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Thomas C. Cady
West Virginia University College of Law

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LAW OF PRODUCTS LIABILITY IN WEST VIRGINIA

THOMAS C. CADY

We are now all well-acquainted to rapid change. Alvin Toffler writes in his book, aptly titled *Future Shock*, that the rate of change in society today is accelerating and has become a major challenge to the individual’s capacity to adapt and cope. In striking similarity, the change in products liability law has been so rapid that it presents one of the most fascinating examples of the common law’s flexibility and its leadership role in social change. The purpose of this article is to detect, hopefully, the current state of the law of products liability in West Virginia and to make some suggestions about the future course that may be followed.

The law of products liability in West Virginia is rich in its variety of theories and its potential for development. The first theory investigated is negligence. Several points emerge. West Virginia’s negligence-based products liability law was quite conventional in terms of the pre-*MacPherson* law; yet remains unsettled even now so many years after *MacPherson*; and there is a rather sharp divergence of opinion between the federal courts (applying West Virginia law) and the West Virginia court as to the status of negligence-based products liability law in West Virginia. Some projections for the future are offered. Part two surveys the past and present state of warranty-based products liability law. A very short part three suggests that the introduction of strict liability in tort concepts into West Virginia’s products liability law may await legislative activity.

I. NEGLIGENCE


The old general rule of the common law dated from the famous 1842 decision in *Winterbottom v. Wright* which held that a manufacturer or seller of a chattel was not liable to third parties, whether for nonfeasance or for misfeasance. The articulated legal reasoning was that there was no “privity” of contract between the manufacturer or seller and the injured third party. Subsequently, the courts began

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*Associate Professor of Law, West Virginia University College of Law. B. A. 1958, Rice University; L.L.B. 1963, University of Texas; L.L.M. 1967, Georgetown University.


to engraft a series of exceptions into the general rule, the most important of which was that the seller was liable to an injured third party where he was injured by an article "imminently" or "inherently" dangerous to life or health. Included within this exception were such obvious items as drugs, food and drink, firearms and explosives.

Such was the settled law until the famous 1916 MacPherson\(^3\) case. Cutting through the maze of exceptions and reversing the old general rule, Judge Cardozo held that general rules of negligence would govern the manufacturer's liability: the maker would be liable in negligence for the foreseeable risks of harm without the artificially protective bar of privity. The very careful Dean Prosser on many occasions has asserted that MacPherson represents the universal ("with the barely possible but highly unlikely exception of Mississippi") law in the United States. Section 395 of the Restatement (Second) of Torts adopts MacPherson as the prevailing rule. The reporter's notes to that section also assert that MacPherson "is now all but universally accepted in the United States." Contrary to Dean Prosser and the Restatement, the acceptability of MacPherson in West Virginia is far from clear, and the source of confusion is the West Virginia court's enigmatic decision in Williams v. Chrysler Corp.\(^4\) Even though MacPherson was decided in 1916 and Williams in 1964, strangely enough the West Virginia court has never been presented with an opportunity to make "a clear-cut definitive ruling"\(^5\) on whether MacPherson is to be accepted or not in West Virginia. The Williams case (and just a few other decisions) is basic to an understanding of negligence-based product liability law in West Virginia.

B. Pre-Williams: The Winterbottom Rule With Exceptions
And Some Federal Projections

As mentioned earlier, the old common law's general rule was Winterbottom with later engrafted exceptions. The most important is the "inherently" or "imminently" dangerous exception. Conventionally stated, the seller of a chattel "owes to any person [without regard to privity] who might be expected to use it a duty of reasonable care in its manufacture if the chattel is 'inherently' or 'imminently' dan-

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gerous.\textsuperscript{6} This exception has been clearly adopted in West Virginia.\textsuperscript{7} Items \textit{specifically} included within this exception in West Virginia are products especially prepared for human use or consumption,\textsuperscript{8} drugs or medicines.\textsuperscript{9} Items \textit{apparently} included within this exception in West Virginia are explosives and other inherently dangerous chattels.\textsuperscript{10} Two West Virginia cases are worthy of special note.

In \textit{Peters v. Johnson, Jackson \& Co.},\textsuperscript{11} an apparent first impression case in the state, the plaintiff brought a negligence-based products liability action against the defendant drugstore company. The plaintiff had been ill for three weeks and was being cared for at the home of a Mrs. McGary. Needing some epsom salts as medicine for plaintiff, either plaintiff or Mrs. McGary sent the McGary son to defendant's store to make the purchase. Plaintiff alleged that, rather than the desired salts, the defendant, negligently dispensed saltpetre which plaintiff took and suffered severe and permanent injury. The trial court instructed the jury that if it found the sale was in fact made to McGary, then plaintiff could not recover and that a duty of only due care was owed by the defendant seller of dangerous drugs. The defendant had a verdict and judgment, and plaintiff appealed. The West Virginia court found the instructions erroneous in two particulars. First, the court held that the defendant as a seller of dangerous drugs owed a duty not of due care but of high care. Second, the court noted that the trial court's theory of negligence-based products liability law was that if the sale had been in fact made to McGary, plaintiff could not recover. The trial court reasoned that since there was no sale to plaintiff, there was no contract and thus no relationship could be found on which to base a duty owing to plaintiff-nonpurchaser. The West Virginia Supreme Court of Appeals emphatically rejected this reasoning and theory of

\begin{itemize}
  \item \textsuperscript{6}Williams v. Chrysler Corp., 148 W. Va. 655, 659, 137 S.E.2d 225, 228 (1964).
  \item \textsuperscript{8}Webb v. Brown & Williamson Tobacco Co., 121 W. Va. 115, 2 S.E.2d 898 (1939) (chewing tobacco).
  \item \textsuperscript{9}Peters v. Johnson, Jackson \& Co., 50 W. Va. 644, 41 S.E. 190 (1902) (medicine).
  \item \textsuperscript{10}Williams v. Chrysler Corp., 148 W. Va. 655, 137 S.E.2d 225 (1964) (dicta citing no cases). Despite the fact that the court cites no authority, the conclusion is consistent with the well-settled common law. See W. PROSSER-TORTS, 560 (3d ed. 1964).
  \item \textsuperscript{11}50 W. Va. 644, 41 S.E. 190 (1902).
\end{itemize}
negligence-based products liability law, and firmly established the basic imminently dangerous exception in West Virginia.

The court began with general principles of negligence law, finding that "[i]f harm may come reasonably and probably to anyone from another's action, there is duty on him so to act as to avoid such injury"\(^{12}\) and that "a party may be sued by such persons for negligence, incapacity or misfeasance in performing his contract with another."\(^{13}\) The court noted that the general common law rule is especially apt in regard to dangerous things sold, and that considering the frights and dangers lurking in drugs, poisons and medicines any other rule would be disastrous. Significantly, the court then relied upon \textit{Thomas v. Winchester}\(^{14}\) (the leading American case holding a seller of a mislabeled drug liable in negligence to a nonpurchasing consumer) as establishing the imminently dangerous exception to the \textit{Winterbottom} rule. The court then concluded with its own formulation of the exception: "[A] third party, a stranger to the sale, can only sue when the thing used, or the negligent act, is very dangerous to human life and injury may reasonably be expected to happen to others therefrom.\(^{15}\)"

The question arises: how do we know what products are very dangerous to human life? The court mentioned many examples including mislabeled drugs, poisons, medicines, foul food, a defective gun, a defective scaffold, a badly repaired gas meter and a badly constructed ladder as all being imminently dangerous and thus very dangerous to human life. On the other hand, the court went on to note a general class of products not to be considered dangerous and hence not within the exception: "We cannot say that every one injured from [a] defect in a railroad car, or carriage or machinery can sue the maker or seller.\(^{16}\) At first blush this distinction between products considered to be dangerous and hence within the exception and products considered to be nondangerous and thus under the general rule appears to be mechanistic and without

\(^{12}\) \textit{Id.} at 647, 41 S.E. at 191.

\(^{13}\) \textit{Id.}

\(^{14}\) \textit{6 N.Y. 397} (1852).

\(^{15}\) Peters v. Johnson, Jackson & Co., \textit{50 W. Va. 644, 651-52, 41 S.E. 190, 193 (1902)}.

\(^{16}\) \textit{Id.} at 651, 41 S.E. at 193. The court cited cases denying liability to third parties involving defective threshing machines and an improperly maintained coach.
reason. Is it not unrealistic to find a defective scaffold which may threaten one or only a few workers and perhaps a few pedestrians below inherently dangerous, and on the other hand, to find a defective railroad car or carriage which may threaten many passengers and many more bystanders or other property not to be inherently dangerous? Perhaps, but the court gave a strong indication that the listing is not mechanically fixed and arbitrary but rather subject to a flexible test: "What is the test or criterion always applicable? Hardly any. Each case involving this nice principle [the distinction between things imminently dangerous and things not so] must be largely its own arbiter." Furthermore, the Court indicated that on two occasions the flexible test is to be realistically applied. First, in placing improperly dispensed medicine within the exception, the Court realistically looked to the purchasing habits of the public: "We know that drugs and medicines are kept in homes, and may, probably will, be used by other persons than the one buying. Such is the probable, usual case." The court also justified placing a defective railroad car, or carriage or machinery in the nondangerous category on the grounds of basic economic fairness for that era by asking "Who would sell under such a rule?"

In short, three significant points emerge from the Peters case. First, it is the first impression case on negligence-based products liability law in the state and hence is entitled to considerable precedential value. Second, it firmly fixed into West Virginia's negligence-based products liability law the inherently dangerous exception to the Winterbottom-privity rule. Third, to determine which products are considered to be or not to be inherently dangerous, the case adopted a realistically based, extremely flexible test, which, of course, under changing conditions would allow enormous expansion and increasing inclusions.

The other noteworthy case in West Virginia negligence-based products liability law is Webb v. Brown & Williamson Tobacco Co.

17 Id.
18 Id. at 646-47, 41 S.E. at 191.
19 Id. at 651, 41 S.E. at 193.
20 This conclusion is hinted at by Judge Browning in Williams v. Chrysler Corp., 148 W. Va. 655, 137 S.E.2d 225 (1964).
In that case, plaintiff's son purchased from a retail store a flat plug of chewing tobacco, known as Blood Hound, manufactured by defendant company. The plug contained a dead worm or moth from which extended numerous fine stickers or stingers, hard and penetrating in their nature, and each about one-eighth of an inch in length. When plaintiff placed the chew in her mouth, these stingers, in large number, penetrated the lining and tissues of the mouth, causing great inconvenience and some pain.

Again, in a first impression case, the West Virginia court expanded the Peters rule in two respects: first, the Peters rule was extended to include a nonfood product — tobacco, and second, the Peters rule was extended from the retailer-seller to include the manufacturer. The court quite explicitly rejected the narrow holdings by several courts that tobacco is not a food and hence not within the inherently dangerous exception to Winterbottom. The court held that the

[M]ore recent cases, containing, as we think the better reasoning, hold that although chewing tobacco is not a food, it is a product especially prepared for human use or consumption, and that lack of care in manufacturing the same furnishes good cause for action on the part of a consumer who may purchase the same from a retailer.\(^\text{22}\)

The Webb case is also important because for the first time the court approved the use of the res ipsa loquitur doctrine in negligence-based products liability law. Subsequent decisions\(^\text{23}\) indicate that there is virtually no degree of proof of due care by the manufacturer that will prevent the case from being submitted to the jury. For example, in Blevins v. Raleigh Coco-Cola Bottling Works;\(^\text{24}\) the majority approved the application of res ipsa loquitur and held that defendant's proof was insufficient to overcome the prima facie presumption of negligence. The Court noted that the issue of negligence was one for the jury despite the fact that defendant had presented evidence showing that:

(a) it had the best type of machinery on the market;
(b) its operating methods were the same as those of recog-
nized standard bottling companies; (c) it employed “excellent help,” and used every care possible in mass production; and (d) a bottle could not go through its soaking, brushing and bottling machines and “come out” containing a substance [some kind of old rotten meat] like that alleged by plaintiff.\(^{25}\)

Two pre-Williams federal court decisions are all that remain to complete the picture. In *Carpini v. Pittsburgh & Weirton Bus Co.*\(^{26}\) and *General Motors Corp. v. Johnson*\(^{27}\) the third and fourth circuits respectively, making *Erie*-educated guesses as to West Virginia’s negligence-based products liability law, held in cases involving negligently manufactured motor vehicles that the *MacPherson* rule obtained in West Virginia. In fact the *Carpini* Court was most assured:

Referring, then, to the law of West Virginia, it is clear that we find there the adoption of the general rule concerning the high duty owed by a carrier of passengers to its customers. *Venable v. Gulf Taxi Line*, 1928, 105 W. Va. 156, 141 S.E. 622. It is undisputed also, by the defendant, General Motors, that the manufacturer of a chattel has a duty of care to the ultimate consumer or user thereof. This was declared to be the law of West Virginia by the Fourth Circuit in *General Motors Corp. v. Johnson*, 4 Cir., 1943, 137 F.2d 320. To be cited also are *Webb v. Brown & Williamson Tobacco Co.*, 1939, 121 W. Va. 115, 2 S.E.2d 898, and, as to Virginia law, *Pierce v. Ford Motor Co.*, 4 Cir., 1951, 190 F.2d 910. Indeed, this principle has now become so well established that it would be sheer affectation to pile up citation of decisions upon it. See in general *Restatement, Torts*, § 388 et. seq.\(^{28}\)

This holding by the Third Circuit takes on added weight by virtue of the fact that the unanimous opinion was written by the distinguished Judge Herbert F. Goodrich and joined in by the equally distinguished Judges Harry E. Kalodner and William H. Hastie.

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\(^{25}\) *Id.* at 430, 3 S.E.2d at 629 (dissenting opinion).

\(^{26}\) 216 F.2d 404 (3d Cir. 1954).

\(^{27}\) 137 F.2d 320 (4th Cir. 1943).

\(^{28}\) *Carpini v. Pittsburgh & Weirton Bus Co.*, 216 F.2d 404, 405 (3d Cir. 1954).
Such then was the state of West Virginia's negligence-based products liability law prior to Williams—the West Virginia Court apparently applying the Winterbottom Rule with exceptions and the federal courts and Prosser believing that it is beyond argument that MacPherson was accepted in West Virginia. The stage is now set for Williams.

C. Williams v Chrysler Corp.

Williams v. Chrysler Corp.\(^{29}\) decided by the West Virginia Supreme Court of Appeals in 1964, is the last word on West Virginia's negligence-based products liability law and the word must be considered disturbing or even perhaps unsettling.

All the court held was that an express warranty (limiting liability to the replacement of defective parts of an automobile and a disclaimer of any other warranties expressed or implied and of all other obligations on the part of automobile manufacturer) prohibited plaintiff, purchaser of an auto manufactured, and so warranted by defendant, from maintaining a negligence-based products liability suit against the defendant manufacturer. Given this holding, the court, quite naturally, felt that there was no need to decide the MacPherson question. The court teasingly went on for five pages discussing the MacPherson rule and substantially unsettling the whole thrust of negligence-based products liability law in West Virginia. In the process of unsettling the law, the court, however, did make some tantalizing suggestions which will be explored in part E infra of this paper. As the court finally said in 1964, "We simply do not reach that [MacPherson] question, and it is not decided."\(^{30}\) And that statement remains true today.


The MacPherson riddle remaining after the Williams case has not been answered by the West Virginia court. Judge Christie, however, in a 1966 decision, Shanklin v. Allis-Chalmers Mfg. Co.,\(^{31}\) has provided an Erie-educated guess. In that case plaintiff, Shanklin, was severely injured when his arm was caught in a forage harvester. The harvester was manufactured by defendant, Allis-Chalmers; wholesaled to one of defendant's authorized dealers, Greenbrier Tractor Sales of Lewisburg, West Virginia; and subsequently retailed

\(^{29}\) 148 W. Va. 655, 137 S.E.2d 225 (1964).

\(^{30}\) Id. at 666, 137 S.E.2d at 226.

to plaintiff's employer, Ralph Phillips, a Monroe County farmer. Because of Phillips' other business interests, plaintiff Shanklin was employed as Phillips' farm manager. While Shanklin was using the harvester he attempted to clear a clogged roller. His arm was caught in the rollers, crushed, and subsequently had to be amputated about three inches below the shoulder.

Plaintiff brought a negligence-based products liability suit against the manufacturer alleging among other things: negligent design, demonstration, and instruction. Note that the injured plaintiff was an ultimate user, not in privity of contract with an allegedly negligent manufacturer—a prototypical MacPherson situation. Defendant vigorously contended that the harvester was not inherently or imminently dangerous and thus, there being no privity of contract, plaintiff could not maintain a negligence action against the manufacturer. Judge Christie noted that the West Virginia court had yet to make a "clear-cut definitive ruling on the question of privity requirement in the area of non-inherently or non-imminently dangerous instrumentality," and that there was a "spirited trend toward disregarding privity." He then went on to conclude:

We find, however, that if this case, where negligence is the gravamen of the complaint, were presented to that Court upon the record now before us, it would adopt the modern view by holding that such a showing [privity] is not a requirement for maintenance of the action.\(^{32}\)

Such was Judge Christie's projection. It now becomes our obligation to determine from a close reading of Williams whether or not the West Virginia court will confirm Judge Christie's prediction.

E. Beyond Williams & Shanklin: Personal Guesswork

Since Judge Christie in Shanklin felt that the West Virginia court would adopt the MacPherson rule should the issue be squarely presented, it may be profitable to make some projections based on a bit-by-bit, piece-by-piece analysis of the three hints contained in Williams: (1) MacPherson by extending exceptions to Winterbottom; (2) MacPherson by limiting Winterbottom to contractors; and (3) No MacPherson because of constitutional restraint.

\(^{32}\) *Id.*, at 231.
(1) *MacPherson* by extending exceptions to Winterbottom.

One of the tantalizing hints dropped in *Williams* is that the court noted that the most general of all the exceptions to the *Winterbottom*-privity rule is the inherently or imminently dangerous category. The court stated:

Perhaps all that the New York Court did in the *MacPherson* case was to extend the exception to the rule by finding that an automobile would fall into the category of being a dangerous instrumentality when it can be said that it will be used by persons other than the initial purchaser and used without tests being made by the owner to reveal latent defects.\(^{33}\)

The court was almost right. Ostensibly, all that Cardozo did in *MacPherson* is well summarized by Prosser:

"On its face the decision purported merely to extend the class of inherently dangerous articles to include anything which would be dangerous if negligently made."\(^{34}\)

Thus, it would appear under the very flexible test first adopted in *Peters v. Johnson, Jackson & Co.* ("What is the test or criterion always applicable? Hardly any. Each case involving this nice principle must largely be its own arbiter.").\(^{35}\) that the West Virginia court is now willing to define at least a negligently produced automobile as an inherently dangerous article. The "at least" part of the statement seems all too clear in view of current carnage on our highways.

Is the West Virginia court ready to accept *MacPherson* at full value, *i.e.*, to say that anything is to be considered dangerous if negligently made? It may be for the following reason. *MacPherson* is the universal American rule. With the weight of authority so massively uniform, the court would set itself not against the trend but against the well-settled, eminentely sensible rule. The *Winterbottom*-privity rule no longer makes any sense and no one has had a good word for it or its policy base in years. Borrowing some lines from Judge Brannon's opinion in *Peters* and substituting automobiles for his references to drugs and medicines, seems to settle the issue:


\(^{34}\) *W. Prosser, Torts*, 660 (3d Ed. 1964).

\(^{35}\) 50 W. Va. 644, 631-52, 41 S.E. 190, 193 (1902).
We know that... [automobiles]... are kept... and may, probably will, be used by other persons than the one buying. Such is the probable, usual case. Is it possible that there is no reparation to this third person for irreparable harm to him from such incompetency or negligence? Considering the frightful dangers lurking in... [automobiles]... this would be a disastrous rule.\(^\text{36}\)

(2) *MacPherson by limiting Winterbottom to contractors.*

Another teasing hint dropped by the *Williams* court was: "It is interesting to note that the *Wright* case, establishing the privity rule, involved the liability of a contractor and not of a manufacturer or seller."\(^\text{37}\)

Prior to this statement, the court cited *Roush v. Johnson*\(^\text{38}\) for the proposition that West Virginia has accepted the inherently or imminently dangerous exception to the general common law rule of an independent contractor's immunity for "turned-over" work. The implication is obvious: The *Winterbottom*-privity rule will be strictly construed; it will be applied to contractor's only, and then subject to the inherently or imminently dangerous exception; it will not be extended to manufacturers or sellers; and, thus, finally the ordinary rules of negligence as per *MacPherson* will be applied to all other providers of goods including manufacturers and sellers.

Since so few products are produced under special contract, but are rather randomly produced for a pre-existing mass market, the West Virginia court could without apparent "change" in the law relegate the *Winterbottom*-privity rule to a very, very narrow corner of negligence-based products liability law.

(3) *No MacPherson because of constitutional restraint.*

The final problem involved in the adoption of the *MacPherson* rule by the West Virginia court is mentioned in *Williams*. The West Virginia Constitution provides in pertinent part that: "Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the legislature."\(^\text{39}\)

\(^{36}\) *Id.* at 644, 646-47, 41 S.E. 190, 191.


\(^{38}\) 139 W. Va. 607, 80 S.E.2d 857 (1954).

Since this section speaks in terms of “when this article goes into operation” which was October 12, 1880, one might think that that is the base line date. While the point apparently has never been explicitly decided, the court appears to use 1872 as the base date.\(^{40}\) This application seems proper since the provision was substantially carried over from article VIII, Section 36 of the 1872 Constitution. Assuming then that 1872 is the right date, the question presented is: What was the state of the common law in 1872?

It is quite clear that the English common law in existence in 1872 was the *Winterbottom*-privity rule with, among others, the inherently or imminently dangerous exception.\(^{41}\) Although there is some small room for argument based upon old West Virginia precedents that the reasons for the *Winterbottom*-privity rule have ceased to exist and hence the rule itself should cease to exist\(^ {42}\) or that the old common law rule is repugnant to contemporary public policy,\(^ {43}\) the more likely result will be as in Cunningham v. County Court of Wood County,\(^ {44}\) where the West Virginia court announced that “[t]his Court, therefore, is sternly and unmistakably enjoined to leave drastic changes in the common law to the legislative branch of state government.”\(^ {45}\)

Thus, it may be that because of constitutional prohibition, explicit adoption of the *MacPherson* rule must await legislative action.

II. Warranty

A warranty-based products liability action is the second branch of products liability law in West Virginia. Suit for breach of warranty has been called a “freak hybrid born of the illicit intercourse of tort and contract.”\(^ {46}\) Originally an action sounding in tort, it

\(^{40}\) Adkins v. St. Francis Hospital, 149 W. Va. 705, 143 S.E.2d 154 (1965). Another interpretation might be that the base date is 1863, since the provision appeared first in article XI, section 8 of the 1863 Constitution. See Williams v. Chrysler Corp., 148 W. Va. 655, 137 S.E.2d 225 (1964); W. Va. CODE ch. 2, art. 1, §1 (Michie 1966).

\(^{41}\) Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852) is the leading American case establishing the exception to the *Winterbottom*-privity rule where the article sold is “inherently dangerous to life or health.” It is cited with approval by the West Virginia court in Peters v. Johnson, Jackson & Co., 50 W. Va. 644, 41 S.E. 190 (1902).


\(^{43}\) Powell v. Sims, 5 W. Va. 1 (1871).

\(^{44}\) 148 W. Va. 303, 134 S.E.2d 725 (1964).

\(^{45}\) Id. at 308, 134 S.E.2d at 728.

\(^{46}\) W. FROSSER & J. WADE, CASES AND MATERIALS ON TORTS, 692 (5th ed. 1971).
gradually came to be regarded as a contract action and today contains elements of both tort and contract law. This section of the paper will deal briefly with the old common law, and then express warranty and implied warranty.

A. The Old Common Law

The basic general rule of sales and hence warranties was *caveat emptor*—let the buyer beware.\(^{47}\) This is well illustrated by the picturesque old 17th century case of *Candelor v. Lopus*.\(^{48}\) A goldsmith sold a stone to the plaintiff stating that it was a bezoar stone (a calcareous concretion in the stomach of a goat) believed to have medicinal powers. The stone turned out to be worthless and yet the court held that there could be no recovery even though the seller knew his statement to be false. There was no liability since there was no express undertaking to be bound. The court thus gave legal imprimatur to the low business ethics of an era in which all sellers were assumed to lie. It is against this common law background that we begin our investigation of warranty-based products liability law in West Virginia.

B. Express Warranty

An express warranty theory based upon specific representations by a seller concerning his product is one method of extending strict liability to the consumer. While originally the courts limited recovery only to cases of intentional misrepresentation in an action for deceit,\(^{49}\) the key modern American authority is *Baxter v Ford Motor Co.*\(^{50}\) In that case the manufacturer was held strictly liable, without scienter or negligence, to the plaintiff who purchased an automobile from a dealer on the basis of literature distributed by the manufacturer representing that the auto's windshield was shatterproof. Plaintiff was severely injured when a pebble struck the glass and shattered it. The court upon first appeal adopted a theory of express warranty but on second appeal the court based its opinion upon a strict liability theory in the nature of deceit for innocent misrepresentation. This distinction will prove to be important below.


\(^{50}\) 168 Wash. 456, 12 P.2d 409, aff'd per curiam on rehearing, 15 P.2d 1118 (1932), aff'd on second appeal, 179 Wash. 123, 35 P.2d 1090 (1934).
Thirteen jurisdictions have followed Baxter, extending it to representations made in labels, literature or in advertising. Two early federal cases rejected Baxter but are now without authority because of changes in the underlying state law. No other courts have rejected the holding of Baxter. Although the law in West Virginia is far from clear, Horton v. Tyree apparently is in accord with the strict liability theory developed in Baxter II.

In Horton, plaintiff was induced to purchase shares in a coal mining company relying upon representations that the shares were "a good buy." The defendant contended that he should be liable only for intentionally or recklessly false misrepresentations. The West Virginia court rejected this limitation and held that where

one who represents that a certain condition exists with the expectation that another will act thereon, when in fact he has no knowledge and regard thereto, will be as liable to another who deals with him on the basis of such representation, should it turn out to be false, as though he knew of the falsity thereof at the time it was made. "He is under a duty to know," said the court, "that the things he represents as facts are in fact true at the time he makes the representation. It is no excuse for him to say that he did not know they were false, . . . 53

While Horton concerned recovery of property loss and a contract measure of recovery, the language is broad enough for potential expansion into the products liability field for personal injury.

C. Implied Warranty

Because of the enactment of the Uniform Commercial Code by the Legislature in 1963, effective since July 1, 1964, substantial changes may be in the offing for implied warranty based products liability law in West Virginia. Decisions are too few at present to make an accurate forecast; but, the common law of implied warranty prior to the adoption of the U.C.C., however, is fairly clear, strongly conservative and, thus, may have an impact on future decision-making.

52 104 W. Va. 238, 139 S.E. 737 (1927).
53 Id. at 243, 139 S.E. at 738.
1. Burgess v. Sanitary Meat Market

In Burgess v. Sanitary Meat Market the West Virginia court, in a case of first impression, noted that the general common law rule of sales was that of caveat emptor but adopted the well-recognized special food implied warranty exception: "[W]here food is purchased from a retail dealer for immediate consumption, there is generally an implied warranty that the article sold is fit for human consumption." Notice the narrow framing of the rule of the case; (a) the product must be food; and (b) the purchase must be from a retail dealer. The court also went on to limit the rule further by stating that the "food sellers implied warranty does not inure to the benefit of parties other than the purchaser." Thus, the court recognized the special food warranty but limited it to persons in privity with the seller.

Finally, citing Pennington v. Cranberry Fuel Co., the court further limited the exception to unsealed foods:

[T]here is no warranty of fitness by a retailer who purchases goods of a reputable brand from a jobber or manufacturer in sealed packages or containers and sells them in the same condition that they were in when purchased, and without the opportunity of inspecting or of otherwise determining the condition of the contents of the packages. There might, however, be a question of negligence in cases where the outside condition of the package or other circumstances would be such as to convey information concerning the contents or to put the retailer on inquiry.

Furthermore, in the Burgess case the court distinguished three prior decisions. In those cases the courts had held that the consumer could maintain a negligence-based products liability action against the manufacturer or bottler but only when the article was intended for human consumption. The anomaly of basing liability of a manufacturer or packer on negligence while basing the liability of

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54 121 W. Va. 605, 5 S.E.2d 785, 6 S.E.2d 254 (1939) (concurring opinion).
55 Id. at 609, 5 S.E.2d at 787.
56 Id. at 611, 5 S.E.2d at 787.
a retailer on implied warranty (depending upon whether the food sold by the retailer is sealed or not) was thus created. Judge Kenna concurring in Burgess criticized this foolish distinction but it was never cured by the court. No such problem should exist under the U.C.C. since it implies a warranty without regard to the type of seller.  

While the court in later cases did expand the common law of implied warranties to include products other than food, the privity requirement limited protection only to the immediate purchaser. The problem of the scope of the protection established by even a U.C.C. implied warranty remains unsettled in two particulars—persons to be protected and total nonprotection via disclaimer.

2. Persons Protected

As previously mentioned the only person protected under the common law implied warranty was the purchaser, even in the food cases. Section 2-318 of the U.C.C. extends the protection to include the purchaser, of course, but also the buyer's family, household and guests. The official comments make it clear that the intent of the section was at least to loosen the common law privity rules preventing all but purchaser recovery. Moreover, the comments state that "[t]he section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." The question then becomes: what projections can be made as to whether the West Virginia court will enlarge the scope of persons protected under an implied warranty? The answer is far from clear. There are no West Virginia cases directly on point; but there are two cases which give some indication.

2. (a) Nettiles v. Imperial Distributors, Inc.

In a 1968 case applying the pre-U.C.C. common law of warranties, the West Virginia court noted that "we consider it reasonable to state that the adoption of that Code by the legislature of this state, and by legislatures of a great majority of the other states of the

60 E.g., Nettiles v. Imperial Distributors, Inc., 152 W. Va. 9, 159 S.E.2d 206 (1968).
nation, demonstrates that anciently conceived principles relating to implied warranties should be reasonably extended. ...”

This is not much, to be sure, but an indication that the court would be favorably disposed to follow a trend or to join a majority on the issue of the number of persons protected by a U.C.C. implied warranty. Section 2-318 has been held by the greater number of cases not to prevent expansion to persons outside the distributive chain. Only the Pennsylvania court has refused expansion. The leading case allowing extension is Elmore v. American Motors Corp. while the leading contra authority is Mull v. Ford Motor Co.

2. (b) Debbis v. Hertz Corp.

In Debbis v. Hertz Corp. the federal district court for Maryland citing two West Virginia Law Review articles noted that a significant argument can be made against extending the protection of an implied warranty beyond those persons listed in section 2-318 of the West Virginia’s U.C.C.

The West Virginia common law of implied warranties apparently limited protection to the purchaser. In adopting the U.C.C. for West Virginia, the Legislature, of course, was presumed to be cognizant of the common law and was thus free to choose among the various alternatives of section 2-318. The West Virginia legislature, however, adopted the alternative which has been labeled “neutral.” On the other hand, the Virginia legislature adopted a consumer-prone alternative by enacting its famous anti-privity statute which expressly eliminates lack of privity as a defense and extends the warranty protection to a “person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods.” The conclusion inevitably follows, that

65 368 F.2d 713 (2d Cir. 1966) (New York law).
70 Lorensen, supra note 67, at 299.
given the old common law of warranties and the glaring contrasts in attitudes between the jurisdictions "it seems doubtful that they [the West Virginia court] will expand upon the action of the legislature and further extend the protection of the Commercial Code."  

3. **Total nonprotection via disclaimer.**  

The second major problem under a West Virginia U.C.C. implied warranty is that of disclaimer of liability. The common law of implied warranties by virtue of Payne\(^73\) and Williams\(^74\) seemed to countenance “disclaiming anything but liability for criminal conduct by anyone not a common carrier.”\(^75\) While both opinions were decided before the effective date of the U.C.C. in West Virginia, the court spoke fondly of better days ahead for the consumer under the U.C.C., suggesting that the pro-consumer attitude of the U.C.C. would have provided a public policy base for a differing conclusion. That prophesy by the court has been severely criticized.\(^76\) The West Virginia U.C.C., section 2-316,\(^77\) specifically permits the seller to disclaim any implied warranty liability. On the other hand, section 2-719\(^78\) declares that the limitation of “consequential damages for injury to the person in the case of consumer goods is **prima facie** unconscionable.” The issue for the future is whether the West Virginia court will fulfill its prophesies of a new day of consumerism a la Henningsen v. Bloomfield Motors, Inc.,\(^79\) in West Virginia.

### III Strict Liability

It should be clear by now that a warranty-based products liability action is at most an unsatisfactory basis for extending strict liability protection to those persons who may be injured by defective products. Problems include the limited scope of persons protected,\(^80\) disclaimers,\(^81\) and the notice requirement.\(^82\) In response to these

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\(^72\) Comment, *supra* note 67 at 329.  
\(^76\) Lorensen, *supra* note 67.  
\(^77\) W. VA. CODE ch. 46, art. 2, § 316 (Michie 1966).  
\(^78\) W. VA. CODE ch. 46, art. 2, § 719 (Michie 1966).  
\(^79\) 32 N.J. 358, 161 A.2d 69 (1960) (disclaimer and limitation of liability, not an implied warranty, unconscionable).  
\(^80\) W. VA. CODE ch. 46, art. 2, § 318 (Michie 1966).  
\(^81\) W. VA. CODE ch. 46, art. 2, § 316 (Michie 1966).  
\(^82\) W. VA. CODE ch. 46, art. 2 § 607 (Michie 1966).
and other problems the A.L.I. proposed section 402A of the Restatement (Second) of Torts. Because of the rapidly developing case law the section was revised three times: first, to include only food and drink; second, a broader coverage to include products intended for intimate bodily use; and, finally, its present (1965) broad coverage of all products:

§402A Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1.) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and,

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2.) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Plaintiff's burden is to prove (1) that there was a defect, (2) which existed at the time the product left the hands of the manufacturer, (3) which was not contemplated by the user, (4) which renders the product unreasonably dangerous and (5) that such defect was the proximate cause of plaintiff's injury.

There are absolutely no cases in West Virginia which approach section 402A. Indeed, strict liability was denied even in the food cases. Again, even in food cases brought against a manufacturer

\[83\] W. PROSSER & J. WADE, CASES AND MATERIALS ON TORTS 707 (5th ed. 1971).
\[84\] RESTATEMENT (SECOND) OF TORTS § 402A (1965).
\[86\] Burgess v. Sanitary Meat Market, 121 W. Va. 605, 5 S.E.2d 785, 6 S.E.2d 254 (1939) (concurring opinion).
or bottler, the West Virginia court required proof of negligence.\textsuperscript{67} This is not the rich rootstock from which will flower judicial adoption of section 402A. It appears rather clear that the court is not likely to extend the law of products liability beyond the limits set by the Legislature.