SALES—Is Uniform Commercial Code § 2-318 an invitation to discard vertical privity in warranty actions?

A vaporizer-humidifier was purchased by an aunt and neighbor of an infant, Earl Coakley. During a visit to the aunt's home, the vaporizer-humidifier sprayed boiling water upon the infant causing his death. Miller, the administrator of Coakley's estate, brought suit for breach of implied warranty of merchantibility[1] against one Preitz, transacting business as Hartsville Pharmacy, the vendor, the Rexall Drug Company, the distributor, and the Northern Electric Company, the manufacturer. The only issues to be resolved were whether the decedent was a "person" entitled to a cause of action, and if so, against whom, within the language of Uniform Commercial Code section 2-318.[2]

The trial court found that the decedent was not a person entitled to a cause of action within Section 2-318[3] and entered judgment for all three defendants. On appeal, *held,* affirmed as to defendants Rexall Drug Company and Northern Electric Company, finding an absence of the required privity of contract between each and the decedent. However, it reversed the lower court as to the more immediate defendant Preitz, holding that the language "family *or* household" provides alternative, not interchangeable, situations as evidenced by the ordinary meaning of the word "or" and that the use of the word "or" within the same section *clearly* prescribed alternative situations,[4] *i.e.* ". . . who is in the family *or* household of his buyer *or* who is a guest in his home . . . ."[5] *Miller v. Preitz,* 422 Pa. 383, 221 A2d 320 (1966).

The majority's decision that the absence of the necessary privity between the decedent and the distributor and manufacturer barred any action by the decedent against them was criticized by the concurring and dissenting opinions.

The court recognized that privity has been long abandoned in negligence actions in Pennsylvania,[6] that nearly a third of the American jurisdictions

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[1] UNIFORM COMMERCIAL CODE § 2-314, Act of April 6, 1953, P.L. 3 § 2-314: 12A § 2-314

(1) Unless excluded or modified (Section 2-316), a warranty that 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 . . . (c) are fit for the ordinary purposes for which such goods are used . . . .

[2] UNIFORM COMMERCIAL CODE § 2-318, Act of April 6, 1953, P.L. 3 § 2-318: 12A § 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 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] The trial court held that the word "family" of § 2-318 was intended by the legislature to be used interchangeably with the word "household"; and that since the decedent, who lived next door to his aunt, was not a member of the "household" also, he could not qualify within the language of this section.

[4] Miller v. Preitz, 422 Pa. 383, 221 A.2d 320, 323-4 (1966).

[5] Emphasis added.

[6] Foley v. Pittsburg-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949). RESTATEMENT (Second), TORTS § 402 A. (1965).

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 consumer or to his property is subject to liability for physical harm

including Pennsylvania have discarded the "privity of contract" doctrine in cases involving goods for intimate personal use or consumption,[7] and that contract law should and does recognize these social policy considerations[8] that are involved in this trend toward greater disuse of the doctrine.[9] However, the court felt bound by precedent indicated by *Hochgertel v. Canada-Dry Corporation*,[10] and by the time-worn doctrine that any "radical change" must come from the legislature,[11] and thus overlooked the invitation of section 2-318 to discard privity by developing case law.

The comments to the Uniform Commercial Code, though not enacted as law by the Pennsylvania Legislature, should still be considered to reflect the intent of the legislature with regard to each code section. Uniform Commercial Code § 2-318, comment 2, does not suggest a restriction as to the warranty liability of remote sellers,[12] and Uniform Commercial Code § 2-318, comment 3, specifically allows for an extension of liability to remote sellers by developing case law if such a trend is desirable in light of social policy considerations.[13] The court does suggest that such a policy is desirable.[14]

The *Hochgertel* case,[15] which the court cites and feels bound by, is dis-

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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.

Cf. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960).

7 Miller v. Preitz, 422 Pa. 383, 221 A.2d 320, 324 (1966).

8 Warranty had its origin in tort law and the language of § 2-318 reflects the reasonableness test of tort law. 4 WILLISTON, CONTRACTS § 970 (Rev. ed. 1936); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888).

9 Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE L. REV. 1 (1963); Jaeger, *How Strict is the Manufacturer's Liability? Recent Developments*, 48 MARQ. L. REV. 293 (1965).

10 Hochgertel v. Canada-Dry Corp., 409 Pa. 610, 187 A.2d 575, 578 (1963), where the court states:

> The general rule in the United States is that the mere resale of a warranted article does not give a subpurchaser the right to sue the manufacturer in assumpsit, on the basis of breach of warranty, for damages incurred by him due to a defect in the quality of the goods. Pennsylvania decisions are in accord with this general proposition. The warranty is personal to the immediate or original buyer, and he alone may avail himself of the benefit thereof. This limitation is based on the rule of privity of contract.

11 Miller v. Preitz, 422 Pa. 383, 221 A.2d 320, 328 (1966).

12 UNIFORM COMMERCIAL CODE § 2-318, Comment 2 provides: "Implicit in this section is that any beneficiary of a warranty may bring a direct action for breach of warranty against the seller whose warranty extended to him."

13 UNIFORM COMMERCIAL CODE § 2-318, Comment 3 provides: "This section expressly includes as beneficiaries within its provisions the family, household, and guest of the purchaser. 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, extends to other persons."

14 Miller v. Preitz, 422 Pa. 383, 221 A.2d 320, 325 (1966).

15 In Hochgertel v. Canada-Dry Corp., 609 Pa. 610, 187 A.2d 575 (1963), a bartender was injured by an exploding bottle of soda water which was purchased by his employer. An order sustaining a demurrer by the defendant manufacturer was affirmed as the Pennsylvania Supreme Court held that the bartender was not a person who qualified for a cause of action within the language of § 2-318,

tinguishable from the *Miller* case, and the language from *Hochgertel* that the *Miller* court feels is binding is inapplicable to the *Miller* factual situation.[16] In *Hochgertel* the plaintiff *did not* qualify as a party entitled to a cause of action within section 2-318. In *Miller* the plaintiff is clearly a qualified party.

Once it is established that the plaintiff qualifies horizontally[17] within the section is it logical and consistent with the intent of the section to maintain rigid vertical privity? The relaxation of rigid horizontal privity requirements in section 2-318 was intended to remove such qualified persons from "any technical rules as to privity."[18] Does the continuance of rigid vertical privity requirements conform with either the intent of the section or the trend in desirable social policy?

The basic question in warranty cases should be whether or not the plaintiff qualifies horizontally; and to discard vertical privity does not change this question. Even with all the defendants in the distributive chain being held liable to the proper plaintiff, there is still the question of whether there exists such a relationship with the original purchaser that the plaintiff should be entitled to a cause of action. Had the *Miller* court viewed the case from the issue of horizontal privity and discarded the concept of vertical privity, it could have rendered a decision for the plaintiff against all the defendants in the distributive chain and still not have been inconsistant with the *Hochgertel* case that it felt bound by.[19]

The absence of a vertical privity requirement would assure the plaintiff of a solvent defendant immediately and avoid probable indemnity actions among the defendants in the distributive chain. Considering that there is nothing within the language of Uniform Commercial Code § 2-318 to restrict the court and that the trend toward the abandonment of vertical privity is evident, it seems reasonable that the *Miller* court could have seized this opportunity to discard vertical privity without fear of invading the legislative domain. In fact, such a decision might have indicated to the Pennsylvania Legislature this developing trend and brought forth from it an enactment similar to the Virginia statute that abolishes both vertical and horizontal privity.

> *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.[20]

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i.e. he was neither a member of the purchaser's family or household, nor was he a guest in the buyer's home.

[16] Once it was decided that the plaintiff, bartender, did not qualify within the language of § 2-318, the further language of Hochgertel is inapplicable to Miller because the plaintiff in Miller clearly comes within the language of § 2-318 as a person entitled to a cause of action.

[17] Vertical privity referring to whom besides the immediate seller the plaintiff may sue, and horizontal privity referring to whom besides the immediate purchaser should be entitled to a cause of action.

[18] UNIFORM COMMERCIAL CODE § 2-318, Comment 2.

[19] See cases and accompanying text in notes 15 and 16, *supra*.

[20] VA. CODE, vol. 2a § 8.2-318 (1966). See also, Brockett v. Harrell Bros. Inc., 206 Va. 657, 143 S.E.2d 897 (1965); Speidel, *The Virginia Anti-Privity*

It is unfortunate that the court in the *Miller* case failed to seize the opportunity to make an advancement toward the abolition of decadent formalities and failed to emphasize the basic issue in any warranty action, *i.e.* did the product during normal use injure a person who could reasonably be expected to use, consume, or be affected by the product?

RONALD L. MYERS June—1968

Statute: Strict Products Liability Under the Uniform Commercial Code, 51 VA. L. REV. 804 (1965).