



1973

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Recommended Citation

Katz, Allen J. (1973) "Notes and Comments: Third Party Beneficiaries of Warranties in Maryland," *University of Baltimore Law Review*: Vol. 2: Iss. 2, Article 7.

Available at: <http://scholarworks.law.ubalt.edu/ubl/vol2/iss2/7>

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THIRD PARTY BENEFICIARIES OF WARRANTIES IN MARYLAND

The Maryland Legislature in 1969 provided for increased consumer protection for third party beneficiaries of warranties. This comment explores the effectiveness of that legislation and concludes that it is sufficient if the courts apply it liberally. If the courts cannot use the present law effectively, suggested legislative alternatives are presented.

I. INTRODUCTION

The Uniform Commercial Code¹ was adopted in Maryland in 1964.² In so doing, the state of Maryland adopted alternative "A" of § 2-318,³ which by its language allows for recovery by certain third party beneficiaries for breach of warranty. In 1969 the Maryland legislature expanded the protection found in §§ 2-314 through 2-318⁴ when it abolished "the requirement of privity in actions brought under these sections."⁵ This action was taken because testimony before the Judiciary Committee of the House of Delegates indicated that "Maryland is far behind other states in extending implied and expressed warranties to third party beneficiaries."⁶ This comment will consider the judicial and legislative success of the State of Maryland in

1. Hereinafter referred to as UCC.

2. MD. ANN. CODE art. 95B (1964).

3. Law of Feb. 1, 1964, ch. 538, § 1 [1963] Laws of Md. 786, as amended MD. ANN. CODE, art. 95B § 2-318 (Supp. 1972). Maryland adopted Alternative A as cited in 6 UCC REP.-DIG. § 2-318, at 1-100.1:

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.

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

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.

4. MD. ANN. CODE art. 95B, §§ 2-314 to -318 Supp. 1972).

5. Ch. 249 [1969] Laws of Md. 709. Item 256, *Explanation*, in the Office of Legislative Reference, Annapolis, Md.

6. *Id.*

protecting persons, not in privity with the seller, who are injured by defective products.⁷

II. DEVELOPMENT AND STATUS OF MARYLAND LAW

The 1969 legislation added the phrase "or any other ultimate consumer or user of the goods or person affected thereby"⁸ to the first sentence of the section. In so doing, the legislature clearly increased the horizontal privity of sales in Maryland, providing protection to a user, consumer, or some person affected by the goods other than a purchaser or subpurchaser.⁹ Vertical privity, on the other hand, involves the rights of a subpurchaser, or one who has dealt with a seller-retailer rather than the manufacturer.¹⁰

7. It should be noted at the outset that "warranties" evolved from the laws of contract and sales, and traditionally required privity. Courts have expanded warranty protection by engrafting tort principles onto it. Strict liability, on the other hand, has come about by relaxation of the negligence for which a manufacturer is accountable. This comment deals with "warranties" because that technique was applied to expand protection to third party beneficiaries by the Maryland legislature. Of the different remedies Prosser has said:

All this is pernicious and unnecessary. No one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract. There is no need to borrow a concept from the contract law of sales; and it is 'only by some violent pounding and twisting' that 'warranty' can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without any illusory contract mask. Such strict liability is familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, and respondeat superior. There is nothing so shocking about it today that it cannot be accepted and stand on its own feet in this new and additional field, provided always that public sentiment, public demand, and 'public policy' have reached the point where the change is called for.

Prosser, *The Assault Upon the Citadel*, 69 YALE L. J. 1099, 1134 (1960).

Kessler, on the other hand, says that as between a warranty theory and a tort theory the former is more desirable. He takes this position because warranty protection under the UCC still requires notice and allows disclaimers but the *Restatement of Torts* does not allow either. Kessler notes that the notice required for a lay consumer and a merchant is different; the difference being based on a desire to detect bad faith on the part of the seller. This is not an attempt to deprive the good faith consumer of his remedy. The provisions in §2-318 are the most lenient here as the injured have complied with good faith as long as they notify the manufacturer "once they are aware of their legal consideration." Thus, any further relaxation of notice is foolish in Kessler's opinion. The disclaimers permissible under the UCC are uncertain according to Kessler, depending on the weight given to the various sections of § 2-316 and § 2-719(3). Kessler believes that the flexibility available in interpreting valid disclaimers and unconscionable disclaimers is an asset to the UCC and can be exercised by the courts without resorting to the device of strict liability. Kessler, *Products Liability*, 76 YALE L.J. 887, 904-909 (1967).

8. MD. ANN. CODE art. 95B, § 2-318 (Supp. 1972). The section reads:

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. A seller may not exclude or limit the operation of this section. (emphasis added).

9. Emroch, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982, 985-86 (1962).

10. *Id.* at 985.

The previous lack of horizontal privity is evidenced in the 1924, pre-UCC case of *State v. Consolidated Gas, Electric Light & Power Co.*¹¹ The court held that a deceased infant's parents could not recover damages from a vendor of the defective gas heater that caused the infant's death because the infant was not in privity of contract with the vendor. Had the 1964 version of § 2-318 been available to the parents of the child, they should have been able to recover.

A Federal District Court construed the 1964 version of § 2-318 in Maryland in deciding *Debbis v. Hertz Corp.*¹² Here, Hertz leased a car with defective brakes in Virginia that collided with decedent, a Maryland resident, in West Virginia. His widow, as administratrix, sued in federal court under West Virginia's Wrongful Death Act. The court applied Maryland law¹³ and stated that the administratrix could proceed against Hertz under the bailee-bailor principle that "[t]hird parties injured by an automobile operated by a bailee and negligently maintained by a bailor may prevail against the bailor."¹⁴ In finding § 2-318 applicable but limited to its terms, *i.e.* "a buyer's family, household and guests," the court held that "the lack of privity between Debbis and Hertz would seem to bar plaintiff from maintaining an action for the alleged breach by Hertz of an implied warranty of fitness. Such actions historically have required privity, and such is rather clearly the law of Maryland today."¹⁵ Maryland courts, accepting the traditional rule, had not yet followed the trend¹⁶ toward eliminating the requirement of privity in warranty actions.¹⁷

In 1971, the same court noted the current warranty rule of § 2-318 in *Uppgren v. Executive Aviation Services, Inc.*¹⁸ In dicta the court said Maryland no longer required privity to maintain a suit against a manufacturer or seller for an injury sustained in the use of a chattel likely to be dangerous for the use for which it is supplied.¹⁹ The holding in *Uppgren* did not explore the limits of Maryland's § 2-318 since the disputed accident occurred in 1967, and the amended warranty section applied only to sales after July 1969.²⁰ Nevertheless, *Uppgren* indicated the federal court's willingness to expand horizontal privity judicially.

Plaintiff in *Uppgren* sued two Maryland corporations and a Texas corporation for the wrongful death of her husband, a government

11. 146 Md. 390, 126 A. 105 (1924).

12. 269 F. Supp. 671, 681 n.11 (D. Md. 1967).

13. At the time the action was brought, both Maryland and West Virginia law recognized version "A" of UNIFORM COMMERCIAL CODE § 2-318.

14. 269 F. Supp. at 679.

15. *Id.* at 680.

16. *Santor v. A & M Karagheusian*, 44 N.J. 52, 207 A.2d 305 (1965); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

17. *Debbis v. Hertz Corp.*, 269 F. Supp. 671, 679 (D. Md. 1967).

18. 326 F. Supp. 709 (D. Md. 1971).

19. *Id.* at 716.

20. *See generally* *Blankenship v. Morrison Mach. Co.*, 255 Md. 241, 257 A.2d 430 (1969).

employee who was killed in a helicopter crash while in the course of his employment. The helicopter was built by defendant Hughes Tool Co., sold by defendant Loving Chevrolet and serviced by defendant Executive Aviation. Although plaintiff was a Minnesota resident and the accident occurred in Minnesota, defendants in this case wanted Maryland law applied as they felt that their liability was limited by privity of contract. Even though Maryland was the situs of the contract between the Department of the Interior, Loving, and Executive, the court refused to apply Maryland law. Rather, the court creatively reasoned that since pre-1969 warranty actions in Maryland bear such close relationship to tort, the courts would apply *lex loci delicti* in this case; accordingly, Minnesota tort law was applied.²¹ The choice of law was determined, *inter alia*, by noting that Professor Prosser considers warranty as a "curious hybrid of tort and contract, unique in the law,"²² and that originally the warranty action was based on tort. Noting that "[t]he Maryland Court of Appeals has quoted the views of Prosser with approval relative to the origin of the action for breach of implied warranty and its close kinship to tort,"²³ the *Uppgren* court went further, stating that since Maryland did not require privity where a dangerous instrumentality was concerned,²⁴ the plaintiff would have a good cause of action even if Maryland law was applied.

A recent state court decision, by avoiding application of the extended warranty protection of the 1969 amendment to § 2-318, undermined the *Uppgren* court's language expanding horizontal privity in Maryland. If the decision in *Bona v. Graefe*²⁵ is to be followed, a case for further legislative expansion of warranty protection should be made. It is significant, however, that the *Bona* court did not cite either *Debbis* or *Uppgren*, nor did it mention the warranty protection of § 2-318. Rather, the holding rested on principles of landlord and tenant law and on the UCC sections governing express warranties and warranties of fitness for particular purposes.

Bona brought suit for injuries when he was thrown from a golf cart which had gone out of control. Alleging breach of warranty and strict

21. The court said:

The fact, therefore, that Maryland has, as a general rule, required privity of contract as a prerequisite to an action for breach of an implied or express warranty does not necessarily mean that its courts view such an action as possessing more of the indicia of contractual actions than of tort actions. It is believed by this court that the highest court of Maryland, if faced with the necessity to decide the question, would determine that an action based upon an implied warranty (arising from a contract or sale made prior, of course, to the July 1, 1969 effective date of the amendment to Article 95B, § 2-318, Code of Md.) bears such a close relationship to one based upon tort that it should be subject to the rule of *lex loci delicti* for the same reasons as is a tort action.

326 F. Supp. at 716.

22. *Id.* at 715.

23. *Id.*

24. *Id.* at 716.

25. 264 Md. 69, 285 A.2d 607 (1972).

liability, Bona sued Graefe, the manager of the golf course, Royce, the distributor of the carts, and Carrigan, the operator of the cart when Bona was injured. In an appeal from a directed verdict for defendants Graefe and Royce, the Court of Appeals sustained the lower court and refused to construe § 2-313²⁶ and § 2-315²⁷ as being applicable to bailments for hire. Stating that Bona's contention would "take us beyond the limits of judicial restraint and into the area of judicial legislation, a journey which we [have] refused to make,"²⁸ the court found it anomalous that "many authors of texts and commentaries seem to take the stance that there should be no differentiation between sales and bailments under Article 2 of the UCC."²⁹ After giving numerous examples of plaintiff recoveries in similar situations (where a chattel was the subject of a lease rather than a sale),³⁰ the court contrarily concluded that "Maryland seems never to have adopted what has been a general rule elsewhere: that the bailor of a chattel to be used by the bailee for a particular purpose known to the bailor impliedly warrants the reasonable suitability of the chattel for the bailee's intended use of it."³¹ This finding by the court becomes relevant to § 2-318 when applied to the holding in *Debbis v. Hertz Corp.*³²

In *Bona*, the court compared a bailee-bailor relationship involving a chattel to principles of landlord and tenant cases. This analogy bypassed the acknowledged trend toward increased protection for bailees of chattels by either increased warranty or tort protection. Disregarding the modern trends, the court held that because a lessor does not impliedly warrant that real property is fit for habitation and because the landlord is answerable at tort only when he negligently

26. MD. ANN. CODE art. 95B, § 2-313 (1964), provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

27. MD. ANN. CODE art. 95B, § 2-315 (1964), states:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

28. 264 Md. at 74, 285 A.2d at 610.

29. *Id.* at 73, 285 A.2d at 609.

30. *Id.* at 74-75, 285 A.2d at 610.

31. *Id.*

32. 269 F. Supp. 671, 681 & n.12.

breaches a covenant to repair, the lessor of a golf cart does not extend a warranty of fitness of purpose to the lessee.³³

Although the court in *Bona* did not mention the warranty protection in § 2-318, it is apparent that it could have interpreted "any other ultimate consumer or user of the goods or person affected thereby" to include a bailee of a golf cart. Thus, the court, using §§ 2-313 and 2-315, not only limited the vertical privity of a bailee, but also closed some advances in horizontal privity protection made by the federal court in interpreting § 2-318 both in *Uppgren* and in *Debbis*. Although *Debbis* is not cited in *Bona*, the bailee-bailor problem was handled differently in the former case. The fact that the expanded § 2-318 became effective on July 1, 1969, before the leasing and accident in *Bona*, is an indication that had the federal court's reasoning been followed, *Bona* would have been protected.

III. § 2-318: VARIATIONS

If the current status of third party protection under § 2-318 in Maryland is somewhat in doubt, it has thus fulfilled the prophecy of Mr. M. King Hill, Jr., of the Virginia Bar, who wrote to the Maryland Judiciary Committee in 1968 that the proposed change in § 2-318 would not put an end to the issue of warranty protection for third party beneficiaries, but instead would cause further difficulty.³⁴ Hill suggested that Maryland alternatively adopt a version of § 2-318 identical to that of Virginia.³⁵ Pointing out that the editorial board of the UCC advocates local options in that section, Hill recommended the single amendment to § 2-318 as more favorable than amending §§ 2-314 through 2-318.

The Comment to § 2-318 in the Virginia Code states that under the official text "[o]nly those 'natural persons' who were in the family or household of the buyer or were guests in his home were protected."³⁶ However, it continues: "Recent Virginia legislation has virtually abolished the privity defense in breach of warranty and negligence

33. 264 Md. at 76, 285 A.2d at 610.

34. Letter from M. King Hill, Jr. to Carl N. Everstine, Nov. 1, 1968, on file with the legislative history of 1969, ch. 249, [1969] Laws of Md. 709, in the Office of Legislative Reference, Annapolis, Md. To wit: "The proposed amendment to section 2-318 seems to me to be one which can only lead to much litigation seeking an interpretation of the new language inserted."

35. VA. CODE ANN. § 8.2-318 (1965), states:

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; however, this section shall not be construed to affect any litigation pending on June twenty-nine, nineteen hundred sixty two.

36. *Id.*

suits."³⁷ Virginia's § 2-318 has been characterized as a codification of the doctrine of strict liability for products.³⁸ Perhaps it would have aided Maryland to adopt the Virginia version of this section, but Maryland courts had not "virtually abolished" the privity defense in 1969. In light of *Bona*, it is not certain that the privity requirement for third parties is abolished yet. If Maryland had copied Virginia's § 2-318, it would have been a case of legislative preemption, forcing the court to change privity-defense concepts.³⁹

Comment 3 of the UCC Official Comments to § 2-318 points out that variation "A" is only applicable to the named persons and "[b]eyond 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."⁴⁰ Section 2-318 was criticized in California as "a step backward," and was omitted from the Code in that state.⁴¹

Alternative "B" is essentially the same as the version of § 2-318⁴² adopted in the 1950 Proposed Final Draft of the Code.⁴³ "C" is "drawn to reflect the trend of more recent decisions as indicated by the Restatement of Torts 2d § 402A⁴⁴ . . . extending the rule beyond personal injuries."⁴⁵ It was mentioned in *Bona* that Maryland has twice rejected the doctrine in § 402A but that "the principle enunciated . . . [therein] is gaining acceptance."⁴⁶

37. *Id.*

38. Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 816 (1965).

39. For an analysis of VA. CODE ANN. § 8.2-318 (1965), see generally 51 VA. L. REV. 804 (1965).

40. UNIFORM COMMERCIAL CODE § 2-318, Comment 3 (1962 version).

41. 6 UCC REP.-DIG. § 2-318, at 1-100.1.

42. A warranty whether express or implied extends to any natural person who is in the family or household of the buyer or who is his guest or 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 and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Id.

43. *Id.*

44. 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.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

45. 6 UCC REP.-DIG. § 2-318, at 1-100.2.

46. 264 Md. at 77, 285 A.2d at 611. The *Restatement* position was rejected in *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1969); and *Telak v. Maszczenski*, 248 Md. 476, 237 A.2d 434 (1968).

A comparison of the variations "B" and "C" shows that "B" retains the phrase "natural person" in the first sentence whereas "C" does not. Alternative "B" notes that the warranty extends to one "who is injured in person" but "C" omits the "in person" requirement. While all three official versions state that "[a] seller may not exclude or limit the operation of this section," variation "C" 's addition of "with respect to injury to the person of an individual to whom the warranty extends" is most significant. This additional phrase grafts the spirit of § 402A indelibly into variation "C". Disclaimers under "C" would not be valid, as opposed to Virginia's version of § 2-318 which allows a valid disclaimer under § 2-316(2) if not unconscionable.⁴⁷ Of the three official versions of § 2-318, the most popular is alternative "A"⁴⁸ as adopted by Maryland in 1964.

The official UCC comment states that the sentence "[a] seller may not exclude or limit the operation of this section," in version "A," can be excluded or modified by a disclaimer under § 2-316. Thus, an innocent third party has no greater rights than a purchaser (or sub-purchaser), or in other words, both share the same vertical privity. The extent of this vertical privity will be determined when the Court of Appeals has the opportunity to construe Maryland's unique § 2-316A⁴⁹ in conjunction with Art. 95B, §§ 2-314⁵⁰ and 2-715(2).⁵¹

47. Speidel, *supra* note 38, at 837.

48. 6 UCC REP.-DIG. § 2-318, at 1-100.2.:

State Variations

Alternative B has been adopted in: Delaware (with variation), Kansas, Rhode Island (with variation), South Carolina (with variation), Vermont.

Alternative C has been adopted in: Colorado (with variation), Hawaii, Minnesota (with variation), North Dakota, South Dakota (with variation), Wyoming (with variation).

All other states, except Alabama, California, Maine, Massachusetts, Texas, Utah, and Virginia, have adopted Alternative A.

49. MD. ANN. CODE art. 95B, § 2-316A (Supp. 1972), provides:

The provisions of § 2-316 shall not apply to sales of consumer goods, as defined by § 9-109, services or both. Any language, oral or written, used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, shall be unenforceable, provided however, that the seller may recover from the manufacturer any damages resulting from breach of the above-described warranty.

Any language, oral or written, used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of the manufacturer's express warranties, shall be unenforceable, unless the manufacturer provides reasonable and expeditious means of performing the warranty obligations.

50. MD. ANN. CODE art. 95B, § 2-314 (Supp. 1972), provides:

(1) Unless excluded or modified (§ 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. Notwithstanding any other provisions of this subtitle, in §§ 2-314 through 2-318 of this subtitle, "seller" shall include the manufacturer, distributor, dealer, wholesaler or other middleman, and/or the retailer; and any previous requirement of privity is abolished as between the buyer and any of the aforementioned parties in any action brought by the buyer. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

There is a strong indication that the ultimate consumer, not just the retailer, will be protected by the additions to § 2-314.^{5 2}

IV. APPLICATION OF *PIERCEFIELD*

At this point, it is interesting to speculate on the scope of § 2-318 had the famous case of *Piercefield v. Remington Arms Co.*^{5 3} occurred in Maryland today. That case involved a shooting accident in Michigan in 1957 (the UCC was adopted in that state effective as of 1964) when the plaintiff, standing beside his brother, was injured by a defective shell in the shotgun his brother was using. The defective shell caused the shotgun to explode, and Piercefield was injured by the shrapnel. No special weight was attached to the fact that plaintiff's brother, purchaser of the shell, was involved. The case therefore presented the issue of an injured innocent bystander not in privity with the retailer, wholesaler, or manufacturer.

The Michigan Supreme Court allowed the plaintiff to proceed against the manufacturer on the theory of breach of implied warranty as well as the theory of negligence of the manufacturer. It was specifically noted that the warranties involved here went beyond the contract of sale and were not imposed by force of the Uniform Sales Act, but evolved from common law decisions in similar situations.

Despite the dicta in *Uppgren* that Maryland no longer requires privity in cases involving a dangerous instrumentality, at common law the

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- (2) Goods to be merchantable must be at least such as
 - (a) Pass without objection in the trade under the contract description; and
 - (b) In the case of fungible goods, are of fair average quality within the description; and
 - (c) Are fit for the ordinary purposes for which such goods are used; and
 - (d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) Are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) Conform to the promises or affirmations of fact made on the container or label if any.
 - (3) Unless excluded or modified (§ 2-316) other implied warranties may arise from course of dealing or usage of trade.

51. MD. ANN. CODE art. 95B, § 2-715 (1964), provides:

- (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
- (2) Consequential damages resulting from the seller's breach include
 - (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
 - (b) injury to person or property proximately resulting from any breach of warranty.

52. See *Erdman v. Johnson Bros. Radio & TV Co.*, 260 Md. 190, 271 A.2d 744 (1970); notes 54-57, 62, 64 *infra* and accompanying text.

53. 375 Mich. 85, 133 N.W.2d 129 (1965).

plaintiff in *Piercefield* would have had uncertain success in Maryland against a remote manufacturer, and would be fortunate indeed to recover against the retailer. Under version "A" of § 2-318, *Piercefield* would no longer be an innocent bystander, but would be a member of his brother's family and therefore entitled to warranty protection. Of course, if *Piercefield* had been a hunter in the field standing beside a stranger with a defective shell, a resultant explosion spraying shrapnel might not have been covered before 1969 in Maryland if the reasoning in *Debbis v. Hertz Corp.* were applied. At this point, vertical privity becomes important: Would *Piercefield*, if covered by § 2-318 before 1969, have been able to reach Remington? Would he be able to reach Remington now?

In *Erdman v. Johnson Brothers Radio & Television Co.*,⁵⁴ the court said that prior to the UCC there had been cases in which the "action was based on implied warranty of the fitness of a product as limited by the common law and the Uniform Sales Act."⁵⁵ Noting that there have been cases "involving manufacturers' products liability bottomed on tort,"⁵⁶ the court also stated that subsequent to the adoption of the UCC in Maryland "[t]here have been cases based on the breach of the manufacturer's or seller's warranty as to the fitness of a chattel for its intended use."⁵⁷ Based on this, if a purchaser has vertical privity, the advent of Maryland's § 2-318 assures the same protection to those covered before 1969 and "to any ultimate consumer" now. "Any ultimate consumer" can be limited if a court too narrowly construes the phrase "reasonable to expect such person may use, consume or be affected by the goods," but this would be antagonistic to the legislative purpose of expanding consumer protection. It is reasonable to assume that *Piercefield* could recover from Remington in Maryland today using § 2-318. If *Piercefield* was standing beside a stranger in a pre-1969 hunting incident, his best chance for success would be if his suit were based on the manufacturer's liability in tort.

V. LATENT-PATENT DEFECT TEST APPLIED TO WARRANTIES

Aside from the "reasonable to expect" limitation above, the latent-patent defect aspect also limits warranty-based recovery actions. The latent-patent defect criterion was well set out in *Blankenship v.*

54. 260 Md. 190, 271 A.2d 744 (1970).

55. *Id.* at 201, 271 A.2d at 749-50.

56. *Id.* at 201, 271 A.2d at 750. The court cited: "Babylon v. Scruton, 215 Md. 209, 303, 138 A.2d 375 (1958); Kaplan v. Stein, 198 Md. 414, 420, 84 A.2d 81 (1951), citing Milestone System v. Gasior, 160 Md. 121, 152 A. 810 (1931). Cf. also Woollay v. Uebelhor, 239 Md. 318, 211 A.2d 302 (1965)."

57. 260 Md. at 201, 271 A.2d at 750. Cases cited for fitness for intended use were Myers v. Montgomery Ward, 253 Md. 282, 252 A.2d 855 (1969), see note 46 *supra*, and Levin v. Walter Kidde & Co., 251 Md. 560, 248 A.2d 151 (1968).

*Morrison Machine Co.*⁵⁸ There, it was determined that neither the designer nor the vendor of a cloth sanforizing machine was liable to an employee of the purchaser who had sustained injury when his hand and arm were caught by the machine. The court held that the lack of protective guards was obvious and thus a "patent," rather than a "latent" (or concealed) defect. The court came to a reasonable conclusion: where the buyer or user of an object is aware of the danger in using the object, he cannot recover if he is accidentally injured in the anticipated manner. Examples would be cutting oneself with a knife, ax, or saw, or being burned by a match. It is only when a *hidden* (or latent) defect is present that the victim of an accident has grounds for recovery.⁵⁹

The court rejected the argument that this case involved recovery based on breach of warranty, and again affirmed that "[t]he case law of Maryland is that there must be privity between the plaintiff and the defendant to enable the plaintiff to recover on a warranty."⁶⁰ This tempers *Uppgren's* appraisal of common law warranty rights in Maryland and indicates that a pre-UCC Piercefield would take his chances against Remington only based on tort liability. However, the court specifically noted that *Blankenship* was not decided under the 1969 addition to Art. 95B, § 2-318, since the incident occurred in 1968 and the machine was purchased in 1954. Further, the pre-1969 § 2-318 in Maryland was not applicable as the court found the determinative date to be the sale of the machine.

Patten v. Logeman Brothers Co.,⁶¹ a 1971 case that closely resembles *Blankenship* (in *Patten* a paper-bailing machine was involved), was decided for the defendant-manufacturer on the latent-patent criteria used in *Blankenship*. No mention was made in *Patten* of either privity or warranty protection.

*Erdman v. Johnson Bros. Radio & Television Co.*⁶² applied the latent-patent test in a situation that the court found would otherwise be covered by the UCC. *Erdman* did not involve horizontal privity, but it was rather an illustration of a limitation on warranties when the latent-patent test is involved. Erdman purchased a television from Johnson which within a few months began to give off sparks and smoke. A repairman for Johnson fixed it temporarily, but a few months later the problem recurred. Johnson assured Erdman that a repairman

58. 255 Md. 241, 257 A.2d 430 (1969).

59. *Id.* at 244, 257 A.2d at 432. The court said:

The manufacturer of a mower is not an insurer, and is under no duty to make an accident proof product* * *. No cause of action is made out in the absence of an allegation that the injury was caused by a latent defect not known to the plaintiff or a danger not obvious to him, which was attendant on proper use* * * 'There is certainly no usual duty to warn the buyer that a knife or axe will cut, a match will take fire, dynamite will explode or a hammer will mash a finger* * *

60. *Id.* at 246, 257 A.2d at 433.

61. 263 Md. 364, 283 A.2d 567 (1971).

62. 260 Md. 190, 271 A.2d 744 (1970).

would come to the house in three days. During the interim, Erdman tried the television and again observed sparks and smoke. That night the defective television caused a fire which destroyed Erdman's house, a loss of almost \$68,000.

The Maryland Court of Appeals determined that the television did not conform to the standard of merchantability required by § 2-314(2)(c), and also that Erdman, although an ultimate consumer, was protected by the UCC. However, the court held that using the television in these circumstances amounted to using an instrumentality with a patent defect, and therefore defeated Erdman's recovery. In support of its application of the latent-patent criteria to Erdman, the court quoted Prosser,⁶³ whose contention it is that the word "warranty" camouflages the real question in cases where a person is accidentally injured by an object with a patent defect. Although the contention receives support by the unsettled nature of the case law on the issue of whether negligence can be imputed to the one injured by a breach of warranty, it is really, however, a matter of semantics. "Negligence," where a user has merely failed to discover a "latent" defect, is not a bar to action against a manufacturer for breach of warranty. This is not the situation where one who is aware that a course of conduct may lead to injury (with an object that has a "patent" defect) proceeds in that conduct in spite of the potential injury, and is subsequently injured. Here the user is guilty of either contributory negligence or assumption of the risk, or both, and thus does not have recourse against a manufacturer.⁶⁴

As Emroch points out, "The emphasis will now shift from privity, or lack of it, to proximate cause and foreseeability. The abrogation of privity, however, does not mean that the manufacturer and seller become insurers."⁶⁵ Although this was written in regard to the Virginia version of § 2-318,⁶⁶ it is also fair commentary on the Maryland

63. Superficially the warranty cases, whether on direct sale to the user or without privity, are in a state of complete contradiction and confusion as to the defense of contributory negligence. It has been said in a good many of them that such negligence is always a defense to an action for breach of warranty. It has been said in almost as many that it is never a defense. This is no more than a part of the general murk that has surrounded warranty," and is one more indication that this unfelicitous word is a source of trouble in the field. Actually, however, the disagreement is solely a matter of language; and if the cases are examined as to their substance, they fall into a very consistent pattern.

Where the negligence of the plaintiff consists only in failure to discover the danger in the product, or to take precautions against its possible existence, it has uniformly been held that it is not a bar to an action for breach of warranty. . . . But if he discovers the defect, or knows the danger arising from it, and proceeds nevertheless deliberately to encounter it by making use of the product, his conduct is the kind of contributory negligence which overlaps assumption of risk; and on either theory his recovery is barred. . . .

Id. at 198, 271 A.2d at 749, citing Prosser, *The Fall of the Citadel*, 32 AM. TR. LAW. ASS'N. J. 1, 21 (1968).

64. 260 Md. at 198, 271 A.2d at 749.

65. Emroch, *supra* note 9, at 991.

66. VA. CODE ANN. § 8.2-318 (1965).

situation. Taken in this light, the latent-patent test is understandable and not without justification. However, if Maryland is to expand consumer protection, the latent-patent test in close cases should be resolved in favor of the consumer.

VI. CONCLUSION

When warranties to third parties are involved, Maryland courts have stressed that change must come from the legislature. The legislature saw the need for change in 1969 and amended Art. 95B, § 2-318 accordingly. It remains to be seen whether the Maryland courts can now apply this law so as to protect third party beneficiaries adequately.

If the extent of the court's range when establishing manufacturers' and sellers' negligence and warranty liability should be "squared with the imagination and ingenuity of the manufacturer and seller, and their expert advertising agencies in trying to reach the largest possible market for their goods, then the protection under the statute should be extended to the entire public."⁶⁷ Certainly, this is a logical and fair appraisal of realistic consumer protection. In view of this, consumers in Maryland are unjustly injured when *Bona*-type decisions are handed down.

The changes made by the Maryland legislature in 1969 in §§ 2-314 through 2-318 are sufficient to expand the protection of third party beneficiaries of warranties in Maryland. Since the legislature has provided the tools, the courts *should* use them with proper liberality. If it happens that the legislature must take the lead again, either the § 2-318 adopted by Virginia or alternative "C" (the UCC codification of the *Restatement of Torts*' position) would present an unequivocal statement of legislative intent that would be particularly hard to ignore.

Allen J. Katz

67. Emroch, *supra* note 9, at 991.