Commercial Law - Waranties - Privity and the Uniform Commercial Code

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From the very nature of this doctrine of subrogation, its mantle must many times, like the garment of charity, cover and wipe out a number of sins of omission or commission.\textsuperscript{21}

The courts have been prone to interpret the provisions of the Code liberally rather than strictly.\textsuperscript{22} The Code, it has been held, is designed to simplify rather than complicate commercial transactions.\textsuperscript{23} Subrogation has long been considered a doctrine that readily lends itself to liberal, equitable, and broad application.\textsuperscript{24}

In the case at bar, the court in its rationale did not specifically rule that the doctrine of subrogation supersedes section 9-312(5)(a). In effect, it ruled that it was merely stressing the intention of the drafters of the Code that the concept of subrogation was, and should be, an inherent part of the Code. This rationale is not inconsistent with the modern, liberal approach to law, which, is increasingly striking down narrow, technical interpretations of statutes which too often defeat rather than aid the realistic and orderly administration of justice.\textsuperscript{25}

Robert Bromberg

\textsuperscript{21} Iowa County Bank v. Pittz, 192 Wis. 83, 91, 211 N.W. 134, 137 (1927).
\textsuperscript{22} See Note, 13 De Paul L. Rev. 172 (1963).
\textsuperscript{24} Jackson Co. v. Bolyston Mutual Insurance Co., 139 Mass. 508, 2 N.E. 103 (1885).
\textsuperscript{25} Contra, Hartford Accident and Indemnity Co. v. State Public School Building Authority, 76 Dauphin County (Pa.) Bar Ass'n, Reporter, 296 (1962). This was a trial court case which was not appealed. The court ruled that since the surety (party seeking subrogation) had constructive notice of bank's duly filed security interest, it should not be subrogated to the rights of that bank.

COMMERCIAL LAW—WARANTIES—PRIVITY AND THE UNIFORM COMMERCIAL CODE

Plaintiff was employed as the manager of a hotel. In the course of his duties as manager he personally purchased four bottles of champagne for the hotel. The wine was produced and bottled by defendant. While plaintiff and other employees were preparing to serve the wine, a cap from one of the bottles suddenly ejected, flew through the air, and struck the plaintiff in the eye, causing serious injury. An action was brought based on breach of implied warranty. The trial court dismissed the complaint upon demurrer by the defendant. The Supreme Court of Pennsylvania reversed the lower court's decision. \textit{Yentzer v. Taylor Wine Company}, 414 Pa. 272, 199 A.2d 463 (1964).

Two problems were faced by the court in its decision in favor of the
plaintiff. The first involved an interpretation of the Uniform Commercial Code (Title 12A of the Pennsylvania Statutes Annotated) and its effect upon the relationship between the parties to the suit. The Uniform Commercial Code provides for liability for breach of implied warranty and further extends warranty protection to those not classically within privity. These two sections, however, did not place the plaintiff in the necessary relationship unless he could have been considered the “buyer” of the wine. The court accordingly examined the plaintiff’s position with reference to section 2-103 and found that the plaintiff “was cast in the important role of ‘buyer’ and consummated the ‘contract to buy’ for his employer. . . .” Since the court found that the plaintiff was, in fact, the buyer of the wine, the Code provisions regarding implied warranty were satisfied and plaintiff was entitled to a recovery for the breach.

The second problem faced by the court was the case of *Hochgertel v. Canada Dry Corp.*, a very recent decision by the same court with a disturbingly similar fact situation. Plaintiff in this case was employed as a bartender and was injured when a bottle of club soda, near which he was working, exploded, sending fragments of glass flying through the air. The club soda had been purchased by the plaintiff’s employer. The court held that the seller’s implied warranty to the buyer did not extend to the plaintiff as an employee. The court in *Yentzer* easily distinguished *Hochgertel* on the ground that the plaintiff in the former case was a “buyer” within the definition of section 2-103, whereas no such relationship existed in the latter.

Justice Eagen, in his dissenting opinion in *Yentzer*, took exception to the majority interpretation of section 2-103 by way of a reference to yet another section of the Code, section 1-201 (32) and (33), which defines

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1 *Uniform Commercial Code* § 2-314, 12A Penn. Stat. Ann. § 2-314 (1954). “(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. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale. (2) Goods to be merchantable must be at least such as (c) are fit for the ordinary purposes for which such goods and used. . . .” Hereinafter all references to the Uniform Commercial Code are to the corresponding sections in Title 12A of Purdon’s Pennsylvania Statutes Annotated (1954) (with annual pocket part).

2 *Uniform Commercial Code* § 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.”

3 *Uniform Commercial Code* § 2-103 (1) (a). “In this Article unless the context otherwise requires ‘buyer’ means a person who buys or contracts to buy goods.”


"purchase" and "purchaser." Plaintiff is clearly not a purchaser in Justice Eagen’s opinion because:

The plaintiff did not become vested with any interest in the wine merely because he served in the capacity of messenger for the purpose of picking it up at the liquor store for his employer.

This point made, the dissenting opinion argued that the plaintiff was merely the agent of his employer and not in contractual privity with the defendant. The conclusion of the dissent was that the plaintiff had an adequate remedy in trespass, as stated in *Loch v. Confair*.

The dissent raises an interesting question. It relied upon two definitions found in the Code, those of “purchase” and “purchaser,” to establish a link between its agency argument and the Code position taken by the majority opinion. Both terms, however, are foreign to the sections of the Code (sections 2-314, 2-315 and 2-318) which came under the scrutiny of the court. The agency argument was sound in and of itself, and was in no need of Code support, even of a definitional nature. If plaintiff was the agent of the hotel, he was not the “buyer.”

Ever since the oft-cited cases of *Thomas v. Winchester* and *MacPherson v. Buick Motor Co.*, jurisdictions across the nation have tended to become more and more liberal in their approach to the privity requirement. In a recent article in the *NACCA Law Journal* the statement is made that: “The *Buick* doctrine has been embraced in all of the American jurisdictions, although in Mississippi only federal court decisions have expressly accepted it.” Many cases, from a multitude of far-flung jurisdictions, are cited in support of this statement.

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6 Uniform Commercial Code § 1-201 (32). “Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or parts thereof, and unless the context otherwise requires, in this Act: (32) ‘Purchase’ includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issuance, gift or any other voluntary transaction creating an interest in property.”

7 Uniform Commercial Code § 1-201 (33). (The same introductory language as found in note 6, supra, precedes sub-section (33).) “‘Purchaser’ means a person who takes by purchase.”

8 414 Pa. at ...., 199 A.2d at 465.

9 361 Pa. 158, 93 A.2d 451 (1953). Plaintiffs picked up a bottle of Yukon Club Sparkling Ginger Ale while shopping in a supermarket and were injured when it exploded. An action was brought for breach of implied warranty. The court held that plaintiffs had no cause of action in warranty, but rather in trespass.

10 6 N.Y. 397 (1852).


12 30 NACCA L.J. 362, 368 (1964).


14 See also Hursh, American Law of Products Liability, § 16 (1961).
Initially, the privity requirement was dropped only in cases involving the "exceptions," such as food products,15 products imminently dangerous when defective,16 products designed for intimate bodily use,17 and so on. Today the list of exceptions is greatly enlarged, and the theory has been advanced that even section 2-318 of the Code is simply another exception.18

What with privity seeing lean times, and the numerous recoveries being granted for so-called exceptions, it is no wonder that the distinction between breach of warranty and negligence is disappearing. Implied warranty cases are now taking on the appearance of tort actions. The language of Breitenstein, J., in Burgess v. Montgomery Ward & Co.,19 affords ample evidence of this view:

But in view of the modern trend against reliance on the privity rule [citing cases] especially as to inherently dangerous chattels [citing cases] we cannot base our decision on lack of privity in a case such as this where the nebulous distinction between implied warranty and negligence amounts to no more than a play on words because the breach of warranty, if any, is the result of negligence.20

The Code states must, of necessity, view privity differently than their non-Code sister states. Section 2-318 is in the spirit of the privity requirement even though mention of privity is not made in so many words.21

How will these states reconcile the Code with the national trend? Not everyone can be fitted into the category of buyer.

There would seem to be three alternatives available to the Code states: 1) They might strictly construe the language of the Code and thereby maintain the traditional distinctions between ex contractu and ex delicto actions, thereby forcing those lacking privity to rely upon a tort remedy;

20 Id. at 497. See also Goldberg v. Kollsman Instrument Corp., 12 N.Y. 2d 432, 436, 191 N.E.2d 81, 82 (1963): "A breach of warranty, it is now clear, is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a non-contracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer."
21 Comment 3 to section 2-318 of the UNIFORM COMMERCIAL CODE indicates that the section is meant to include as beneficiaries within its provisions the family, household, and guests of the purchaser. The comment then states: "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." This would seem to indicate that the section is intended to be flexible so as to adapt to the developing case law. This hardly is possible in light of the language of the section. Perhaps the authors envisioned a slightly different developing case law.
2) they might construe the language of the Code to fit as many cases as possible into the “excepted” classification of section 2-318, by loosely interpreting “buyer,” thereby achieving simply a more confused version of the first alternative; or 3) they might work to revise the Code to bring it into line with the national trend. Pennsylvania, it would appear, has taken the second of these alternatives.

Quintin Sanhamel

CONSTITUTIONAL LAW—FREEDOM OF PRESS—MISSTATEMENT OF FACT HELD PRIVILEGED IN LIBEL ACTION BY PUBLIC OFFICIAL

The petitioner, “New York Times,” published a paid political advertisement attacking segregationist activity in the South and requesting contributions to fight segregation. It is uncontested that some of the statements contained in the advertisement were false. No one was specifically mentioned, but the respondent, police commissioner, charged libel by innuendo and sued the “New York Times.” The trial judge instructed the jury that the statements made were libelous per se. The question of whether the innuendos were strong enough to implicate the police commissioner in the minds of the reading public was left to the jury. A verdict of $500,000 was returned against the defendants. The Supreme Court of Alabama affirmed the judgment. The United States Supreme Court held that the first and fourteenth amendments require that a public official, in order to recover for a defamatory falsehood, must prove that the statement was made with actual malice. There being no evidence of actual malice present in the case, the Supreme Court reversed. The two concurring opinions argued in favor of an absolute privilege of free press, and thus would extend the protection of the press even beyond that which the majority opinion had conditioned on the lack of actual malice. *New York Times Company v. Sullivan*, 376 U.S. 254 (1964).

Prior to this case, the guarantee of the first amendment had never immunized the press from subsequent liability for false and damaging statements. Previously, the extent of the liability of the press depended upon

1 ALA. CODE tit. 7, §§ 908 & 914 (1940). Libel per se signifies either that the words are defamatory on their face or that they are actionable without proof of damage. PROSSER, TORTS § 93, p. 588 (2d ed. 1955).


3 Black, J., joined by Douglas, J. and Goldberg, J., joined by Douglas, J., concurred in the result in separate opinions.

4 The right of the press to invoke privilege where the publication in question contains a misstatement of fact has been a controversial subject, the decisions of the various