318. The court said: "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."[43]

It would appear that the Pennsylvania court assumed (1) that the list of beneficiaries expressly set out in section 2-318 could not be expanded and (2) that the employee could not be considered part of the "family" of the employer.

Recently, a slight retreat from the strict application of the privity requirement may have occurred in Pennsylvania. In *Yentzer v. Taylor Wine Co.*[44] a hotel manager was injured by a wine bottle purchased by him, presumably on the behalf of his employer, for the purpose of serving it to hotel guests. The

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op. cit. supra note 24; Gillam, *op. cit. supra* note 4.

37. Young v. Great Atl. & Pac. Tea Co., 15 F. Supp. 1018 (W.D. Pa. 1936).
38. 5 Cal. Rptr. 863, 353 P.2d 575 (1960).
39. *Id.* at 869, 353 P.2d at 581.
40. *Ibid.*
41. 190 Cal. App. 2d 35, 11 Cal. 2d 823 (1961); 1 FRUMER, PRODUCTS LIABILITY § 16.03[7] (1963).
42. 409 Pa. 610, 187 A.2d 575 (1963).
43. *Id.* at 615, 187 A.2d at 578.
44. 414 Pa. 272, 199 A.2d 463 (1964).

court permitted the manager to sue on a warranty theory, holding that the plaintiff *was* in privity with the seller since he was the actual purchaser.[45] It would seem that a distinction was drawn here between employees who purchase and those who do not. This must mean that in an industrial setting a purchasing agent, who seldom ever sees the product, may sue on the contract warranties, while the ordinary production-line employee, for whose use the product was intended, may not. The case seems to raise an additional question. What will be the outcome when the employer himself is injured by a product purchased on his behalf by his agent? Presumably the court will then invoke the agency principles it rejected in *Yentzer*.

A landmark case occurred in New Jersey in 1960, prior to the adoption of the Code in that state. *Henningsen v. Bloomfield Motors, Inc.*[46] was an action by an automobile purchaser and his wife against the retailer and manufacturer of an allegedly defective automobile. The wife was injured when the steering mechanism failed while she was driving. The court permitted recovery, saying:

> 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 of reasonable suitability of an automobile for ordinary highway operation. *Those persons must be considered within the distributive chain.*[47]

Although it is true that section 2-318 would allow the wife or member of the purchaser's family to utilize the purchaser's warranty, it would seem that the above quoted language would extend the warranty to all those reasonably expected to use or be affected by the product. The opinion seems to evidence (1) a penetration of the fictions which placed the implied warranty of quality in the contract and (2) a realization of the need to return to the same duty limits used in tort.

The Official Code Comment to section 2-318[48] purports to indicate the legislative intention in adopting the section. The *Henningsen* court appears to have cleared the way for a liberal interpretation of section 2-318 by its definition of "distributive chain,"[49] quoted above. The comment is as follows:

> This section expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the

45. *Id.* at 273, 199 A.2d at 464.
46. 32 N.J. 358, 161 A.2d 69 (1960).
47. *Id.* at 395, 161 A.2d at 100. (Emphasis added.)
48. UNIFORM COMMERCIAL CODE § 2-318, Comment 3. (Emphasis added.)
49. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 395, 161 A.2d 69, 100 (1960).

> 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.*[50]

The term "distributive chain" is not defined in the Code. The New Jersey court has defined the term so that any person whose use of the product is "within the anticipation of parties to such a warranty"[51] is included in the chain. If the distributive chain extends from the manufacturer down to the purchaser and over to the employee who is reasonably expected to use the product, the second sentence of the comment clearly allows the expanding case law to add to the list of beneficiaries set out in the section. This interpretation is supported by the clause, "[b]eyond this, the section is neutral,"[52] which must refer to the immediately preceding sentence. This "neutral" clause means that *beyond those persons enumerated* the section is neutral and each jurisdiction may insert those additional persons which its developing case law determines deserve the benefit of the purchaser's warranty.

Since New Jersey appears to have prepared its case law so that section 2-318 will extend to those users who are reasonably foreseeable, that state may be returning to the duty limits used in tort. The *Henningsen* decision may then be the first significant step in returning the implied warranty to tort principles.

It is implicit in the foregoing interpretation that those beneficiaries enumerated in the section compose the minimum who may sue on the buyer's warranty. The state may increase the number but it cannot reduce it below the floor set up by the section. To permit such reduction would mean that the section is a mere suggestion and that an adopting state could compose its own list. The section does not concern itself with the case law which has developed *prior* to adoption. It refers only to *developing,* or future case law.

Pennsylvania appears to have ended the "distributive chain" at the purchaser.[53] The Official Comment[54] is apparently interpreted to refer only to vertical privity, although the section itself deals solely with horizontal privity. If this line of reasoning is accepted one may well infer from the comment that *beyond the horizontal privity rules set up by the section, the Code makes no pronouncements on vertical privity requirements,* where the beneficiary attempts to sue a remote vendor. This interpretation is supported by the "case law" clause,[55] which seems to trace only the vertical segment of the distance

50. UNIFORM COMMERCIAL CODE § 2-318, Comment 3. (Emphasis added.)
51. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 395, 161 A.2d 69, 100 (1960).
52. UNIFORM COMMERCIAL CODE § 2-318, Comment 3.
53. Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963).
54. UNIFORM COMMERCIAL CODE § 2-318, Comment 3.
55. UNIFORM COMMERCIAL CODE § 2-318, Comment 3.

from manufacturer to beneficiary. The "seller" would be the manufacturer, and the "buyer" the wholesaler, who "resells" to the retailer.[56] This clause may be interpreted in Pennsylvania as saying that the section does not purport to alter the rules on whether the warranty extends to the purchaser, the last member of the "distributive chain." Since vertical privity is not intended to be regulated by the section, the case law on vertical privity is naturally permitted to expand or contract. Section 2-318 is then static in its horizontal limits. Only those beneficiaries expressly given will be permitted to sue on the buyer's warranty.

It would appear, however, that the word "this" in the "neutral" clause was intended to modify the word "includes" in the immediately preceding sentence. The clause would then conform to the New Jersey interpretation of the "case law" clause. The adopting state may add to the beneficiaries "included"—go "beyond"—but it may not detract from it. The "case law" clause is an amplification of the "neutral" clause; which states that not only is each adopting state able to expand the number of beneficiaries able to move horizontally, but also it may extend the manufacturer's warranty to the retailer, the purchaser of any beneficiary in addition to the 2-318-beneficiaries, according to the dictates of its developing case law. This interpretation follows logically, since all these persons are within the "distributive chain."

The *Hochgertel* court cites a Connecticut case for the proposition that "a maid was not a member of the buyer's household."[57] *Duart v. Axton-Cross Co.*[58] was an attempt by a cook employed by a college to recover for injuries sustained through the use of a dishwashing product. A later case, *Connolly v. Hagi*,[59] specifically questioned the reasoning in *Duart*. In *Connolly* a gasoline station attendant was permitted to proceed against the manufacturer of an automobile which lurched over him while he was servicing it. The court cited *Henningsen* and a previous Connecticut case, *Hamon v. Digliani*,[60] which adopted the *Henningsen* rationale to allow recovery by a non-purchaser beneficiary. It would seem that Connecticut has adopted the *Henningsen* definition of "distributive chain" and its foreseeable plaintiff language. Furthermore, it would appear that the *Duart* case no longer represents the law in Connecticut.

A pre-Code case in New York, *Williams v. Union Carbide Corp.*,[61] allowed an employee to proceed against the seller for injuries due to the failure of an alleged defective safety mask purchased for plaintiff's use by his

56. See diagram of privity rules p. 446 *supra*.
57. Hochgertel v. Canada Dry Corp., 409 Pa. 610 n.613, 187 A.2d 575 n.577 (1963).
58. 19 Conn. Supp. 188, 110 A.2d 647 (1954).
59. 24 Conn. Supp. 198, 188 A.2d 884 (1963).
60. 148 Conn. 710, 174 A.2d 294 (1961).
61. 17 App. Div. 2d 661, 230 N.Y.S.2d 476 (1962).

employer. The court in *Williams* cited and followed *Thomas v. Leary*.[62] In *Thomas* the court said:

> There is no doubt that the doctrine of privity will be extended, sooner or later, to include employees of the purchaser. There is no good reason why it should not be so extended now.[63]

Here, the employee of the dentist-purchaser was injured when a dental chair collapsed. The reasons for allowing the action are two—*Peterson* was cited for the proposition that plaintiff was a member of the "industrial family" of his employer, and *Henningsen* for the proposition that he was in the "distributive chain," since his use of the chair was "reasonably foreseeable."[64]

Thus, the courts of California, New Jersey, Connecticut and New York allow employees to proceed on their employer's warranties when injured in person by a defective product. The subsequent adoption of the Code should not hinder the employee's action against the employer's vendor because of the prior alignment of the case law of these states with the provisions of section 2-318.

Pennsylvania, on the other hand, by construing section 2-318 as strictly limiting those able to utilize the buyer's warranty, may have effectively prevented case law development toward a more realistic limit on the duty of the seller of defective goods. This duty arises in the employee situation by reason of the act of making available a defective and sometimes dangerous product to one who has little or no control over its source and for whose use the product was specifically manufactured. The expense arising from injuries due to such use should be borne not by the injured employee, but by those engaged in the business of creating and disseminating these inferior goods for profit. The implied warranty of merchantable quality has no place in the contract of sale. It is a liability imposed by law, not by agreement. Warranty is historically a tort action, though not necessarily sounding specifically in negligence. The tort duty limits, also imposed by law, should be applied to permit recovery by those whose injuries are reasonably foreseeable.

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62. 15 App. Div. 2d 438, 225 N.Y.S.2d 137 (1962).
63. *Id.* at 441, 225 N.Y.S.2d at 140.
64. *Id.* at 443, 225 N.Y.S.2d at 141-42.