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John E. Murray Jr.

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# RANDOM THOUGHTS ON MENDEL

JOHN E. MURRAY, JR.\*

Notwithstanding disclaimers, one must live with what he writes. Thus, a short piece which merely attempts to set forth reactions carries a considerable risk. For the sake of form, this disclaimer should be included: no effort is made here to explore the topic in traditional scholarly fashion. The premise (which the reader may choose to reject) is that the author is capable of such "traditional" scholarship. What follows are some reactions to *Mendel v. Pittsburgh Plate Glass Co.*<sup>1</sup>

The problem in *Mendel* is well-known. It has been presented to other courts and it is a problem which law students may have been forced to consider in courses such as Commercial Transactions or even Torts. One short answer to it is that any court confronted with the necessity of deciding the theoretical basis for personal injury caused by a defective product should choose a tort theory such as that set forth in the Restatement of Torts.<sup>2</sup> The cause of action would then accrue at the time of the injury and a typically short period (two or three years) would then begin to run. Whether the injured plaintiff is a buyer of the product, someone in the buyer's household, a guest in his home, or a consumer who purchased from the retail-buyer, should be irrelevant. There was no cause of action before the personal injury occurred, and the cause of action which began its existence at the time of the injury should be characterized as a tort because it has all of the elements of tort and none of the elements of contract in relation to a plaintiff such as Cecile Mendel. If the plaintiff happens to be the buyer of the defective product which causes his personal injury, the contract concept intermeddles and creates judicial problems, some of which became insuperable obstacles for the majority in *Mendel*. However, even the buyer who has sustained a personal injury should bring his action in tort, *i.e.*, use a strict liability theory in tort. Were this a traditional piece, appropriate quotes from Justices Traynor and Francis could be suggested. Hopefully, the reader need not be convinced of this conclusion or the reasons in support of it. The problem in *Mendel* was that the majority was simply not convinced.

The reaction could simply end here: the majority should have ac-

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\* Professor of Law, University of Pittsburgh, School of Law. B.S., LaSalle College, 1955; J.D., Catholic University, 1958; S.J.D., University of Wisconsin, 1959.

<sup>1</sup> 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490 (1969).

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

cepted section 402A of the Restatement or something akin thereto; it did not, and consequently, the maze of Uniform Commercial Code (UCC) construction problems are raised. Once the Code is considered as the exclusive route to strict liability protection for plaintiffs such as Cecile Mendel, the construction urged by the majority is plausible, at least on a "plain-meaning" basis. It is that construction which is so disappointing. Eventually, the Court of Appeals may simply have to recognize its error in *Mendel* and adopt section 402A for many reasons, including the statute of limitations problem found in the Code. From that standpoint, the majority may have created a snarl which is reminiscent of the shackles placed on the doctrine of *Lawrence v. Fox*<sup>3</sup> by the incredibly narrow construction of that doctrine in *Vrooman v. Turner*,<sup>4</sup> thus retarding if not precluding a viable third-party beneficiary theory. The majority might have benefited from a thorough exploration of the Pennsylvania situation in relation to product liability. The Pennsylvania Supreme Court created a snarl, attempted to undo it piecemeal and eventually produced the confrontation opinion resulting in the emasculation of vertical privity and the adoption of section 402A.<sup>5</sup> There is an almost incredible waste of judicial energy in such a process often creating results which are complex and unjust.

At bottom, the question must be asked: does the UCC preempt the question of personal injury recovery when the injury is caused by a defective product? Long before the Code was drafted, there were viable methods available to injured plaintiffs in certain kinds of situations to procure relief on a strict liability basis. This was particularly true in the food and beverage cases and became increasingly true in non-food cases when the product was "inherently" dangerous and, ultimately, even when it was not. Yet, with all of this development, the implied warranty theory was a vital part of the arsenal. When the drafters of the UCC had to decide what to do with product liability, they were willing

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<sup>3</sup> 20 N.Y. 268 (1859).

<sup>4</sup> 69 N.Y. 280, 25 Am. Rep. 195 (1877). This opinion limited the doctrine of *Lawrence v. Fox* to cases involving the same essential facts. Therefore, the only third parties who could recover were creditor beneficiaries. Since 1877, the New York courts have been attempting to free themselves from this burdensome opinion. Various inroads have been attempted. See, e.g., *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639 (1918). See also *Lait v. Leon*, 40 Misc. 2d 60, 242 N.Y.S.2d 776 (Sup. Ct. Queens County 1963), which suggests that the remaining shackles are nebulous. However, in *Scheidl v. Universal Aviation Equip., Inc.*, 159 N.Y.S.2d 278 (Sup. Ct. Suffolk County 1957), the shackles seem real, indeed.

<sup>5</sup> See *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968). Pennsylvania adopted section 402A of the Restatement of Torts in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). Shortly thereafter, it upheld the requirement of vertical privity in *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966). The confrontation and resolution occurred in *Kassab*. There is still the question of a further extension of horizontal privity in Pennsylvania. See *Tucker v. Capitol Mach., Inc.*, 307 F. Supp. 291 (M.D. Pa. 1969).

to extend the concept of horizontal privity but remained neutral on the ultimate extension and expressly refused to deal with vertical privity. The neutrality is clearly expressed as follows:

This section expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.<sup>6</sup>

The "developing case law" is foundational in the Code. So often, a Code section will state a principle rather than a rule which requires, to a greater or lesser extent, case-by-case development. One example is a disconcerting section, 2-207, which deals with the now famous or infamous "battle of the forms."<sup>7</sup> Certainly, the unconscionability standard set forth in 2-302 is almost totally dependent upon case law development and was designed only to provide the courts with a sufficient basis for such development.<sup>8</sup> Other illustrative sections may be set forth but are not necessary to the conclusion. How would 2-318 have read (or at least, what changes in the comments to that section would have occurred) if 402A had been well-established through judicial adoption at the time the Code was drafted? This is not to suggest that any court should place itself in the position of a legislature with hindsight knowledge and then proceed in allegedly spurious fashion to construe the Code as it is now written. Rather, an inquiry as to the purpose of 2-318 and related sections might reveal that the drafters of the UCC (and the legislators who later enacted it) may not have felt that the ultimate concept of product liability was intended. There is no difficulty in construing the Code in terms of its underlying purposes, and assuming that "underlying" means, at least, that the purposes are not always clearly expressed, a "plain-meaning" methodology is rejected.

In the oft-forgotten Article, it is clearly stated: "This Act shall be liberally construed and applied to promote its underlying purposes and policies."<sup>9</sup> This is a "Rule of Construction" which courts are commanded to use. The application of the rule to the instant situation suggests that 2-318 was not intended as the ultimate or exclusive law on products liability; that a court is permitted if not invited to extend 2-318 and, therefore, the adoption of something like 402A is not in

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<sup>6</sup> UNIFORM COMMERCIAL CODE § 2-318, comment 3.

<sup>7</sup> See MUIRAY, *Intention Over Terms: An Exploration of UCC 2-207 and New Section 60*, *Restatement of Contracts*, 37 *FORDHAM L. REV.* 317 (1969).

<sup>8</sup> See MUIRAY, *Unconscionability: Unconscionability*, 31 *U. PITT. L. REV.* 1 (1969).

<sup>9</sup> UNIFORM COMMERCIAL CODE § 1-102(1).

conflict with such purposeful development. Thus, the fundamental error of the majority in *Mendel* is the failure to construe the Code as it must be construed according to the basic rule of construction expressly set forth.

The failure by the majority to pursue "underlying purposes" is particularly evident in its handling of the specific sections beyond 2-318. Once it decided that the exclusive strict liability theory was contractual, the appropriate sections of the UCC had to be applied, albeit analogously, since the Code was not applicable to the controversy before the Court. Does the Code deal with personal injuries? The answer to this inquiry is found in 2-715(2)(b) which includes, under consequential damages, injuries to the person proximately caused by any breach of warranty. What is the Code statute of limitations? Well, 2-725 could not be clearer: it is four years from the time a cause of action accrues, and it accrues when the breach occurs. When does the breach occur? To the rescue is 2-725(2): "A breach of warranty occurs when tender of delivery is made." Now, returning to the first sentence of the subsection: "A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Nothing could be clearer and there is no room for interpretation when the language is clear. The majority does not discuss any other possible interpretation, although, unwittingly, it has *interpreted* these sections.<sup>10</sup>

A manufacturer of air conditioners sells a large shipment to a retailer who keeps some in stock for three years. He finally sells the last one in sealed carton to a consumer who installs it in his bedroom window. A year and a day later, the consumer's son is "shocked" when he turns the operating knob, sustaining permanent disability. The cause is clearly traced to a manufacturing defect. When did the breach occur? It occurred upon tender of delivery to the retailer. When did the cause of action accrue? It accrued when the breach occurred, regardless of the aggrieved party's lack of knowledge of the breach. Consequently, plaintiff loses in his suit against the manufacturer. Consider another hypothetical with the same fact pattern except that the plaintiff purchases the conditioner on the day delivery was made to the retailer. On the same day, he installs the conditioner and his son is "shocked." Three years and eleven months later, his lawyer commences the action. Assuming

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<sup>10</sup> It is sometimes said, in a case in which the written words seem plain and clear and unambiguous, that the words are not subject to interpretation or construction. One who makes this statement has of necessity already given the words an interpretation — the one that is to him plain and clear; and in making the statement he is asserting that any different interpretation is "perverted" and untrue.

Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 171-72 (1965).

the usual elements for recovery, plaintiff wins. It is interesting to compare the results in these two situations with the policy reason suggested by the majority for its conclusion. First, of course, it did not consider the question to be open. This was because it read the judicial precedent as relegating the action to breach of warranty. Regardless of the precedent, it read the Code as preempting this area. For the curious, however, the majority opinion does set forth the following statement of policy:

We are willing to sacrifice the small percentage of meritorious claims that might arise after the statutory period has run in order to prevent the many unfounded suits that would be brought and sustained against manufacturers ad infinitum. Surely an injury resulting from a defective product many years after it had been manufactured, presumptively at least, is due to operation and maintenance.<sup>11</sup>

It is difficult to believe that the majority of the Court knew exactly what it was sacrificing. There is the suggestion that the majority does not believe that any theory of product liability is sound. The defect can either be proved or not; the defective condition of a glass door, air conditioner or any other product may be caused by faulty operation or maintenance. If the Court is suggesting that the burden on the plaintiff to prove the defect is not sufficient, it can judicially restructure that burden and, in cases such as *Mendel*, it could even go so far as to set forth a rebuttable presumption that the defect was not in the manufacture of the item. Whether this would be desirable is not important; it is important, however, that the Court did not appreciate the essential distinction suggested.

Perhaps more than any other deficiency, the majority opinion made no inquiry at all as to the purposes of the vital section involved, 2-725. The purposes of 2-725 include uniformity of statutes of limitations for businesses operating on a nationwide basis and a realistic statutory period for normal commercial record keeping.<sup>12</sup> A careful examination of the statutory language indicates that a "plain-meaning" interpretation could lead to results opposed to the majority's conclusion. The language of the UCC states: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued."<sup>13</sup> Clearly, a plaintiff such as Cecile Mendel is not bringing an action for the breach of a sales contract. This argument is mitigated by the critical language which follows: "[a] breach of warranty occurs

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<sup>11</sup> 25 N.Y.2d at 346, 253 N.E.2d at 210, 305 N.Y.S.2d at 495.

<sup>12</sup> UNIFORM COMMERCIAL CODE § 2-725, comment.

<sup>13</sup> *Id.* § 2-725(1).

when tender of delivery is made."<sup>14</sup> The plaintiff was, *inter alia*, basing her cause of action upon a breach of warranty theory. Notwithstanding this "answer" to the argument that the drafters of the UCC were thinking in commercial contract terms, the section is oriented toward a genuine breach of contract situation for several other reasons. If a "cause of action accrues when the breach occurs," it accrues only to the purchaser regardless of his knowledge of the defect, because the only legal relationship is a contractual one between buyer and seller and, therefore, the only breach which can occur goes to that relationship. Cecile Mendel had no cause of action at this time because there was no duty owed to her which was breached. Moreover, the cause of action accrues when the breach occurs, "regardless of the aggrieved party's lack of knowledge of the breach." Who is an "aggrieved party"? The definition set forth in the Code indicates that an "aggrieved party" is any party entitled to a remedy.<sup>15</sup> There is no elaboration of this "new" term in the comment to 1-201. Cecile Mendel is not an "aggrieved party" under the Code definition. Again, the only possible "aggrieved party" at the time of delivery is the buyer.

If the Code drafters had considered plaintiffs such as Mendel when structuring 2-725, would it have been changed? It would have been most helpful if they had indicated in some fashion whether the four-year period was to run from the time of delivery in relation to third parties such as the plaintiff. One mode of construction is merely to conclude that since they said nothing, they intended the same period to apply, regardless of the plaintiff. If the Code is to be interpreted in this flagellant fashion, there is little hope for it. One only has to point to the plausible ("plain meaning") argument of Professor Leff which states that the unconscionability standard of 2-302 does not apply to a situation wherein the seller has formally complied with the requirements of warranty disclaimers set forth in 2-316.<sup>16</sup> The fact that this construction would undermine the purpose of both 2-316 and 2-302 was simply not considered; only the language was considered important. In any event, the drafters of the UCC said nothing about the situation before the Court in relation to the statute of limitations. Did they consider the situation in any other context?

There is an interesting analogous situation wherein the drafters took upon themselves, at least in two comments, the responsibility of

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<sup>14</sup> *Id.* § 2-725(2).

<sup>15</sup> *Id.* § 1-201(2).

<sup>16</sup> See Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115 U. PA. L. REV. 485, 523-24 (1967); see also Murray, *supra* note 8, at 48-49.

differentiating buyer-merchants from beneficiaries such as the plaintiff. Section 2-607(3)(a) deals with the requirement of notice from the purchaser to the seller within a reasonable time after the buyer has or should have discovered the seller's breach. Absent such notice within a reasonable time, the buyer is "barred from any remedy." This section could play havoc with non-buyer beneficiaries under 2-318. If a retailer purchased air conditioners for resale and discovered no defects upon tender of delivery, he would accept the goods. Assume he sells a conditioner to a consumer who, a few months later, is "shocked" when he operates it. The action is brought against the manufacturer and retailer. *Inter alia*, the defense of 2-607 (3) (a) is presented: the consumer-buyer did not notify the seller or manufacturer of breach within a reasonable time. This is ludicrous and the Code recognizes it as such. In the first instance, "[a] reasonable time" for notification from a retail consumer is to be judged by different standards.<sup>17</sup> Furthermore:

Under this article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance.<sup>18</sup>

The comment goes on to suggest that some notice is essential but it is extended in the case of a consumer. The standard is one of good faith. If comment 5 could be slightly changed it might apply with great force to 2-725:

Under this article, various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present action in regard to the time when a cause of action accrues since the beneficiary has no cause of action until injured and is not, therefore, an aggrieved party until injured.

This fictitious comment would have been in keeping with the policy found in the comments to 2-607 particularly comment 5, its sensibleness being unquestioned. It is absurd to measure a "reasonable time" from the time the goods are accepted by the purchaser when the breach of warranty is the basis for a personal injury action by a non-buyer beneficiary under 2-318. Such a party has "nothing to do with acceptance." In relation to 2-725, such a party has nothing to do with tender of delivery. Alas, there is no such comment to 2-725. Thus, the answer

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<sup>17</sup> UNIFORM COMMERCIAL CODE § 2-607, comment 4.

<sup>18</sup> *Id.* § 2-607, comment 5.

supplied by the majority is that we must abide the absurd result it reached though an analogous absurd result is avoided by the comments to another section.

Should a court construct fictitious comments or construe the Code as if they existed? Is this not diametrically opposed to statutory interpretation standards, whether interpreting the Code or some other statute?<sup>19</sup> In consideration of these important questions, one must recall that in a statute, it is imperative to start with the statutory language. The trouble with the majority opinion is that it *ended* its exploration with the language. The statutory language is *operative* language which leads to the next question—whether the fact situation before the court fits nicely within the operative language? What elements are required by the section? Are all of these elements present in the fact situation? If we stop and briefly examine the operative language of 2-725, we find, that the fact situation does not easily meet the requirements. The section demands that there be a breach of warranty and, when there is such a breach, a cause of action accrues regardless of the aggrieved party's lack of knowledge of the breach. Finally, the breach occurs when tender of delivery is made. Thus, we must have a breach to have a cause of action, and, apparently, there must be an aggrieved party. A reasonable reading (though certainly not the only one) suggests that we have none of these operative elements. At the very least, they are not easily found. It now becomes necessary to search through the Code for some other section which is applicable. Unfortunately, there is none. Now that we have found that the only section that seems to treat our fact situation is one where our situation does not easily fit, should it be applied though our situation is longer and wider (or shorter and narrower) than the section? The simple answer is the negative maxim: if the shoe does not fit, don't wear it. The rule should not be used. How do we decide how bad a fit the section is? We look to the reason for the rule and in this process, we consider other sections, analogous sections. A section of the Code does not stand alone. We have considered an analogous section (2-607) and found that the drafters intended a result therein which is opposed to the construction of 2-725 urged by the majority. We have also carefully considered 2-318 and the fact that the drafters expressly foresaw the possibility, if not probability, of significant case law development beyond anything found in that section. Add these explorations to the fact that the operative elements of 2-725 are not clearly present in our fact situation and the inescapable conclusion

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<sup>19</sup> It is probably desirable to confess that the author agrees with those who suggest that the Code is not a genuine Code but rather a group of statutes.

seems to be that 2-725 should not be applied in the present situation. The incredible fact is that the majority (at least in terms of the opinion by Judge Scileppi), did not even deign to consider these possibilities.

The kind of Code construction in the majority opinion creates serious obstacles for the future. It cannot be gainsaid that the Code represents a substantial improvement over its antecedents. However, it is not simply a series of amendments to the Uniform Sales Act, the Negotiable Instruments Law, and statutes designed to protect the secured creditor. It is an attempt to provide a totally new legal structure for commercial situations. This is not to suggest that all of the past is to be ignored. In fact, prior legal and equitable principles are incorporated to supplement the Code provisions.<sup>20</sup> But, the Code is a new statutory departure, and it is filled with Llewellynesque leeways. The pervasive concepts of commercial reasonableness and good faith as well as the generality of many provisions, particularly those in Article 2, require courts to approach the application of this new set of statutes with a different focus. The focus must be creative and imaginative and it must be concerned with purposes. It requires lawyers and courts to consider all of the surrounding circumstances all of the time. Thus, the advocates and their judges will have to engage in a great deal of empirical verification beyond that which they considered in the past. This is further mandated by the revolutionary developments in the agreement process which suggests, *inter alia*, that intention must prevail over form. Moreover, the sleeping giant of unconscionability requires this. The sections dealing with the parol evidence rule,<sup>21</sup> the emasculation of the preexisting duty rule,<sup>22</sup> assignment and delegation,<sup>23</sup> the open price term,<sup>24</sup> and the output-requirements contract,<sup>25</sup> to name a few others, move in the same direction. This is why it was so important for the majority to consider the purposes of the relevant sections before it in *Mendel*. Section 2-318 is intended as nothing more than an effort to set forth a basis for strict liability under the implied warranty mantle. The drafters could not have been more clear in this regard, though one must rely upon the unenacted comments to reach this construction. With the movement, the change, the requirement of creativity and imagination elsewhere, did the drafters intend to slam the door on parties such as Cecile Mendel under 2-725? If the response is: why didn't they say

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<sup>20</sup> UNIFORM COMMERCIAL CODE § 1-103.

<sup>21</sup> *Id.* § 2-202.

<sup>22</sup> *Id.* § 2-209.

<sup>23</sup> *Id.* § 2-210.

<sup>24</sup> *Id.* § 2-305.

<sup>25</sup> *Id.* § 2-306.

something different about such plaintiffs? The answer must be: no statute anywhere at anytime said everything.

The ultimate disappointment suggested by the majority opinion in *Mendel* is not its refusal to adopt 402A or something akin thereto. Certainly, this failure is significant, and, had the Court gone the 402A route, the case would have simply added to the increasing number of jurisdictions so doing. Having failed in this, the Court then shifted to Code gear and effected a bungling construction which must be un-snarled. The performance by the majority is, unfortunately, not unusual. Karl Llewellyn and his friends have presented one of the most significant challenges to courts in the history of American law. That challenge, in some situations, can be met only by the artistry of Cardozo and the precision of Brandeis. In deciding *Mendel*, the majority of the New York Court of Appeals was simply not blessed with such attributes.