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COMMENTS

PRIVITY; PROPERTY DAMAGE; AND PERSONAL INJURIES . . . A RE-APPRAISAL

MALCOLM L. EDWARDS

. . . it appears that a realistic, judicial analysis and reappraisal of the privity rule would be quite appropriate.¹

The responsibility of a vendor of personal property to persons other than his immediate vendee has troubled courts throughout our legal history.² The primary purpose of this comment is to analyze this liability for personal injuries or property damage in an action for breach of warranty. The inquiry is strictly limited to those obligations which arise incidentally to a sale or contract to sell personal property. It does not extend to sales of realty or to those transactions which are not sales, such as service contracts and contracts of bailment. The discussion is further limited to the vendor's liability for personal injuries and property damage and does not include liability for the invasion of intangible economic interests.³ The comment is not concerned with causes of action other than breaches of warranty, such as causes of action sounding in negligence or fraudulent misrepresentations. The discussion will be devoted to the existing law in Washington, and a summary with emphasis of possible future developments.⁴

THE EXISTING LAW IN WASHINGTON

The extent to which a vendor of personal property is liable to persons other than his immediate vendee for personal injuries or property damage is not clear under the Washington law. The relevant statute in this area is the Uniform Sales Act. It was adopted in Washington in 1925.⁵ The language used in the sections devoted to warranties⁶ is that of "buyer" and "seller" and "sale" and "contract of sale." This has been interpreted as meaning the Act

¹ Freeman v. Navarre, 47 Wn.2d 760, 767, 289 P.2d 1015, 1019 (1955).

² PROSSER, TORTS § 86 (2nd ed. 1955).

³ The area of law relating to the invasion of intangible economic interests is sufficiently broad to merit a comment directed to that subject alone.

⁴ The comment includes all of the relevant cases disclosed by the author's research in an attempt to give the subject an exhaustive treatment.

⁵ RCW 63.04.

⁶ RCW 63.04.120 through .170.

regulates only the rights and duties of a "buyer" and "seller" who are parties or privies to the same "contract of sale" or "sale."⁷ Such a construction should mean that a discussion of the law relating to the liability of a vendor to persons other than his immediate vendee need not concern itself with the Uniform Sales Act.⁸ However, the court has developed certain fictions to bring problems in this area under the purview of the Act, namely: by finding a contract relationship under a broadened definition of agency⁹ or by calling the injured party a third party beneficiary of the original sale.¹⁰

Those cases decided prior to the passage of the Act in 1925, and subsequent cases which do not rest on a finding of privity, must be based on the common law. The mere fact that the Sales Act does not regulate the rights and duties between a vendor and persons not in privity does not indicate a legislative intent to limit the vendor's liability solely to parties in privity. Section 73¹¹ indicates that the vendor's liability in this area is governed by the common law. It provides that, "In any case not provided for in this Act, the rules of law and equity, including the law merchant . . . shall continue to apply . . ."

Washington cases give verbal support to the general common law rule of no liability without privity. Appended to this general rule are several so called exceptions.¹² The surprising thing is that there is little authority to support the general rule. There is more positive authority for the general rule in actions based on implied warranty than in actions based on express warranty. Because of this possible difference in treatment by the court, they will be discussed separately in this comment.¹³

Express Warranty

None of the Washington cases, on their facts, support the often stated general rule that privity is required to maintain an action based on express warranty. The most noted case in this area is *Baxter v. Ford Motor Company*,¹⁴ decided in 1932. In that case, the plaintiff

⁷ Cochran v. McDonald, 23 Wn.2d 348, 161 P.2d 305 (1945).

⁸ Uniform Sales Act, *supra* note 5.

⁹ Freeman v. Navarre, *supra* note 1.

¹⁰ Jeffery v. Hanson, 39 Wn.2d 855, 239 P.2d 346 (1952).

¹¹ RCW 63.04.740.

¹² Mazetti v. Armour, 75 Wash. 622, 135 Pac. 633 (1913).

¹³ Warranties of title are primarily concerned with invasions of intangible economic interests and are not discussed in this comment. To the effect that privity is a requirement in this area, see *Peregrine v. West Seattle State Bank*, 120 Wash. 653, 208 Pac. 35 (1922).

¹⁴168 Wash. 456, 12 P.2d 409, 412 *aff'd* 15 P.2d 1118 (1932).

purchased a new car from a dealer after reading circulars put out by the defendant manufacturer representing the windshield of the car to be shatterproof. The contract between the plaintiff and the dealer contained a disclaimer clause. Shortly after purchasing the car, the windshield shattered under a slight impact causing injury to one of the plaintiff's eyes. The court paid verbal homage to the privity requirement but went on to allow recovery against the defendant on the theory the statements in the circular were express warranties. In so doing, the court stated:

It would seem unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities, which they, in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.¹⁵

This case would seem to indicate that privity is not a requirement in an action for breach of an express warranty based on statements of fact contained in a manufacturer's advertisements as to a consumer who in justifiable reliance thereon purchases the product in the ordinary course of trade.¹⁶

The court, in later cases, has departed from the frank approach to the problem demonstrated in the *Baxter case*, *supra*. As a substitute recovery has been granted by finding a fictional contractual relationship between the parties. The most recent illustration of this is *Freeman v. Navarre*,¹⁷ decided in 1955. The owner of the proposed Bellevue Shopping Square hired an architect to plan the development. An agent of the manufacturer of "Ric-Will" pipe represented to a mechanical engineer, hired by the architect, that their underground heating pipe had a long and trouble-free life. The engineer specified in the contract that "Ric-Will" pipe was to be used. Navarre Plumbing and Heating was awarded the mechanical contract and purchased and installed the pipe as per the specifications. The pipe proved to be defective and the owner of the project was allowed to recover against the manufacturer of the pipe on theory that privity existed.

¹⁵ *Ibid* at p. 462.

¹⁶ Sholley, *Manufacturer's Advertisements as Express Warranty to Consumer*, 7 WASH. L. REV. 351 (1932); *But cf.* Dobbin v. Pacific Coast Coal Co., 25 Wn.2d 190, 170 P.2d 642 (1950), which refers to the case as resting on fraud. Notice that there was no proof of negligence or knowledge of the defect on the part of the defendant. *But cf.* Fleenor v. Erickson, 35 Wn.2d 891, 215 P.2d 885 (1950), where the court referred to the *Baxter* case as an extension of the warranty doctrine.

¹⁷ 47 Wn.2d 760, 289 P.2d 1015 (1955).

The court said that the contractor was the agent of the owner for the purpose of the purchase of the pipe. This appears to be an obvious fiction as the owner lacked the requisite degree of control over the contractor's performance of the job. A contractor of this sort should be classified as an "independent contractor" and not an agent. His function is to do a job for a price to meet the specifications. The existence of this contractual relationship does not give the contractor authority to enter into contracts binding the owner of the project.¹⁸ A common rule of agency is that if an agent enters into a contract of purchase on behalf of his principal, whether or not the principal is disclosed, the seller of the goods may sue the principal for the purchase price.¹⁹ Clearly, the manufacturer of the "Ric-Will" pipe would not have been very successful in an attempt to hold the owner of the shopping square *personally liable* for the purchase price of the pipe. True, the seller may have been able to exert a materialmen's lien²⁰ against the subject matter of the contract. However, the exertion of the lien does not hold the owner *personally liable*. The seller's only claim is *against the property* upon which the lien is exerted.²¹

The advisability of making the agency argument in cases of this type has been illustrated in previous decisions of the court. In *Wisdom v. Morris Hardware Co.*,²² an apple orchard owner told the defendant hardware store that he and his neighbors were having a great deal of trouble with aphids. The defendant sold him a spray which he represented would solve the problem without injuring the trees. The owner told the defendant that if the spray worked he could probably sell a lot of it to other orchard owners in the valley. The defendant gave the owner some literature describing the product. Upon returning to the valley, the owner told four of his neighbors what the defendant had said and showed them the literature. Two of the neighbors purchased some of the product from the defendant. Two others ordered the product on credit from a produce store in an adjacent town. The spray damaged the trees and all five parties brought suit against the defendant. All five recovered. The court found privity on the basis that the owner was the agent of the defendant for the purpose of conveying the representations to the four neighbors. As to the owner and two of the neighbors who purchased the product

¹⁸ MECHEM, AGENCY § 14 (4th ed. 1952).

¹⁹ *Ibid* at § 15.

²⁰ RCW 60.04.010.

²¹ *Ibid*.

²² 151 Wash. 86, 274 Pac. 1050 (1928).

from the defendant, the court had little difficulty. The court had a greater problem as to the two neighbors who purchased from the produce store. Surmounting the problem, the court held the produce store was the agent of the two plaintiff's for the purchase of the product because the produce store advanced them credit.²³ Query: could the hardware store hold these two plaintiff's personally liable for the purchase price of the product?

A 1952 decision²⁴ of our court points out another possible avenue of escaping the professed privity rule. In this case, *A* told *B* he had a buyer for a caterpillar tractor. Both *A* and *B* were vendors of used equipment. *B* found that *C* had a caterpillar and both discussed it with *A*, in which discussion both *B* and *C* assured *A* that the caterpillar would be warranted as 90% new and never used in salt water. *B* confirmed this conversation by sending a notarized statement to *A*. *B* purchased the tractor from *C* and sold it to *A* who sold it to *D*. *D* returned the tractor after it broke down. The court allowed *A* to recover against *C* on the theory that *A* was an intended beneficiary in the contract of sale between *B* and *C*.

Three Washington cases have denied recovery in this area. In each of them the court stated that there can be no recovery without privity of contract. The cases could have and might have been decided on alternative grounds. The first of these was *Kramer v. Carbolineum Wood Preserving Co.*²⁵ In this case, the plaintiff purchased a chemical product to kill fruit tree borers from *A* store. The label on the can represented that the chemical would kill borers and make fruit trees healthier. At a later date, the plaintiff purchased the same product from *B* store sans label. The second purchase was applied and it damaged the plaintiff's trees. The court denied recovery against the distributor who allegedly sold both cans to the different stores. The court pointed out that there was no proof that the defendant had sold either of the cans to either of the two stores. In such a case, no liability would result even if privity were not a requirement. The cause of action failed for lack of a casual relationship between the defendant's conduct and the damage suffered by the plaintiff. If decided on privity alone, it may demonstrate a reluctance of the court to hold liable a distributor who has no control over the production of the product.

The second case in which recovery was denied was *Cochran v.*

²³ Cf. *Ingraham v. Associated Oil Company*, 166 Wash. 305, 6 P.2d 645 (1932).

²⁴ *Jeffery v. Hanson*, *supra* note 10.

²⁵ 105 Wash. 401, 177 Pac. 771 (1919).

McDonald.²⁶ The plaintiff purchased a can of anti-freeze, the use of which damaged his car. The can bore a label placed upon it by the manufacturer, representing the product as safe for use in automobiles. The service station from which the plaintiff purchased the anti-freeze purchased it from a distributor who purchased it from the manufacturer. The court refused to hold the distributor liable. The case does not necessarily support the privity rule. The court pointed out an alternative ground for the decision, namely that the distributor did not adopt the warranty on the label by the mere act of selling it to a retailer for resale to the ultimate consumers.²⁷ The third case, *Dobbin v. Pacific Coast Coal Co.*,²⁸ could have been decided on the alternative grounds that the subject matter of the sale was realty and the representations which allegedly gave rise to the express warranty were made after the purchase. In this case, the plaintiff, after purchasing a house, read a circular describing the furnace which the builder had purchased and installed in the home. The furnace smoked and did not supply adequate heat. The court denied recovery against the manufacturer.²⁹

Each of the above three cases can be said to stand for the rule that privity is required for an action based on breach of an express warranty. However, the statement of the privity rule can be relegated to the realm of dictum by use of the analysis set out above. One approach appears to be as reasonable as the other. Therefore, our court stands in the unique position of being able to overrule the supposed general rule without overruling a single Washington case.

Implied Warranties

There is more positive authority for the privity requirement in an action for breach of an implied warranty. The leading case in this area is *Mazetti v. Armour*,³⁰ decided in 1913. The court gave a restaurant lessee recovery against a food manufacturer, not in privity with the plaintiff, for loss of profits occasioned by serving unwholesome tongue to a verbose customer. The case arose on a demurrer to a complaint alleging negligence and breach of an implied warranty. The court discussed both causes of action in a somewhat unrelated manner and held that recovery should be allowed under one theory

²⁶ *Cochran v. McDonald*, *supra* note 7.

²⁷ *Cf. Jolly v. Blackwell and Co.*, 122 Wash. 620, 211 Pac. 748 (1942).

²⁸ 25 Wn.2d 190, 170 P.2d 642 (1946).

²⁹ The court also pointed out the furnace was not faulty. The fault was in the installation.

³⁰ 75 Wash. 622, 135 Pac. 633 (1913).

or another. In discussing the warranty aspect of the case, the court stated that privity was required with certain exceptions. The stated exceptions were:

(1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the article; and (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous.³¹

It would appear that exceptions (2) and (3) are not really exceptions at all. They are causes of action other than breach of warranty. Exception (2), "where the defendant has been guilty of fraud or deceit in passing off the article," states a cause of action based on fraudulent misrepresentations, and exception (3) states a cause of action based on negligence. Nevertheless, this passage which confuses alternative remedies has been repeated in dictum in nearly every subsequent case which has dealt with the problem.³²

Apart from the cases involving food, there is no authority for exception (1), "Where the thing causing the injury is of a noxious or dangerous kind." In the food cases, the court apparently feels that the possibility of harm from defective food products is so great that the consumer must be protected by imposing absolute liability on the vendor. It is significant to note that this first case allowed recovery for invasion of an intangible economic interest—loss of profits—not for bodily harm to the consumer of the food. A subsequent case has allowed recovery for *personal injuries* occasioned by eating unwholesome food,³³ where the court held a dairy liable for breach of an implied warranty to an ultimate consumer who purchased the milk from the owner of a dairy route. The court indicated that the farmer who sold the milk to the dairy would be liable except for the plaintiff's failure to prove that the milk he consumed came from his farm. In a more recent case, *Geisness v. Scow Bay Packing Co.*,³⁴ recovery would have been granted against the canner of certain salmon purchased by the plaintiff from a retailer if the plaintiff had successfully proven that her sickness was caused by the unwholesome character of the fish. The above cases seem to support the rule that a vendor of food products impliedly warrants their wholesomeness "to all who may be

³¹ Ibid at p. 624.

³² See all of the remaining cases cited in this portion of the comment.

³³ *Nelson v. West Coast Dairy Co.*, 5 Wn.2d 284, 105 P.2d 76 (1940).

³⁴ 16 Wn.2d 1, 132 P.2d 740 (1942).

³⁵ *Mazetti v. Armour*, *supra* note 12 at p. 630.

damaged by reason of their use in the legitimate channels of trade."³⁶

Recovery has been denied in an action for breach of an implied warranty in three cases where the subject matter of the sale was not food. *Cochran v. McDonald*, *supra*, discussed in the express warranty section, seems to squarely support the general rule that privity is required to maintain an action based on implied warranty. The two remaining cases also mentioned the rule requiring privity, but each could have been decided on other grounds. As pointed out previously, in *Dobbin v. Pacific Coast Coal Co.*, *supra*, the subject matter of the sale was realty and the evidence did not support the plaintiff's contention that the furnace was defective. In *Fleenor v. Erickson*, *supra*, the defect was in the installation of the insulating material without providing for ventilation between the floor upon which the material was placed and the ground beneath it. Theoretically an implied warranty can cover defects in installation. Section 15 (1) of the Uniform Sales Act³⁶ states, "Where the buyer . . . makes known to the seller the particular purpose for which the goods are required . . . there is an implied warranty that the goods shall be reasonably fit for such purpose." However, in this case, it did not appear that the manufacturer of the insulating material was ever informed of the absence of ventilation between the floor and the ground. Therefore, he did not impliedly warrant that it would be fit for the particular purpose or application intended by the plaintiff. There is also the additional factor that the plaintiff had purchased the material before talking to the agent of the manufacturer. The above analysis indicates that the court can abandon the privity requirement in implied warranties by overruling but one case, namely the *Cochran* case, *supra*.

SUMMARY: POSSIBLE FUTURE DEVELOPMENTS

The Washington lawyer representing an injured plaintiff not in privity with the defendant is faced with two possible courses of action. He may ground his claim for relief on the Uniform Sales Act. In that event the attorney must exercise his imagination and find the existence of privity on some fictional basis such as the agency or third party beneficiary method. The court has accepted this approach in express warranty cases and would quite probably accept it for implied warranties in a proper case. As a second approach the lawyer may admit the lack of privity and base his claim on the common law. He should be successful on either express or implied warranty if the subject

³⁶ RCW 63.04.160 (1).

matter of the sale is food, or if the facts fall within the express warranty doctrine of the *Baxter case, supra*. The court may be susceptible to an attempt to bring cases within the dictum of exception (1) in the *Mazetti case, supra*: namely where "the thing causing the injury is of a noxious or dangerous kind . . .". Under either of the two possible approaches, the plaintiff will have a greater chance of recovering if the defendant is a manufacturer or, in some other manner, exercises some degree of control in the production or packaging of the subject matter of the sale.

Unfortunately, the law is in such a state of confusion that the plaintiff may have to appeal to gain a favorable judgment. This is an expensive process and is prohibitive in many cases where the amount in dispute is not large. The moral of the story may be that a vendor can, without any substantial risk, place products in the channels of commerce which might injure many people a little, but not those which might injure a few people a substantial amount. The use of fictions tends to increase the law's uncertainty and the consequent necessity of appeal. If the court is in basic disagreement with the privity requirement, it would appear they would be rendering a public service by frankly stating this disagreement and overruling the often stated general rule.

The court has recently indicated a willingness to re-examine the privity requirement.³⁷ Such a re-examination should include an inquiry into both the legal and substantive factors surrounding the rule. As previously pointed out, the court can negate the Washington authority for the rule requiring privity in the area of express warranty without overruling a single case, and in the area of implied warranty by overruling but one decision.

There are strong historical legal grounds for overruling this case. The rule was derived by a confusion of *writ* and *right*. The early English cases in this area were sued out of the writ, *trespass on the case*, and were regarded as tort actions.³⁸ Due to the use of the writ of *assumpsit* in later cases,³⁹ all warranty obligations came to be regarded as contractual in nature. Later courts improperly allowed the writ to control the right and held that there could be no recovery in a *tort action* where the wrong was also a breach of contract unless

³⁷ *Freeman v. Navarre, supra* note 1 at p. 765.

³⁸ *Fitz Ab Monst de Faits*, pl. 160 (1383); Cf *WILLISTON, SALES* § 195 (rev. ed. 1948) to the effect that the law of warranty is one hundred years older than the writ of *special assumpsit*.

³⁹ *Stuart v. Wilkins*, 1 Dougl. 18 (1778).

there was a contractual relationship between the parties.⁴⁰

Authority can be found for abandoning the professed general rule in warranty actions by reference to the growth of negligence law. Privity of contract was once a requirement in negligence actions where the tort was also a breach of contract. Early courts carved out an exception to the rule where the subject matter of the sale was inherently dangerous. After a losing struggle to define satisfactorily what was "inherently dangerous," Justice Cardozo, in *MacPherson v. Buick Motor Co.*,⁴¹ wrote an illuminating opinion in which he stated, "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 a thing of danger." It was just a short step from this statement to the rule which now prevails in Washington and in the majority of the states, namely: an injured party may recover against a vendor-tortfeasor in a negligence action, despite the lack of a contractual relationship between the parties, provided all the elements necessary to constitute a cause of action are alleged and proved.⁴² The one-time "inherently dangerous" negligence exception is strikingly similar to the present Washington "noxious or dangerous" warranty exception stated in the *Mazetti case*, *supra*. This similarity of growth provides analagous authority for overruling the rule requiring privity in warranty actions.

The most common objection to overruling the privity requirement is that, by so doing, the court would be usurping the power of the legislature. This objection overlooks the fact that the history of the common law is a history of change to cope with the problems presented by the changing world. The abandonment of the privity requirement in negligence actions was accomplished by judicial decision and not by legislative decree. As early as 1913, our own court recognized the legitimate power of the courts to modify the existing law to meet new problems. In so doing, the court stated, "An exception to a rule will be declared by courts when the case is not an isolated instance, but general in its character and the existing rule does not square with justice."⁴³ The privity requirement was born in an age where the consumer dealt directly with the manufacturer on a personal basis. Since that time we have had a significant change in

⁴⁰ *Langridge v. Levy*, 2 M & W 519 (1837), affirmed 4 M & W 338; *Earl v. Lubback*, 1 K.B. 253 (1905).

⁴¹ 217 N.Y. 382, 111 N.E. 1050 (1916).

⁴² *Freeman v. Navarre*, *supra* note 1; *Bock v. Truck and Tractor Inc.*, 18 Wn.2d 458, 139 P.2d 706 (1943).

⁴³ *Mazetti v. Armour*, *supra* note 12 at p. 629.

business methods with attendant “. . . mass production, large scale or national promotion, and distribution . . .”⁴⁴ of products. The enormity of this change should exempt the court from any charges of usurpation of legislative power should it decide to abandon the privity requirement in warranty actions.

The change in business methods also makes it exceedingly difficult, if not impossible in many cases, to prove negligence.⁴⁵ In many instances the alleged negligent act may have occurred thousands of miles from the place where the injury was sustained. The method of proving negligence is generally by the use of the doctrine of *res ipsa loquitur*. To recover under this doctrine, one must show that the defect was one which usually does not occur without negligence on the part of the defendant. The plaintiff must exclude the possibility that the accident was due to the misconduct of intermediate handlers and meddling third persons. The practical difficulties of obtaining evidence as to the history of the product after it has left the defendant's hands are sufficient to make recovery practically impossible in many cases.⁴⁶

The extension of the vendor's liability on a breach of warranty to persons not in privity need not result in unlimited liability. A test similar to the one applied in negligence cases could be utilized to hold the ambit of the vendor's responsibility within reasonable bounds. Substituted for the privity requirement would be the “proximate cause” test or the more predictable test of whether a reasonable vendor could have foreseen a possibility of the harm which resulted.⁴⁷ Under existing law, a vendor may be held responsible to persons other than his immediate vendee. It is generally held that a vendee who has purchased goods with a warranty may recover damages he has been compelled to pay a subpurchaser to whom the goods were resold with a similar warranty.⁴⁸ In one English case⁴⁹ there was a series of five recoveries with the manufacturer ultimately paying the consumer's damage plus the costs of all the litigation.⁵⁰ Substitution of the test of foreseeability for the privity test should eliminate this needless increase of the cost of administering the judicial system and release money for other activity more worthwhile to society.

⁴⁴ Freeman v. Navarre, *supra* note 1.

⁴⁵ PROSSER, TORTS § 88 at p. 505 (2nd ed. 1955).

⁴⁶ *Ibid.*

⁴⁷ Note *Manufacturers' and Vendors' Liability Without Fault to Persons Other Than Their Immediate Vendees*, 33 COLUM. L. REV. 868 (1933).

⁴⁸ WILLISTON, SALES § 244 (rev. ed. 1948).

⁴⁹ Kasler and Cohen v. Slavouski, 1 K.B. 78, 96 L.J.K.B. 850 (1928).

⁵⁰ Intervening insolvency or lack of liability can stop this chain reaction. WILLISTON, SALES *op cit. supra* note 48.

Perhaps the most convincing reason for abandoning the privity requirement is the vendor's greater ability to distribute the risk of loss. Justice Holmes has said:⁵¹

Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy today are mainly the incidents of certain well known businesses.

This comment would appear to be as appropriate today as it was when made in 1897. Shouldn't the vendor bear the expenses of injury to persons other than his immediate vendee as he does other expenses incidental to the sale of his products? It is submitted that the conflicting social interests of the vendor and persons who come into contact with his product can best be balanced by placing liability on the vendor for the foreseeable risks created within the scope of the warranty obligation. The vendor can transfer this risk to an insurance company⁵² or act as a self-insurer. In either event, the cost of so doing will be reflected by a negligible increase in the cost of the goods sold, and the ultimate risk will be distributed to all those who are benefited by purchasing the product.

If our court is willing to examine the privity question as an original proposition, it is believed that the legal and substantive factors set out above will lead to an abandonment of the rule requiring privity between the parties to an action based on breach of warranty. The author concurs in the belief that "... a realistic, judicial analysis and reappraisal of the privity rule would be quite appropriate."⁵³

⁵¹ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

⁵² "The business of writing such insurance (against tort liability) is not a new one. It has been practiced for more than a half century; its routines are familiar to thousands whose livelihood it supplies." Gardner, *Insurance Against Tort Liability—An Approach to the Cosmology of the Law*, 15 LAW & CONTEMP. PROBS. 455 (1950).

⁵³ Freeman v. Navarre, *supra* note 1.