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Warranty Law in Maryland Product Liability Cases: Strict Liability Incognito?

Martin H. Freeman
Freeman & Freeman, P.C.

Delverne A. Dressel
Assistant City Solicitor, Baltimore

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The authors consider the question of whether warranty law in Maryland now provides the plaintiff in a product liability case with a cause of action similar to that which would be available under the doctrine of strict liability in tort. The development of the strict liability doctrine is traced and its current scope and requirements for recovery are compared with those of the action for breach of the implied warranty provided in the Uniform Commercial Code.

One of the most phenomenal events in product liability law has been the rapid adoption by most jurisdictions of "strict liability in tort." ¹ The courts in these jurisdictions have supplemented common law negligence remedies by creating a new theory of tort liability. This doctrine allows recovery by any person who was injured by a defective product, regardless of whether he was a party to the contract for its sale.²

Maryland is not among the jurisdictions that have adopted strict liability in tort.³ Yet the question arises of whether gradual changes in Maryland law have accomplished a similar result. This article will examine that question. A discussion of the origin and development of the doctrine of strict liability will be followed by a comparison of its current scope with the scope of the action for breach of an implied warranty of merchantability under the Uniform Commercial Code⁴ [hereinafter referred to as the Code] as it now exists in Maryland.⁵


². Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966) [hereinafter cited as Prosser, 50 Minn. L. Rev.], explains the doctrine and gives an account of its development.


⁵. The primary focus of this article is on the potential for recovery for damages caused by a defect in the construction or assembly of a product as opposed to a defect in its design. In
Under the doctrine of "strict liability in tort," a seller is liable to users or consumers of his product for injuries to their person or property that are caused by an unreasonably dangerous defect in the product, and there is no need for the plaintiff to prove negligence or privity of contract, or to conform with any of the other formal requirements traditionally associated with contract actions.\(^6\)

In order to understand how these technical legal impediments to recovery were eliminated it is necessary to understand how they came into being. The warranty obligation originally provided the basis for a deceit action in tort.\(^7\) Eventually it evolved to the status of contract with the inevitable result that a breach of warranty action came to be regarded as inseparable from a contract action, and the privity requirement, an elementary premise of contract law, attached.\(^8\)

The privity requirement was simply that one must be a party to a contract in order to have standing to enforce it or to claim damages for a breach of its warranties.\(^9\) Under this limitation, only the buyer could maintain a cause of action for a breach of warranty, and the buyer's action was only against his immediate seller. He could not sue others further up the chain of title, such as the manufacturer or distributor.

Exceptions to this requirement began to develop. The courts first allowed recovery in the absence of privity when an "inherently dangerous" product was involved and the defendant's negligence could be proved.\(^10\) Then came what Prosser considered the first major breach in the privity barrier: the 1916 decision in *MacPherson v. Buick Motor Co.*\(^11\) Cardozo there stated a rule that literally swallowed the exception: "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser... then, Volkswagen of America v. Young, 272 Md. 201, 321 A.2d 737 (1974), the Maryland Court of Appeals rejected the suggestion that strict liability would provide a more viable theory of recovery than negligence for damages flowing from a design defect, due to the fact that the "reasonableness" of the design is the crucial test for recovery under both theories. *Id.* at 221, 321 A.2d at 747-48. While the strict liability theory of recovery may have other advantages over negligence in design defect cases, it would seem that the greatest area of confusion is in the conflicts and differences between the results achievable under warranty law and those achievable under strict liability law with respect to construction defect cases. Thus the scope of this article is confined to this latter topic.

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\(^6\) RESTATEMENT (SECOND) OF TORTS, § 402A, Comment m at 355 (1965).


\(^8\) Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L. J. 1099, 1126-27 (1960) [hereinafter cited as Prosser, 69 YALE L. J.].


irrespective of contract, the manufacturer of this thing is under a duty to make it carefully." 12 This expanded duty was rapidly adopted throughout the country, and extended to the point that "[N]o one now seriously disputes the broad general rule that the seller of a chattel is always liable for his negligence," 13 regardless of his lack of privity with the plaintiff.

Almost simultaneously, the privity barrier suffered a double-barrelled attack from another direction. Courts in a few states began to allow recovery against manufacturers of defective foodstuffs when neither privity of contract nor negligence was present. 14 Eventually a theory was developed, on grounds of public policy, that an "implied warranty" ran with these goods from the manufacturer to the consumer. 15 This rationale was based on the idea that warranty, being the child of both tort and contract, had retained some of its tort inheritance and could thus provide a basis for recovery in the absence of proof of negligence. 16

Some attempts were made to expand the exception for food products to mechanical products, 17 but, according to Prosser 18 the "dramatic moment" of the fall of the citadel of privity came with the decision of the New Jersey Supreme Court in Henningsen v. Bloomfield Motors, Inc. 19 In that case, the driver of an automobile, who was the wife of the purchaser, sustained injuries when a defect in the automobile’s steering mechanism caused it to collide with a wall. At that time, a warranty of merchantability was implied in every sales contract under the Uniform Sales Act. Although the defendant automobile manufacturer had attempted to evade this implied warranty by removing itself from privity with the retail purchaser and by giving a limited express warranty in conjunction with a disclaimer of the implied warranty, 20 the Henningsen court held that an implied warranty of suitability for use nevertheless accompanied new automobiles from the manufacturer into the hands of the ultimate purchaser. 21

Other states quickly began to adopt this approach, which was actually "strict liability upon a warranty," 22 and to apply it to a

12. Id. at 389, 111 N.E. at 1053.
18. Prosser, 50 MINN. L. REV. at 791.
20. Id. at 404, 161 A.2d at 95.
21. Id. at 384, 161 A.2d at 84.
22. Prosser, 50 MINN. L. REV. at 800.
variety of products.\textsuperscript{23} It soon became evident, however, that the use of
the warranty concept as a vehicle for imposing liability without fault
was not devoid of problems. Even when the privity requirement was
eliminated, the claimant's case was restricted by the seller's disclaimers
of warranty; limitations on the scope of the implied warranties of
fitness for purpose or merchantability; the possibility of recision of the
sale, the notice of breach requirements; the necessity of reliance upon
any representations; and potential for preclusion of wrongful death
damages in warranty cases.\textsuperscript{24}

Instead of attempting to deal with the problems apparently inherent
in this implied warranty concept of recovery, legal scholars advanced
another solution: give the concept another name. If the desired result
was a theory that would "combine the contractual notions of liability
without fault with the tort notions that the injured party need not be a
party to the sales contract,"\textsuperscript{25} why not call the theory strict liability in
tort and eliminate the warranty connotations and requirements?\textsuperscript{26} The
American Law Institute adopted this suggestion in the Restatement
(Second) of Torts, which stated the strict liability theory as follows:

(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) applied although
(a) the seller has exercised all possible care in the prepara-
tion 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.\textsuperscript{27}

\textsuperscript{23} See, e.g., Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr.
Rptr. 697 (1963); Simpson v. Power Prods., Inc., 24 Conn. Supp. 409, 192 A.2d 555
2d 438, 225 N.Y.S.2d 137 (1962); Lang v. General Motors Corp., 136 N.W.2d 805 (N.D.
1965).

\textsuperscript{24} Prosser, 69 Yale L. J. at 1127-34. These limitations are discussed in more detail infra,
beginning at p. 23.

\textsuperscript{25} R. Nordstrom, Sales, § 90 at 279 (1970).

\textsuperscript{26} See Prosser, 69 Yale L. J. at 1134.

\textsuperscript{27} Restatement (Second) of Torts, § 402A (1965).
As the law now stands, Maryland is one of only five states that have not accepted the concept of strict liability in tort.\textsuperscript{28} Yet Prosser suggested that, given enough time, the problems with warranty might have been solved by changes in the sales law or amendments to the Uniform Commercial Code\textsuperscript{29} and stated that the transition from warranty to strict liability in tort is "more one of theory than substance."\textsuperscript{30} There is no magic in the name given to a cause of action, and breach of warranty can be as useful an action as strict liability in tort provided it is not burdened with the difficulties that have traditionally accompanied warranty law. If Maryland warranty law has eliminated these burdens, then strict liability has arrived in Maryland, \textit{via warranty} instead of tort.

\textbf{WARRANTY}

The Uniform Commercial Code, which applies to sales transactions, supplies the current basis for a warranty action in Maryland. Subsection one of Section 2-314 provides the following implied warranty:

Unless excluded or modified \ldots, 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.\ldots\textsuperscript{31}

Subsection two defines merchantable goods as, \textit{inter alia}, those goods that "are fit for the ordinary purposes for which such goods are used; and \ldots adequately contained, packaged, and labeled as the agreement may require.\ldots\textsuperscript{32}

Although the Code also provides for an implied warranty of fitness for a particular purpose\textsuperscript{33} and for express warranties,\textsuperscript{34} the implied warranty of merchantability requires fewer elements of proof and is thus the most viable route to a result equivalent to that allowed under strict liability in tort.\textsuperscript{35} A comparison of the requirements for recovery

\begin{itemize}
\item \textsuperscript{28} 1 CCH \textsc{Prod. Liab. Rep.} ¶ 4060, at 4036-37 (1974). Alabama, Delaware, Georgia, Massachusetts are the others. Puerto Rico has not adopted the doctrine, however the District of Columbia has. \textit{Id.}
\item \textsuperscript{29} Prosser, 50 \textsc{Minn. L. Rev.} at 801.
\item \textsuperscript{30} \textit{Id.} at 804. \textit{See} Jackson \textit{v.} Muhlenberg Hospital, 96 N.J. Super. 314, 232 A.2d 879 (1967).
\item \textsuperscript{32} \textit{Id.} § 2-314(2).
\item \textsuperscript{33} \textit{Id.} § 2-315.
\item \textsuperscript{34} \textit{Id.} § 2-313.
\item \textsuperscript{35} To recover for breach of the implied warranty of merchantability, the plaintiff need not prove that the seller made any representation about the goods, as he would for express warranty (\textit{Compare} § 2-314 \textit{with} § 2-313), nor need he prove that the seller knew that he intended to use the product for a particular purpose and that he was relying on the seller's skill or judgement to furnish suitable goods, which is required to recover under
\end{itemize}
under an implied warranty of merchantability with the requirements of recovery under the strict liability in tort doctrine, as it is currently applied, will reveal the inadequacies, if any, of the warranty remedy.

**The Privity Requirement**

As discussed earlier, under the warranty law requirement of privity of contract a seller is liable to no person other than his immediate buyer. In product defect cases, it is necessary to subdivide privity of contract into two broad classifications in order to fully comprehend its import. Vertical privity encompasses the rights of the purchaser against persons in the chain of title other than his immediate seller, such as the manufacturer or distributor. Horizontal privity applies to the rights of a user of the goods who is not the original purchaser.

**The Vertical Chain**

Under the Uniform Commercial Code, a warranty of merchantability is effective only against a “seller.” That term is defined in Section 2-103(1)(d) as “a person who sells or contracts to sell goods.” Thus, until recent amendments an injured purchaser could recover damages from his immediate seller only. Effective July 1, 1969, Section 2-314 was amended to provide that for Sections 2-314 through 2-318 the definition of “seller” includes “the manufacturer, distributor, dealer, wholesaler or other middleman or the retailer...” The amendment also expressly abolished the requirement of privity as between the buyer and these parties in an action brought by the buyer.

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36. See note 9 supra and accompanying text.
42. Law of April 23, 1969, ch. 249, [1969] Laws of Md. 709, codified in Md. Ann. Code, Comm. L. Art., § 2-314(1)(b) (1975). This second amendment apparently accomplishes the additional result that, with respect to an action for breach of express warranty under Section 2-313, the buyer may sue others in the chain of title than his direct seller.
In *Frericks v. General Motors Corp.* the Maryland Court of Appeals specifically confirmed that a plaintiff who otherwise qualifies to bring a breach of implied warranty action may bring it against the manufacturer as well as the retail vendor. The court ruled that "[I]n light of the Maryland Uniform Commercial Code definition of 'seller' the allegations are sufficient to state a breach of warranty cause of action against both General Motors [manufacturer] and Anchor [retailer]." Thus, the vertical privity requirement no longer provides an obstacle to recovery in warranty in Maryland.

**The Horizontal Chain**

When the Maryland legislature amended Section 2-314, changing the definition of seller to abolish the requirement of privity along the vertical chain, Section 2-318 of the Code was also amended, resulting in the abolishment of the horizontal privity requirement in sales of consumer goods for users, consumers, or persons affected by the goods if it would be reasonable to expect these persons to use, consume, or be affected by the goods.

The outer limits of the Section 2-318 amendment have not been defined. However, in *Frericks v. General Motors Corp.*, the court held that a guest in an automobile was qualified to recover under Section 2-318. Although no Maryland appellate court has discussed the issue of bystander recovery in warranty, it is reasonable to expect that full effect will be given to the amendment, and thus, that "other persons affected" by the goods, including bystanders, will be allowed to recover.

This result would correlate with that allowed under the most liberal interpretation of the strict liability in tort doctrine. Although the Restatement reserved opinion on whether bystanders should be allowed recovery, extending the cause of action only to "consumers and users" of the product, some cases have allowed recovery by bystanders.

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43. 274 Md. 288, 336 A.2d 118 (1975) (manufacturer and retailer held liable for damages resulting from a secondary collision).
44. *Id.* at 303, 336 A.2d at 127.
   Prior to the amendment of Section 2-318, the privity requirement was eliminated only with respect to the buyer's family, household and guests.
47. *But see* Proxmire v. General Motors Corp., Civil Action No. 72-1044-N (D. Md., filed Jan. 19, 1973), where the court, in a memorandum opinion certifying the issue to the Maryland Court of Appeals, indicated its belief that recovery could be allowed in Maryland. The case was later settled.
48. *Restatement (Second) of Torts*, § 402A, Comment o (1965). The institute did acknowledge the increasing demand for consumer protection at all levels.
Despite this extension of the classes of plaintiffs protected by the implied warranty, a vestige of the horizontal privity requirement may remain in Maryland. Only those users, consumers or persons affected by the goods who are "injured in person" are allowed recovery by Section 2-318. Other jurisdictions have construed this language to require that a third party beneficiary to the sale must suffer personal injury in order to qualify for recovery for a breach of warranty.

Dictum in *Addressograph-Multilith v. Zink*, a Maryland Court of Appeals case, indicates that the Maryland courts will reach a similar conclusion. Although the *Addressograph* court held that the facts of the case required that the manufacturer be equitably estopped from asserting a lack of privity as a defense, it stated that privity of contract would otherwise remain an "essential ingredient... in a

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allowed the case to go to trial on a theory of strict liability); Lomendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969). *Contra*, Torpez v. Red Owl Stores Inc., 228 F.2d 117 (8th Cir. 1955) (sister of purchaser was injured; court found no implied warranty of fitness when product was selected by self-service); Rodriguez v. Shell's City Inc., 141 So. 2d 590 (Dist. Ct. App. Fla. 1962) (§ 402A not mentioned—court required injured user of product).

52. 273 Md. 255, 329 A.2d 28 (1974). Zink had leased typesetting equipment that was accompanied by an express warranty from the manufacturer, Addressograph. The equipment failed to function properly and Zink stopped making the required monthly payments to the lessor. When the lessor sued for the unpaid balance, Zink countered with a third-party complaint against Addressograph, alleging that, because of its breach of the express warranty, any judgment in favor of the lessor should be against Addressograph. No personal injury or physical damage to property was suffered by Zink. His only damages were in the nature of loss on his bargain.

One may question why the Code was applied to this case, which involved a lease rather than a sale (See discussion of leases and bailments *infra* at p. 65, and MD. ANN. CODE, Comm. L. Art., § 2-106(1) (1975)). Where, as here, it is the warranty of the manufacturer who sold the equipment to the lessor that is being relied upon, rather than a lessor's warranty, the court will apparently regard the transaction as one falling within the parameters of the Code.

*Addressograph* raises another question. Since the warranty being relied upon was an *express* warranty, to which Section 2-313 applies, Zink could not take advantage of the expanded definition of "seller" in Section 2-314(1)(a), which applies only to Sections 2-314 through 2-318. Thus, the court looked to Section 2-318, which it found also inapplicable. One wonders, however, why Zink did not invoke Section 2-314(1)(b), which states that "Any previous requirement of privity is abolished as between the buyer and any of the aforementioned parties [manufacturer, distributor, dealer, wholesaler or other middleman and/or the retailer] in any action brought by the buyer." (emphasis added). The court did not address this question, but one possible explanation is that Zink was actually not a buyer from the manufacturer, even though the manufacturer was a seller as to Zink's lessor. There is some room for argument that Section 2-314(1)(b), like Section 2-314(1)(a), has reference only to Sections 2-314 through 2-318. However, it is strange that this limitation was not expressly mentioned in one subsection but was in the other. Furthermore, this construction would make Subsection (1)(b) entirely superfluous.

Finally, however, it should be noted that all of the *Addressograph* court's references to the Code are rendered superfluous by its final conclusion that it was unnecessary to determine whether recovery could be allowed under the Code, since the same result could be and was achieved under contract law.

53. 273 Md. at 281-82, 329 A.2d at 31-32.
breach of express warranty action not involving personal injury.\textsuperscript{54} It should be noted, however, that the type of injury involved in \textit{Addressograph} was what is commonly characterized as economic loss—loss on the bargain—as opposed to property damage, which is generally characterized as physical injury to property.\textsuperscript{55} Even under strict liability in tort, which does permit recovery for physical injury to the property of users and consumers,\textsuperscript{56} only a few courts have allowed recovery for economic losses;\textsuperscript{57} others have refused such damages to parties in non-privity,\textsuperscript{58} following Prosser's suggestion that such damages are more suitably determined and awarded according to the rules of the contract theory of recovery.\textsuperscript{59} The dictum in \textit{Addressograph} could thus be read as referring only to personal injury as distinguished from economic loss; however, the case seems to indicate that damages for physical injury to property are available under warranty theory only to those third party beneficiaries who are personally injured.

Section 2-318 is only a qualifying Section, however, and should not be read to preclude an award of damages for physical injury to property or even economic loss,\textsuperscript{60} when the third party beneficiary is "injured in person." Once a plaintiff acquires the status of privity of contract by virtue of either Section 2-314's extended definition of seller, or Section 2-318's extension of the Code warranties to third party

\textsuperscript{54} Id. at 281, 329 A.2d at 31.
\textsuperscript{55} See note 52 supra. See also Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), which distinguished between property damage and economic loss.
\textsuperscript{56} Restatement (Second) of Torts, § 402A (1965).
\textsuperscript{59} Prosser, 50 Minn. L. Rev. at 822-23.
\textsuperscript{60} Cf. Midland Forge, Inc. v. Letts Indus., Inc., 395 F. Supp. 506 (N.D. Iowa, 1975). The plaintiff sued the distributor and manufacturer of drop forging hammers that failed to perform, alleging a breach of implied and express warranties under the Code. In denying a motion to dismiss, the court relied on strict liability law to avoid the personal injury restriction of Section 2-318, and held that the plaintiff could recover from the manufacturer with whom he was not in privity. However, in discussing damages, the court, noting that the economic losses sought were not recoverable under strict liability law in Iowa, characterized the case as one resting in contract, citing Hawkeye-Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 381-82 (Iowa 1972), which had acknowledged that both implied warranty under the Code and strict liability could form independent theories for recovery. This characterization of the claim under contract law permitted the plaintiff to invoke the long-arm statute, and presumably, to recover economic losses on the contract, even though strict liability theory was the basis for the dismissal of the lack of privity defense.
beneficiaries, he should be regarded as entitled to all of the remedies that a buyer could recover from his direct seller, unless the Code expressly provides otherwise elsewhere.\footnote{See Sections 2-316 and 2-316.1, discussed \textit{infra} at p. 61.}

\textit{The Notice Requirement}

Section 2-607(3)(a) of the Code provides:

\begin{quote}
(3) Where a tender has been accepted
(a) the buyer must within a reasonable time after he discovers or should have discovered any breach, notify the seller of breach or be barred from any remedy.\ldots \footnote{See American Mfg. Co. v. United States Shipping Board Emergency Fleet Corp., 7 F.2d 565, 566 (2d Cir. 1925), cited by Prosser in 50 \textit{Minn. L. Rev.} at 829.}
\end{quote}

Courts in various jurisdictions have suggested that the purpose of this notice requirement is to protect a seller against unduly delayed claims,\footnote{Wagner Tractor Inc. v. Shields, 381 F.2d 441, 445 (9th Cir. 1967). See Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245, 254 (N.D. Ill. 1974), where it was held that notice was not required in a suit for non-delivery because it was too late to remedy the situation and notice would have achieved nothing.} to enable him to "minimize any damages or correct the defect,"\footnote{Metro Investment Corp. v. Portland Road Lumber Co., 263 Ore. 76, 501 P.2d 312 (1972). See also \textit{Md. Ann. Code}, Comm. L. Art., § 2-607, Comment 4 (1975).} and to require that he be informed that the "transaction is troublesome and must be watched."\footnote{See Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974); Leeper v. Banks, 487 S.W.2d 58 (Ky. 1972); San Antonio v. Warwick Club Gingerale Co., 104 R.I. 700, 248 A.2d 778 (1968).} In the product liability context, the rule has been interpreted as intended to give the defendant an opportunity to properly defend his claim by marshalling evidence while it is still available.\footnote{Prosser, 50 \textit{Minn. L. Rev.} at 829, citing James, \textit{Products Liability}, 34 Tex. L. Rev. 144, 192-97.} Dean Prosser, however, takes issue with the application of the rule in product liability cases involving personal injury:

\begin{quote}
[T]he injured consumer is "seldom steeped in the 'business practice' which justifies the rule," and at least until he has legal advice it will not occur to him to give notice to one with whom he has no dealings.\footnote{Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974); Leeper v. Banks, 487 S.W.2d 58 (Ky. 1972); San Antonio v. Warwick Club Gingerale Co., 104 R.I. 700, 248 A.2d 778 (1968).}
\end{quote}

Several jurisdictions have nevertheless applied the notice requirement to the consumer \textit{buyer} of a defective product that caused injury.\footnote{See Berry v. G.D. Searle & Co., 56 Ill. 2d 548, 309 N.E.2d 550 (1974); Leeper v. Banks, 487 S.W.2d 58 (Ky. 1972); San Antonio v. Warwick Club Gingerale Co., 104 R.I. 700, 248 A.2d 778 (1968).} The Maryland appellate courts have not directly faced this situation. In
Smith v. Butler, however, the Court of Special Appeals applied the requirement in a breach of warranty case where the buyer sued his seller for losses incurred due to the inoperability of the product he purchased.

Although this case did not involve personal injury, there was no indication that the court would rule differently in that circumstance. The notice requirement can be expected to pose a problem in Maryland to any buyer whose suit is based on breach of warranty, whereas there would be no notice problem with a suit based on strict liability in tort. This is not a severe problem for a consumer buyer, however, since he knows who his seller was and can probably locate him and give notice within the required "reasonable time."

This is particularly true in light of the liberal construction taken by Comment five to Section 2-607 of the "reasonable time" requirement when a retail customer is involved. That Comment states that, for the retail buyer, a reasonable time is a reasonable time after "he becomes aware of the legal situation," and apparently contemplates the fact that the ordinary consumer buyer will not know that he is required to give notice to his seller until he has consulted an attorney. Furthermore, the notice requirement is a flexible one. There is no need to inform the seller of the precise nature of the defect; notification that a breach has occurred is sufficient. In Smith, the court held that there is no requirement that the notice be written; a telephone call would be sufficient to sustain the buyer's rights. The court also stated that


70. There is room for an argument that Section 2-607(3)(a) should not be imposed on a retail buyer whose claim is for breach of warranty, as opposed to revocation of acceptance, since the Section can be construed as addressed only to the requirement that notification precede revocation of acceptance.

The 2-600 series of the Code addresses itself to breach of the contract by the seller, as outlined in § 2-601, "[I]f the goods or the tender of delivery fail in any respect to conform to the contract the buyer may (a) reject the whole; or (b) accept the whole..." Section 2-606 then explains "What Constitutes Acceptance of Goods." Section 2-607 is entitled "Effect of Acceptance; Notice of Breach." [See Md. Ann. Code, Comm. L. Art., § 1-109: "Section captions are parts of Titles 1 through 10 of this article."] Subsection (1) requires the buyer to pay the contract for which he accepts. Subsection (2) states that acceptance precludes a rejection, but in the case of any breach of the contract, presumably including warranty, the buyer may revoke his acceptance under the following section (Id. at § 2-608, Revocation of Acceptance) provided he gives notice. It is important to note that in § 2-607 warranty is nowhere expressly mentioned; it is merely another action which may be brought by the buyer for breach of contract. The notice requirement may thus be read as intended to accomplish for the buyer the same result upon revocation of acceptance, cure by the seller if possible, as does Section 2-508 in cases of rejection (Section 2-508 is entitled "Cure by Seller of Improper Tender or Delivery." Under that Section the seller has an absolute right to remedy the defect, while oftentimes, where the goods have already been used to the buyer's detriment, a cure of the goods is impossible as loss has already been sustained).


"[I]t is not necessary that the buyer actually communicate to the seller that the goods are defective. . . . [E]fforts to contact the seller through repeated telephone calls, even though unsuccessful, are sufficient to constitute notice. . . ."\textsuperscript{74}

Another problem with the notice requirement is whether it should be imposed when the plaintiff in the breach of warranty action is a subpurchaser, instead of a direct buyer from the defendant, or when the plaintiff is an injured third party, as opposed to a buyer. Often these plaintiffs have not dealt directly with the person entitled to notice, and will have more trouble discovering his identity. This problem is raised in \textit{Frericks v. General Motors Corp.},\textsuperscript{75} where on remand, the Circuit Court for Cecil County granted a summary judgement for the defendants on the grounds that the plaintiff, a guest in the automobile that contained a defect-causing injury, failed to give notice to either the retailer or the manufacturer of the automobile.\textsuperscript{76} This case is now docketed for review by the Maryland Court of Special Appeals.\textsuperscript{77}

An examination of the Code and its history reveals the complexity of the issue that the \textit{Frericks} case presents. The word "buyer" is defined in the Code as "a person who buys or contracts to buy."\textsuperscript{78} "Seller" is defined as a person who sells or contracts to sell goods.\textsuperscript{79} Under these definitions, prior to 1969 an ultimate consumer was barred from bringing suit against a seller, and a buyer could not sue a manufacturer because of lack of privity. As noted earlier, the Maryland legislature eliminated the privity requirement in 1969 by amending Section 2-318 to extend a manufacturer's warranties to provide consumer remedies.\textsuperscript{80} At the same time, the term "seller" as used in Sections 2-314 through 2-318 was re-defined to include the "manufacturer, distributor, dealer, wholesaler, or other middleman or the retailer."\textsuperscript{81}

The terms "buyer" and "seller" as they are used in Section 2-607 were not re-defined by these amendments. The ramifications of this omission may be characterized in at least two ways. On the one hand, it can be argued that any attempt to apply the notice requirement to a plaintiff not in privity with the defendant would considerably limit the possibility of recovery under the newly-available consumer remedies. On the other hand, it is also arguable that the legislature did not intend to extend a warranty remedy to parties not in privity without also impressing on those parties the obligations that other persons entitled to the remedy would undertake, since to do otherwise would allow

\textsuperscript{74} Id. at 472, 311 A.2d at 817.
\textsuperscript{75} 274 Md. 288, 336 A.2d 118 (1975).
\textsuperscript{76} No. 10307 (Cir. Ct. Cecil Co. Aug. 18, 1975).
\textsuperscript{79} Id. § 2-103(1)(d).
\textsuperscript{81} Id.
parties who have paid no consideration for their rights a better chance of recovery than that given to parties whose rights have been received in return for consideration.

Comment five to Section 2-607 explains that, to some extent at least, third party beneficiaries do not fall within the reason of the notice requirement, since they have nothing to do with acceptance. However, the Comment goes on to indicate that a beneficiary is required to notify the seller that an injury has occurred, and that, although the time for reasonable notification after an injury may be extended, "even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation." 82

Nevertheless, there is authority to support the proposition that neither a third party beneficiary nor any other person not in privity with the defendant is required to give notice of a breach of warranty. In Tomcyuk v. Town of Cheshire, 83 a minor guest, who was injured while riding a bicycle purchased by his host, was not required to give notice to the defendant manufacturer of the breach of warranty that resulted in his injury. 84

After discussing the definition of "buyer" and "seller," the court quoted Section 2-106(1): "A 'sale' consists in the passing of title from the seller to the buyer for a price..." 85 and stated that "Where [Section 2-607(3)] speaks of a 'tender,' it means a tender of goods. A tender is an offer." The court then concluded:

However, it cannot be argued that the plaintiff Sandra Tomcyuk is a "buyer" under the meaning of the statute. It cannot be said that a "sale" was made by Union Cycle [manufacturer] to the Cartas [owners of the bicycle]... . The Legislature intended to make a distinction between the manufacturer as a seller to a retailer as a buyer and the retailer as a seller to the public as buyer, for in [Section 2-607(5)] it is provided that "[W]here the buyer is sued for a breach of warranty... (a) he may give his seller written notice of the litigation."... 

Simply because the legislature created certain rights in a third party beneficiary as to express or implied warranties, in adopting [Section 2-318], does not mean by implication such a beneficiary must give notice of an alleged breach to the manufacturer. If it were the legislative intent to require such notice, the Code would have said so... 87

84. Id. at 73-74.
86. Id. at 73-74.
87. Id. It should be noted that Connecticut had nowhere amended the definition of "seller" in its Code, as Maryland has done in Section 2-314.
The Tomcyuk case was followed in the more recent case of Chaffin v. Atlantic Coca Cola Bottling Co., which involved a situation where the parent of the child-buyer was injured by a foreign substance in his drink. Citing Tomcyuk, the court reiterated that the notice requirement cannot apply to a third party beneficiary under Section 2-318. Since there has been neither a tender to nor an acceptance by such party, he cannot be held to the requirements of a buyer.

Although both Tomcyuk and Chaffin involved the notice requirement as applied to a third party beneficiary, the language of the cases is also applicable to a subpurchaser. With regard to both potential plaintiffs, Professor Anderson has stated:

A person not in privity with the defendant, assuming that he is permitted to sue the defendant, is not barred for having failed to give notice to the defendant for the Code only requires that the plaintiff give the notice to "his seller." This carries with it the double restriction that the plaintiff be a purchaser and that he have purchased from the defendant. Thus the notice provisions of UCC § 2-607 do not apply to subpurchasers or bystanders.

These cases and commentaries appear to indicate that the viability of the notice requirement as applied to consumer sales is threatened. The potential for liberal construction alleviates to a large degree its effects on the suit of a consumer buyer against his direct seller. Furthermore, in terms of both construction and policy, the Maryland courts may well have the latitude to deny application of the notice requirement in a suit for breach of warranty by a third party beneficiary or subpurchaser.

Disclaimers

Another well-documented problem for the plaintiff who seeks recovery in warranty is the seller's ability to limit or disclaim some portion of the liability that would otherwise follow from his warranty. Theoretically, at least, disclaimers should present no problem to the plaintiff whose action is brought in strict liability in tort, and in these cases the courts have generally disregarded their effects. The

89. 127 Ga. App. at 620, 194 S.E.2d at 515.
92. See Restatement (Second) of Torts, § 402A, Comment m (1965). But see Franklin, supra.
93. E.g., Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). In the battle to obviate possible injustice the courts have attempted to get around disclaimers
rationale behind the judicial antipathy toward disclaimers has been characterized as a desire to "spread the losses" caused by defective injury-producing goods among a large number of people, through insurance and price increases.\(^9\)

Until 1971, Maryland allowed the disclaimer and limitation of implied warranties, although Section 2-316 of the Code restricts the manner in which liability can be disclaimed.\(^9\) Effective July 1, 1971 however, the legislature added to the Code Section 2-316.1,\(^9\) which provides:

1. The provisions of Section 2-316 do not apply to sales of consumer goods, as defined by Section 9-109, services,\(^9\) or both.

2. Any oral or written language 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, is unenforceable...\(^9\)

by finding that the disclaimer was not brought home to the buyer, or by construing it as inapplicable to the facts. Meyers v. Land, 314 Ky. 514, 235 S.W.2d 988 (1951) (obscure place); McPeak v. Baker, 236 Minn. 420, 53 N.W.2d 130 (1952) (only applicable to express warranties); Federal Motor Truck Sales Corp. v. Shanus, 190 Minn. 5, 250 N.W. 713 (1933) (printed matter on reverse side of sales contract not called to buyer's attention); Ward v. Walker, 44 N.D. 598, 176 N.W. 129 (1920) (ineffective when made after contract).


97. The reference to services in this Section has posed a source of confusion. A key question frequently confronting the courts is whether implied warranties arise in transactions for the sale of services as well as goods. Schuchman v. Johns Hopkins Hospital, [1970-1973 Transfer Binder] CCH PROD. LIAB. REP., ¶ 6557 (blood transfusion considered a service not encompassed by the U.C.C.). See generally Rapson, Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort, 19 RUTGERS L. REV. 692, 697 (1965).

98. Md. Ann. Code, Comm. L. Art., § 2-316 (1975). Consumer goods, as used in this Section, are those "used or bought for use primarily for personal, family or household purposes." Id. § 9-109(1). This Section may result in confusion as courts attempt to
While Subsection one of Section 2-316.1 clearly eliminates the effects of Section 2-316 on sales of consumer goods and services, Subsection two is somewhat confusing. The Subsection is phrased disjunctively, and the first phrase, “Any . . . language . . . which attempts to exclude or modify any implied warranties . . . .” would appear to make unenforceable any exclusion or modification of the implied warranties themselves in sales of consumer goods and services. The second phrase, however, “or to exclude or modify the consumer’s remedies . . . .” while it prohibits exclusion or modification of only the consumer’s remedies, does not have the same effect on the remedies of the “persons affected by the goods” who are given the benefit of implied warranties under Section 2-318. Of course, as explained previously, neither the consumer nor the “person affected” will have a cause of action under Section 2-318 unless he has suffered “injury in person.”

It is arguable that the term “consumer” in Section 2-316.1(2) was intended to be an abbreviated version of the list of persons who qualify for warranty protection under Section 2-318. Since Subsection one of Section 2-316.1 eliminates altogether the effects of Section 2-316 on sales of consumer goods and services, there would be no restriction at all on the exclusion or modification of remedies of persons, other than consumers, who are affected by the goods unless the term “consumer” in Section 2-316.1(2) is taken to include them. This would seem to be the most likely intention of the legislature since the preservation of the warranty to persons affected by the goods would have little practical effect unless their remedies were also preserved.

Furthermore, an interpretation of Section 2-316.1(2) that would eliminate persons affected by the goods from its protection would conflict with Section 2-719(3) which, in its prohibition of any clearly distinguish certain consumer goods from “equipment” under § 9-109(2). Goods are equipment “if they are used or bought for use primarily in business . . . .” The question has yet to be answered as to where this leaves an item such as an automobile which is driven to work each day and used for family outings. Is the vehicle a “consumer good” or “equipment”? Courts will have to determine precisely the category in which such goods belong since under Maryland law the classifications are mutually exclusive. McFadden v. Mercantile-Safe Deposit & Trust Co., 260 Md. 601, 618, 273 A.2d 198, 206 (1971).

Under clause (3) of § 2-316.1:

Any oral or written language 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, is unenforceable, unless the manufacturer provides reasonable and expeditious means of performing the warranty obligations.


99. As noted earlier, under § 2-318, warranties are extended to:

[A]ny 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.


Consequential damages may be limited or excluded unless the limitation or
limitation of consequential damages for injury to the person in sales of consumer goods as prima facie unconscionable, indicates no intent whatsoever to discriminate between consumers and other persons who would have a cause of action for breach of warranty. While it can be argued that Section 2-719(3) partially fills the void left by Section 2-316.1(2)'s failure to mention "persons affected thereby" with respect to remedies, in that it provides at least some limitations on the exclusion or modification of the remedy of damages for injury to those persons, it should be noted that the effect of Section 2-719(3) on remedies for the breach of implied warranties was perhaps eliminated along with Section 2-316, since that Section specifically refers to Section 2-719(3).

The legislature should be encouraged to eliminate the confusion inherent in Subsection two of Section 2-316.1. As the matter now stands, however, disclaimers to implied warranties and limitations of their remedies present no obstacle to the consumer. With respect to persons affected by the goods, it appears that the only remedy that could be excluded or modified under even the most restricted interpretation of Sections 2-316.1(2) and 2-719(3) would be property damage. However, as the Court of Special Appeals recently held in McCarty v. E.J. Korvette, Inc.,101

While there is no statutory presumption of unconscionability with respect to a limitation of consequential damages for injury to property in the case of consumer goods, ... a clause ... which attempts to exclude liability for both personal injury and property damage by limiting liability to replacement of parts is so tainted by unconscionability as to warrant deletion in its entirety.102

To eliminate the restriction on exclusions or modifications of remedies for "injury to the person" of persons affected thereby, the courts would have to take the unlikely position that the legislature intended to both exclude such persons from the protection of Section 2-316.1 and eliminate the effects of Section 2-719(3) on what would otherwise be their remedies.

Should the courts hold that the term "consumers" in Section 2-316.1(2) includes persons affected by the goods, disclaimers would have no more of an effect on claimants under the Code than they do on strict liability claimants.103 In this context, it should be noted that even in strict liability jurisdictions, courts have sometimes given

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102. Id. at 14.
103. See notes 92 and 93 supra.
practical effect to disclaimers by allowing the defendant to avoid liability on the grounds that the plaintiff "assumed the risk" implicit in the disclaimer or limitation.104

Liability of a Non-merchant

Section 2-314 provides that the warranty of merchantability is implied in a contract for sale only when the seller is a merchant with respect to goods of that kind.105 While the Maryland courts have not been confronted with the issue of whether recovery could be allowed for breach of warranty when the seller of the goods did not normally deal in that product, the warranty provisions do not appear to allow for such a radical extension of liability.

A similar problem also arises in a strict liability action.106 According to Comment f of Section 402A of the Restatement, strict liability is inapplicable to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor....107

This restriction on the applicability of the strict liability doctrine has not yet been fully defined.108 It has been held, however, that the "business" in question need not be the main business or the raison d'etre of the defendant. In Price v. Shell Oil Co.,109 the Shell Oil Company was held to be in the business of leasing trucks and thus answerable to a strict liability claim for injuries suffered by an employee of the lessee.110

On the other hand, no strict liability has been imposed when courts have found that the seller did not regularly deal in the specific goods in question. Even California, a state which is normally a forerunner in the

105. Md. ANN. CODE, Comm. L. Art., § 2-314(1) (1975). As discussed earlier, the term "seller" in this Section includes the manufacturer, distributor, dealer, wholesaler or other middleman or the retailer.
107. Restatement (Second) of Torts, § 402A, Comment f (1965).
field, has seen fit to deny recovery. Thus, Maryland's warranty law is no more restrictive in this area than the strict liability in tort theory.

Applicability of the Code to Leases and Bailments

Although the provisions of the Uniform Commercial Code do not directly prohibit the application of warranty law to leases and bailments, the Maryland Court of Appeals has attempted to impose this restriction. In Bona v. Graefe, the court refused to allow recovery under the Code to a plaintiff who was injured when the brakes of a leased golf cart failed to operate properly. The court indicated that such an extension of the Code's warranty provisions would constitute judicial legislation.

In 1974, the Maryland legislature responded to the Bona decision by extending the implied warranty of fitness for a particular use, in Section 2-315, to leases and bailments of goods. Obviously, however, this amendment is of no use to the lessee or bailee whose claim rests on the implied warranty of merchantability. In light of the


112. Md. ANN. CODE, Comm. L. Art., § 2-106(1) (1975) provides:
In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods.

However, Comment 2 to § 2-313 states:
Although this section [express warranties] is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. . . . [T]he matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise. (emphasis added).

113. 264 Md. 69, 285 A.2d 607 (1972).

114. Id. at 74, 285 A.2d at 609-10.

(1) 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 purposes.

(2) The provisions of subsection (1) apply to a lease of goods and a bailment for hire of goods which pass through the physical possession of and are maintained by the lessor, sublessor, or bailor.

116. For a complete discussion of this apparent "legislative error" see 4 U. BALT. L. REV. 197 (1974).
court's refusal in *Bona* to extend the warranty provisions, it is unlikely that it will now extend the lease clause of Section 2-315 to those instances properly covered by Section 2-314.117 Thus, if leases and bailments are to be covered by the implied warranty of merchantability, Section 2-314 must also be amended. There are indications that this may have been the legislature's intent in 1974.118

At first glance the theory of strict tort liability of the Restatement appears to be of no greater assistance to the lessee or bailee than warranty. Section 402A plainly imposes strict liability upon only sellers of goods.119 Nevertheless, in *Price v. Shell Oil Co.*,120 where an employee of the lessee of a gasoline tank truck sued the lessor for injuries sustained when a ladder mounted on the tank split, the court stated that there was no substantial difference between sellers and non-sellers such as bailees and lessors.

In each instance, the seller or non-seller places an article on the market, knowing that it is to be used without inspection for defects. In light of the policy to be subserved, it should make no difference that the party distributing the article has retained title to it.121

Clearly, this interpretation of the strict liability theory by some jurisdictions leads to a greater opportunity for recovery than warranty law in its present form offers. While amendment to Section 2-314 would rectify the situation, the current form of the Uniform Commercial

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117. Indications may be drawn from the language of the court in Myers v. Montgomery Ward & Co., 253 Md. 282, 295-96, 252 A.2d 855, 863-64 (1969) that Sections 2-314 and 2-315 overlap. Under Section 2-315, a buyer need not verbally communicate to the seller the particular purpose for which goods are intended, if the circumstances are such that the latter has reason to know that purpose. Under such conditions, the seller breaches both the warranty of fitness for the purpose and merchantability if he supplies goods that do not permit the buyer to realize the purpose intended. (See 1 W. Hawkland, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE (1964). In this narrow circumstance, the court might apply the warranty of merchantability to a lease or bailment.


119. RESTATEMENT (SECOND) OF TORTS, § 402A (1965). However, Section 408 of the RESTATEMENT imposes a duty of reasonable care upon lessors as follows: One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it.


121. *Id.* at 251, 466 P.2d at 726, 85 Cal. Rptr. at 182; accord, Cintrone v. Hertz Truck Leasing, 45 N.J. 434, 212 A.2d 769 (1965) (imposed strict liability on the lessor of trucks since the lessee put motor vehicles in the stream of commerce exposing the lessee to as great or a greater quantum of potential harm from defective vehicles than usually arises out of sales by the manufacturer).
Commercial Code in Maryland does not extend effective protection to users of leased or bailed goods.

**Plaintiff's Rescission of the Sale**

One of the difficulties noted by Dean Prosser regarding recovery under a warranty action was that rescission of the sale by the buyer precludes recovery under breach of warranty.\(^1\) Although this rule prevailed in a majority of states,\(^2\) Dean Prosser acknowledged the fact that such has never been the situation in Maryland.\(^3\)

When the Uniform Sales Act was in effect, the Court of Appeals in *Russo v. Hochschild Kohn & Co.*\(^4\) held that the rescission of a contract and recovery of the purchase price paid would not bar the recovery of special damages arising out of the breach of warranty in connection with a sales contract.\(^5\) At present there is no indication that the *Russo* holding will be disturbed as a result of the Uniform Commercial Code. The *Russo* decision that recovery of the purchase price paid in connection with the sale does not bar the elements of special damages is still, and will probably remain, viable law.\(^6\)

**Statute of Limitations Problems**

One of the major problems in a breach of warranty action involves the statute of limitations provided in the Code. Section 2-725 provides that an action for breach of warranty must be commenced within four years after the cause of action has accrued.\(^7\) The cause of action for breach of warranty accrues when tender of delivery is made unless the warranty explicitly extends to future performance of the goods, in which case it accrues on the date the defect was or should have been discovered.\(^8\)

This statute of limitations has consistently been held applicable to product liability actions based on a breach of warranty, except in some jurisdictions where a general statute of limitations applies to all actions claiming damages for personal injury, regardless of the theory of

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122. Prosser, 69 YALE L. J. at 1131.
124. Prosser, 69 YALE L. J. at 1131 n. 188.
125. 184 Md. 462, 41 A.2d 600 (1945) (defective hair lacquer pads caused scalp infection).
126. *Id.* at 467, 41 A.2d at 602; *accord*, Distillers Distrib. Corp. v. Sherwood Distilling Co., 180 F.2d 800 (4th Cir. 1950) (where a buyer has the right to rescind a sale for breach of warranty, he also has an election to accept goods and to sue for damages for the breach without returning or offering to return the goods).
recovery. Since Maryland has no general personal injury statute of limitations, the limitations period in Section 2-725 will probably be deemed applicable to all product liability cases based on breach of warranty.

This limitation period presents a virtually insurmountable obstacle to a plaintiff who sustains injury more than four years after he purchases the product. In addition, Section 2-725(1) permits a seller to further limit his liability to one year after delivery, by so specifying in the contract of sale. The warranty plaintiff is generally at a greater disadvantage in this respect than the plaintiff whose action is brought in strict liability in tort. The statute of limitations in a strict liability action is generally governed by tort law and runs from the date of injury, rather than the date of sale.

The Requirements of Reliance and the Contributory Negligence Problem

Historically, warranty principles required that the claimant act in reliance upon some representation or assurance, or some promise or undertaking given to him by the defendant. In the modern sales market it is often difficult, if not impossible, to prove reliance when the ultimate user has not dealt with all the parties in the vertical chain of title. However, with regard to the warranty of merchantability, the Code imposes no specific reliance requirement. The official comments to the Code indicate only that the breach of warranty of merchantability must be a proximate cause of the injuries sustained.

The Maryland Court of Appeals, in Erdman v. Johnson Brothers, dispensed with any reliance difficulty in cases of the warranty of merchantability by recognizing that the requirement is simply another way of saying that lack of proximate cause is available as a defense in a breach of warranty action. The court stated:

It would appear that an individual using a product when he had actual knowledge of a defect or knowledge of facts which were so obvious that he must have known of a defect, is either no longer relying on the seller's express or implied warranty, or has interjected an intervening cause of his own, and therefore a breach of such warranty cannot be regarded as the proximate cause of the ensuing injury.

131. See Burch, supra note 129 at 27.
133. See Burch, supra note 129 at 33.
137. Id. at 196-97, 271 A.2d at 747.
The court discussed abandonment of reliance, contributory negligence, assumption of risk, intervening cause and absence of proximate cause and concluded that attempting to differentiate the various terms was an exercise in semantics, stating that under any of the theories the important factor is that:

[A]lthough there may have been a breach of the warranty . . . the breach is no longer considered 'the proximate cause of the loss.' . . .

The lack of proximate cause of an injury is thus more significant than the lack of reliance or the fact that the plaintiff was contributorily negligent. This position is highly analogous to that taken in strict liability cases. Proximate causation must be proved, and, generally, assumption of risk is allowed as a defense, while a defense of contributory negligence, or mere failure to discover a defect is not. If the consumer discovers the defect, or knows the danger arising from it and deliberately proceeds to encounter the danger by using the product he assumes the risk and recovery is barred. It appears then that reliance, contributory negligence and assumption of the risk are no more a problem under a warranty theory of action than under strict liability.

Other Problems of Proof

Few, if any, essential differences persist with respect to the nature of proof required to establish the respective causes of action for breach of implied warranty of merchantability and strict liability in tort. Comment 4 to Section 2-314 of the Code outlines the requisites of proof of a breach of the implied warranty of merchantability:

[I]t is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that

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138. Id. at 197-200, 271 A.2d at 747-49.
139. Id. at 200, 271 A.2d at 749.
the breach of the warranty was the proximate cause of the loss sustained.\textsuperscript{143}

The quantum of proof necessary to give rise to a prima facie case of strict liability in tort is equally narrow, limited and specific: where a product is sold in a defective condition that is unreasonably dangerous to the consumer and the consumer suffers injury proximately caused by the defect, the seller is liable to the consumer.\textsuperscript{144}

Some courts have apparently been confused about the necessity for the plaintiff in a strict liability action to establish that the alleged defect was "unreasonably dangerous."\textsuperscript{145} As a result of the development of a public policy that the cost of injuries from defective products should be borne by manufacturers,\textsuperscript{146} the current tendency is to reject as a necessary prerequisite to recovery the proof that the injury-causing product was "unreasonably dangerous," and to require only proof of some defective deviation in construction.\textsuperscript{147} Summarily, then, there is, as a matter of practicality, no distinction between what the plaintiff must prove in a strict liability or breach of warranty action.

Substantial problems exist under both causes of action in connection with products that are unavoidably dangerous. Generally, if the dangers which inhere in the product are generic to its utility,\textsuperscript{148} the defects will not give rise to a cause of action.\textsuperscript{149} Knives are not defective because they can cut, for without the capacity to cut, they would have no usefulness. So, too, butter may cause arteriosclerosis, smoking cigarettes may cause cancer and liquor may cause liver damage; these too are unavoidably dangerous product defects which foreclose any possibility of recovery. Consumer injury in this area, while cautiously not defined as the result of contributory negligence, is based on a policy of precluding a plaintiff from recovery for his failure to possess knowledge that is an integral part of being alive,\textsuperscript{150} that is, a failure to expect generally known dangers.\textsuperscript{151}

Although further distinctions may yet be drawn with reference to what is needed to plead and prove individual actions under the

\textsuperscript{149} Rheingold, \textit{What are the Consumer's 'Reasonable Expectations?'}, 22 Bus. Law. 589 (1967).
\textsuperscript{150} Note, 42 Ford. L. Rev. 943 (1974).
alternative theories of strict liability and breach of warranty, the single most distinct impression conveyed in an analysis of the relative requirements of the two lies not in any disparity between the doctrines but in the analogy.152

Wrongful Death Damages

Wrongful Death Acts in most states provide that certain designated persons may maintain an action for damages against a person whose wrongful act caused the death of a close relative of the designated person. It has been suggested that, because of its contract associations, a breach of warranty can not provide an appropriate basis for a suit for wrongful death damages.153 Although some jurisdictions have denied recovery,154 others have allowed it.155 The tort nature of the strict liability action presents no problem when it is used as the basis for wrongful death recovery.156

Maryland's Wrongful Death Act defines a "wrongful act" as "an act, neglect, or default including a felonious act which would have entitled the party injured to maintain an action and recover damages if death had not ensued."157 The Maryland appellate courts have not ruled on whether a breach of warranty falls within this definition. However, the Maritime Amendment to the Wrongful Death Act,158 which uses the same language, has been interpreted by the United States District Court for Maryland to extend a wrongful death action when the decedent's death was caused by a non-negligent act of a ship.159 In Smith v. A/S Nabella,160 the court expressed a belief that:

[T]he Maryland Court would hold that the Maryland statute is not limited to the wrongful acts, neglects and defaults with which the legislators who adopted it were familiar, but that the

152. Note, 42 FORD. L. REV. 943 (1974). For a further discussion of the problems of proof in a product liability action, see Powell, Proof of a Defect or Defectiveness, beginning at p. 77 of this issue.
155. See B.F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959) (applying Kansas law but issue of whether the Kansas wrongful death statute permitted recovery based on breach of warranty was not specifically raised); Kelley v. Volkswagenwerk Aktiengesellschaft, 110 N.H. 369, 268 A.2d 837 (1970) (scope of amended wrongful death statute was broader than Maryland's).
158. Id. at 3-902(b).
statute was intended to apply to all wrongful acts, neglects, and defaults which from time to time would entitle the party injured to maintain an action.\textsuperscript{161}

This construction by the federal courts of the Maritime Amendment might well persuade the Maryland appellate courts to similarly construe the remaining portions of the Wrongful Death Act.\textsuperscript{162} Even if this construction is accepted, however, it can be argued that a wrongful death claimant is not an appropriate plaintiff in a breach of warranty action brought under the Uniform Commercial Code. Since the plaintiff was not a party to the contract, his cause of action must arise under Section 2-318 and, so the argument would go, the emotional anguish suffered due to the death of another would not constitute the “injury to person” necessary to qualify under that Section.

The contra argument is that the Wrongful Death Statute specifically creates a cause of action for the “injury in person” that results from the death of a close relative, giving the claimant a cause of action to the degree that the decedent, had he lived, would have had one.\textsuperscript{163} Thus, once it is established that a breach of warranty is a wrongful act, the Wrongful Death Statute, and not the Code, determines the parties entitled to recovery.

It should be noted in this context, however, that the cause of action in wrongful death is for the wrong to the beneficiary, not the wrong to the decedent.\textsuperscript{164} The beneficiary does not stand in the shoes of his decedent, as would the personal representative in a survival action.\textsuperscript{165} Since the breach of warranty action is limited to persons covered by the warranty, it can be argued that the wrongful death claimant must establish himself as one to whom the benefits of the warranty extend before he can be allowed to use a breach of the warranty as the basis for his claim. Under Section 2-318 of the Code, he must establish not only that he was affected by the goods but also that he suffered “injury in person.” Whether the Maryland courts would hold that mental anguish constitutes a sufficient “injury in person” to enable the wrongful death claimant to qualify under Section 2-318 is an open question.

A potential for an anomaly could arise if a breach of warranty is allowed to provide the basis for a claim for wrongful death damages.\textsuperscript{166}

\textsuperscript{161} \textit{Id.} at 671.
\textsuperscript{162} Santoni v. Mallenckrodt Chem. Works, No. 5107 (Balt. City Super. Ct., July 7, 1975) held that an action for wrongful death damages could be based on a breach of warranty theory, relying on the analogy of the \textit{Nabella} decision.
\textsuperscript{165} For cases that have defined the differences between a wrongful death action and one brought by a personal representative, see \textit{Smith v. Gray Concrete Pipe Co.,} 267 Md. 149, 297 A.2d 721 (1972); Stewart v. United Elec. Light & Power Co., 104 Md. 332, 65 A. 49 (1906).
The statute of limitations for a wrongful death action runs from the date of death and expires after three years, while a breach of warranty action runs for four years from the date of the breach, which is the date of the tender of the goods. If a decedent’s injury does not result in his death until after the warranty limitations period has run, the wrongful death claimant might have a cause of action where his decedent’s, had he lived, would have been time-barred. The same potential exists with a negligence or strict liability in tort action, however, where the limitations period usually runs from the date of injury. Again, there is a possibility that the decedent may linger after the injury until his original action is time-barred.

The problems that would arise in a wrongful death action based on a breach of warranty can be resolved by an inquiry into the basic nature of the Wrongful Death Act: What is the extent to which recovery under the Act is limited by the requirements of the theory of recovery that provides the underlying basis for the claim? A thorough analysis of the history, and intent of the Act, with special emphasis on the definition of a “wrongful act,” will be required of the appellate court that finally confronts the issue.

**Damages**

Although various issues involving the damages recoverable under both strict liability in tort and warranty theories have been discussed throughout this article, it is helpful to summarize the current state of the law in this area.

There seems to be no question but that damages for personal injury may be recovered by a buyer, a consumer or user of the defective product under both strict liability in tort and warranty. In many of the jurisdictions that adopt the theory of strict liability, recovery by a bystander for personal injury is also allowed. It would appear that, as a result of Maryland's amendments to the Code, a similar result will inure to the bystander who brings his action in warranty.

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168. For a more extensive discussion of this problem, see Burch, supra note 129, at 45.
170. As to such recovery in warranty cases in Maryland, see Frericks v. General Motors Corp., 274 Md. 288, 301, 336 A.2d 118, 126 (1975).
172. See discussion at p. 53 supra.
Recovery for physical harm to the property of users and consumers, even though they are not in privity with the defendant, as well as buyers, is available under strict liability. The same is true as to buyers in Maryland, but such recovery by users and consumers depends on whether the Maryland courts will interpret the term "injured in person" in Section 2-318 of the Code to include physical injury to a person's property, and if not, whether recovery of property damage will be allowed once it is proved that the person qualifies under Section 2-318 by suffering "injury in person," however that term is interpreted. The construction given to this term will also have an effect on whether wrongful death damages, and other such recovery can be allowed on a warranty theory. This recovery is available in strict liability in tort.

While some courts have allowed recovery for economic loss to parties not in privity with the defendant under a theory of strict liability in tort, the better view seems to be that such damages will not be allowed. Economic loss for breach of warranty is not recoverable under warranty law in Maryland by third party beneficiaries, unless, perhaps, they have also suffered "injury in person," but such recovery could logically be allowed to subpurchasers to the same extent that it is allowed to a buyer. As to punitive damages, recovery is generally not allowed under a breach of warranty theory and any recovery under a strict liability theory would most likely be allowed only where the additional elements of proof generally required are presented.

With respect to the measure and type of damages recoverable under the Code, the provisions of Subsections two and three of Section 2-714 bear direct relevance:

(2) The measure of damages for breach of warranty is difference at the time and place of acceptance between the value of the goods accepted and the value they would have

174. See Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965), where the plaintiff was allowed to recover from a manufacturer in an indemnity suit for damages he had paid to persons and property injured when defective brakes in his tractor-trailer resulted in its collision with a passenger bus.
175. See discussion at p. 54 supra.
180. Since the term seller has been re-defined by Section 2-314 to include manufacturers and other parties in the vertical chain of privity a buyer should be permitted to recover the same type and measure of damages from the manufacturer as he would be from his direct seller.
had if they had been as warranted, unless special circum-
stances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages
under the next section may also be recovered.

The essence of what is embraced within the term “consequential
damages” in Section 2-714 is further defined in Section 2-715(2)(b),
wherein it is dictated:

(2) Consequential damages resulting from the seller’s breach
include

(b) injury to person or property proximately resulting from
any breach of warranty.

It should be noted that this Section does not require precise
measurement of such damages. As stated in Comment 4 to Sec-
tion 2-715:

The burden of proving the extent of loss incurred by way of
consequential damage is on the buyer, but the section on liberal
administration of remedies rejects any doctrine of certainty
which requires almost mathematical precision in the proof of
loss. Loss may be determined in any manner which is reasonable
under the circumstances.\(^{182}\)

The earlier treatment in this article of disclaimers is also relevant to
this discussion of damages. In summary, it appears that, with respect to
consumer goods, Section 2-316 and 2-719 of the Code, taken together,
prohibit the exclusion or limitation of remedies in implied warranties
with the exception that property damage or economic loss to one who
is not a buyer or consumer may perhaps be limited or excluded.\(^{183}\)

CONCLUSION

This comparison of warranty with strict liability in tort has
illustrated that while the scope of recovery allowed under the Code in
Maryland closely approaches that which might be available under strict
liability in tort, it is nevertheless deficient in a few areas. The basic
question that must be re-examined by the Maryland courts and
legislature is whether or to what extent the remaining distinguishing
characteristics and requirements of the warranty theory of recovery
should permit defendants to avoid liability for their defective products.

The adoption of strict liability in tort would solve the immediate

\(^{183}\) See discussion at p. 60-64, supra.
problem. New problems might arise, however, in interpreting the doctrine and resolving its conflicts with warranty law.\textsuperscript{184} The alternative solution is to continue the current pattern of judicial clarification and amendments to the Code, accomplishing "strict liability" via warranty, instead of tort. While this evolution of warranty law might take longer to accomplish, the result could be a clearer definition of rights and liabilities, supported by a rationale more consistent with the historical precepts of warranty and tort law.

\textsuperscript{184} For a discussion of possible problems of conflict, see Franklin, supra note 91.