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Advertised-Product Liability:
Law of Manufacturer's Liability

*B. Joan Holdridge**

Negligence[1]

A Brief History.

IRONICALLY, *Winterbottom v. Wright*,[2] the case which has had the most influence on the manufacturer's liability, was not an action against a manufacturer, but one against a contractor. The oft-quoted "rule" in this case was actually dicta, the court going no further than to hold that a defendant who has undertaken to do work for another, which is necessary to the safety of the person or property of a third-party plaintiff, does not thereby become liable for a failure to perform his contract competently merely because the third party knows of the contract and chooses to rely on its performance.

The words of Lord Abinger, who foresaw "the most absurd and outrageous consequences, to which I can see no limit, . . . unless we confine the operation of such contracts as this to the

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[1] See also Gillam, Products Liability in a Nutshell, 37 Oregon L. R. 119 (1958); Products Liability: A Symposium, 24 Tenn. L. R. 787 (1957); Strict Liability of Manufacturers: A Symposium, 24 Tenn. L. R. 923 (1957); Harper and James, Torts, ch. 28, 1534 (1956); Prosser, Torts, ch. 17, 497 (2d ed. 1955); James, Products Liability, 34 Tex. L. R. 44, 192 (1955); Wilson, Products Liability, 43 Calif. L. R. 614, 809 (1955); Dickerson, Products Liability and the Food Consumer (1951); Miller, Liability of a Manufacturer for Harm Done by a Product, 3 Syracuse L. R. 106 (1951); Steensland, Liability of the Manufacturer to the Ultimate Consumer Under Modern Merchandizing Practices, 9 Mont. L. R. 101 (1948); 164 A. L. R. 569 (1946); Clark, Let the Maker Beware, 19 St. John's L. R. 85 (1945); Seefeld, Tort Liability of Manufacturers to Users of Their Goods, 25 Marq. L. R. 173 (1941); Niebler, Torts—Breach of Warranty—Liability of Manufacturer of Defective Chattels, 22 Marq. L. R. 136 (1938); Ducker, Tort Liability of Manufacturers, 12 St. John's L. R. 281 (1938); Jeanblanc, Manufacturer's Liability to Persons Other Than Immediate Vendees, 24 Va. L. R. 134 (1937); Feezer, Tort Liability of Manufacturers, 19 Minn. L. R. 752 (1935); Rice, Liability of a Manufacturer to a Sub-Vendee, 18 Cornell L. Q. 445 (1932); Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendees, 45 L. Q. R. 343 (1929); Feezer, Tort Liability of Manufacturers and Vendors, 10 Minn. L. R. 1 (1925).

[2] 10 Mees & W. 109, 152 Eng. Rep. 402, 11 L. J. Ex. 415 (1842). In this case, the driver of a mail coach was injured when it collapsed, throwing him from the seat. It was alleged that the defendant had a contract with the Postmaster General to keep the coach in "fit, proper, safe and secure state and condition," and that since he had not done so, he was liable.

parties who entered into them," [3] were taken to mean that the liability for negligence in performance of a contract or manufacture of goods to be sold was to be restricted to those who were parties to the contract or the sale.

This interpretation was strengthened by the concurring opinion of Alderson, B., who said that:

> If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favor of the actions is, that this is a case of hardship; but that might have been obviated if the plaintiff had made himself a party to the contract[4];

and by Rolfe, B., who said that:

> The duty (with breach of which the defendant was charged) . . . is shown to have arisen solely from the contract; and the fallacy consists in the use of that word "duty." If a duty to the Postmaster-General be meant, that is true; but if a duty to the plaintiff be intended . . . there was none.[5]

It is most unfortunate that such an interpretation should have been placed upon their words. In an American case, *Farwell v. Boston & Worcester R.R. Co.*,[6] which was decided just three months prior to the English case of *Winterbottom v. Wright*, Shaw, C.J., anticipated that case in his opinion and suggested a result contra to the decision as it was rendered in England. He said:

> A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors, whose duty it was to keep it in repair and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors paying toll to the proprietors of the road and receiving compensation from passengers for their carriage, and suppose the engineer suffers a loss from the negligence of the switch tender. We are inclined to the opinion that the engineer might have a remedy against the railroad corporation, and if so, it must be on the ground, that as between the engineer employed by the proprietors of the engine and cars, and the switch tender employed by the corporation, the engineer would be a

[3] Id., at 115, 11 L. J. Ex., at 418.

[4] Ibid.

[5] Ibid.

[6] 4 Metc. (Mass.) 49 (1842).

> stranger between whom and the corporation there could be no privity of contract.[7]

Except for the fact that the switch might be regarded as real estate (although, despite its attachment to the soil, it is essentially mechanical equipment), Justice Shaw suggested a situation analogous to *Winterbottom v. Wright* and supposed the same relation between plaintiff and defendant which in fact existed in *Winterbottom v. Wright,* yet he suggested that recovery should be permitted and for precisely the reason given by the judges in the Exchequer for denying the plaintiff's right to recover.

There was other authority which might have been used to reach a contrary conclusion. In 1773, in the famous "Squib Case," [8] the defendant threw a lighted squib (over-sized firecracker) into a large crowd. It fell near Willis, who immediately picked it up and threw it. When it landed near Ryal, he also threw it, the squib struck the plaintiff in the face and exploded, putting out one of his eyes. The defense was that the injury was caused by Ryal's act, not that of the defendant. But the court held that the defendant was

> . . . the person, who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do.[9]

Or, perhaps one could have turned to Fitzherbert, who said: "It is the duty of every artificer to exercise his art rightly and truly as he aught." [10]

It is strange, especially in the face of these earlier citations, that a "holding" based solely on the policy of protecting one group, the manufacturer, could have introduced a concept into the law which, even today, affects many decisions in this field. The basic inconsistency of the privity rule with the legal development during the nineteenth century is evidenced by the

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[7] Id. at 61.

[8] Scott v. Shepherd, 2 Black W. 892, 96 Eng. Rep. 525 (1773); another report of the case appears in 3 Wils. 403, 95 Eng. Rep. 1124 (1773).

[9] Id. at 894, 96 Eng. Rep. at 526.

[10] Fitzherbert, De Novel Natura Brevium 94D (1514), cited by Williams, J. in Marshall v. Newcastle Ry., 11 C. B. 655, 663 (1851).

decision in *Rylands v. Fletcher.*[11] Here the court held the defendant strictly liable; he had voluntarily created the risk and therefore should bear the costs of the danger. Thus, in the space of only a few years, the *privity* rule, which had led to a holding of no liability in *Winterbottom v. Wright,* on the same reasoning led the judges in *Rylands v. Fletcher* to create a rule of strict liability, *viz.,* that there was no breach of a "duty of care." [12]

Almost immediately after the formation of this rule, the courts began to whittle it away with exceptions. In 1869, an English court held that a defendant owed a duty toward the person who was known to him to be about to use his product to see that it should reasonably be fit for the purpose for which it was bought and that it had been compounded with reasonable care, the action lying neither in warranty nor contract, but in negligence.[13] However, this case was much criticized in England, and it devolved upon an American court in *Thomas v. Winchester*[14] to state the first of many exceptions which eventually "swallowed the asserted general rule of nonliability, leaving nothing upon which that rule could operate." [15] In *Thomas v. Winchester,* the court held:

> In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury therefore was not likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser as actually happened . . . Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequence of the act . . . In . . . an act of negligence imminently dangerous to the lives of others . . . the party guilty of the negligence is

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[11] L. R. 3 H. L. 330 (1868). In this case the defendant had a water reservoir constructed on his land. Unknown to him, the land was honeycombed with abandoned mining shafts, some of which led into the working mine of the plaintiff who brought suit when his mine was flooded by the water escaping from the reservoir.

[12] Feezer, Tort Liability of Manufacturers and Vendors, 10 Minn. L. R. 1, 17 (1925).

[13] George v. Skivington, L. R. 5 Ex. 1 (1869). The defendant mixed a hair rinse and sold it to the husband of the plaintiff, knowing it was to be used by the plaintiff.

[14] 6 N. Y. 397 (1852). Belladonna, a poison, was mislabeled by the defendant as extract of dandelion. After passing through the hands of two druggists, it was sold to the husband for use by his wife.

[15] Carter v. Yardley & Co., 64 N. E. 2d 693, 164 A. L. R. 559, 568 (1946).

liable to the party injured, whether there be a contract between them or not.[16]

Two other exceptions to the general rule evolved, and probably others would have developed had it not been for Judge Sanborn's summary of the exceptions in *Huset v. J. I. Case Thrashing Machine Co.*:[17]

> The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life and health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life is actionable by third persons who suffer from the negligence. The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner.[18] The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated whether there were any contractual relations between the parties or not.[19]

This synthesis of the law was readily adopted since it provided convenient pegs upon which to hang a decision. But, once again, the wording of the first exception was most unfortunate. The cases which Judge Sanborn cited in support of this exception were either foods,[20] drugs,[21] explosives,[22] or fire-

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16 Thomas v. Winchester, supra n. 14, at 409.

17 120 Fed. 865, 870, 57 C. C. A. 237, 51 L. R. A. 303 (8th Cir. 1903).

18 Heaven v. Pender, 11 Q. B. D. 503 (1883).

19 This restriction to the exception has only been applied in Windram Manufacturing Co. v. Boston Blacking Co., 239 Mass. 57 (1921).

20 Bishop v. Webber, 139 Mass. 411 (1885). The caterer was held liable for supplying a bad crab to a guest at a club supper which the caterer had agreed to serve in a contract with the manager. Although no cases were cited, the courts citing this opinion naturally included drink in the list.

21 Thomas v. Winchester, supra n. 14; Norton v. Sewall, 106 Mass. 143 (1870); Peters v. Johnson & Co., 50 W. Va. 644, 41 S. E. 190 (1902). All were cases in which a retail druggist had wrongly labelled a drug bought from a third person or had improperly compounded such drug under a prescription.

22 Elkins v. McKean, 79 Pa. 493 (1875). The plaintiff's declaration alleged that the defendant, an oil refiner, had put upon the market as an illuminant, oil "which he knew to be inflammable, explosive and unsafe" for the use for which it was sold. This case is really authority for Judge Sanborn's third exception rather than his first.

arms.[23] The ease with which an item could be pigeon-holed by classifying it as a food, drink, drug, explosive or firearm led to many arbitrary decisions.[24] The manufacturers of such items as chewing tobacco,[25] air guns,[26] Coca-Cola,[27] etc., were found liable for the negligent manufacture of their product, while manufacturers of elevators,[28] high-powered machinery,[29] automobiles,[30] boilers,[31] thrashing machines,[32] etc., were not.

However, it remained for the opinion of Judge Cardozo in *MacPherson v. Buick Motor Co.*[33] to cut through all the "verbal niceties" of Judge Sanborn's decision and to reject once and for all the idea that only certain classes of articles can be imminently dangerous.

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[23] Dixon v. Bell, 5 M. & S. 198 (1816). The defendant was neither the maker nor the vendor of the gun which, knowing it to be loaded, he entrusted to a servant girl of thirteen, who in play shot the plaintiff's son. This case lays down no rule peculiar to the maker or vendor of firearms and seems to have been included in order to complete the list of articles most spectacularly used to destroy human life.

[24] "It would be a sad confession for a prohibitionist to admit that alcoholic drinks are made and sold to preserve human life, but even the most ardent of them would hesitate to say that they are made and sold with the intention of destroying it." Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendee, 45 L. Q. 343, 356 (1929). E.g., Watson v. Augusta Brewing Co., 124 Ga. 121, 52 S. E. 152, 1 L. R. A., N. S., 1178, 110 Am. St. Rep. 157 (1905).

[25] Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So. 365 (1918). Contra: Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S. W. 1009 (1915).

[26] Herman v. Markham Air Rifle Co., 258 Fed. 475 (E. D. Mich., 1918). Contra: Miller v. Sears Roebuck & Co., 250 Ill. App. 340 (1928).

[27] Boyd v. The Coca-Cola Bottling Works, 132 Tenn. 23, 177 S. W. 80 (1915).

[28] Berg v. Otis Elevator Co., 64 Utah 525, 231 P. 832 (1924). Cf. Tipton v. Barnard & Lees Co., 302 Mo. 162, 257 S. W. 791 (1924).

[29] Le Bourdais v. Vitrified Wheel Co., 194 Mass. 341, 80 N. E. 482 (1907). Contra: Borsbe v. Duhokof Stove Co., 231 Mass. 466, 14 N. E. 415 (1922) where the court held that one who turned over possession of a stove under a conditional sale, retaining ownership of it, was liable to a person other than his vendee for injuries received due to its defective condition while using it in the right of the vendee.

[30] Foster v. Ford Motor Co., 139 Wash. 341 (1927) 246 P. 945 (1926); Ford Motor Co. v. Livesay, 61 Okla. 231, 160 P. 901 (1916).

[31] Laudemar v. Russell & Co., 46 Ind. App. 52, 91 N. E. 822 (1910); Socony Oil Co. v. Church, 52 Tex. Civ. App. 325 (1903) (a derrick for drilling oil was held to be not inherently dangerous to the workmen doing the drilling).

[32] Heiser v. Steel Plant, 110 Mo. 605 (1892).

[33] 111 N. E. 1050, 217 N. Y. 382, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440 (1916).

> We hold, then that the principle of *Thomas v. Winchester* is not limited to poisons, explosives and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. . . . There must be knowledge of a danger, not merely possible, but probably. . . . There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. . . . We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow. . . .
>
> In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.[34]

This case stimulated the existing tendency to impose liability on a manufacturer. Accordingly, many courts have come to extend such liability not only to those who use the article, but also to those who share the effects of its use,[35] or are in the vicinity of the place where it is to be used,[36] as well as to cover property damage[37] and even damage to the chattel itself.[38] The

[34] Id. at 1053-1055.

[35] Coakley v. Prentiss-Wabers Stove Co., 182 Wis. 94, 195 N. W. 388 (1923).

[36] Sider v. General Electric Co., 237 N. Y. 64, 143 N. E. 792 (1924).

[37] Murphy v. Sioux Falls Serum Co., 44 S. D. 421, 184 N. W. 243 (1921). Contra: Moch v. Renssalaer Water Co., 219 App. Div. 674, 220 N. Y. Supp. 557 (3rd Dept. 1927), affd. 247 N. Y. 160, 159 N. E. 896 (1928). The court refused to impose a tort liability on a water company who had contracted to furnish water for a community, which it did negligently, causing loss of plaintiff's home by fire. Hinman, J., dissenting at 681, 220 N. Y. Supp., at 564 said: "The relationship of the parties in this case is such that, aside from contract, the damage to the inhabitants is to be foreseen, and there is a duty to avoid the injury."

[38] International Harvester Co. v. Sharoff, 202 F. 2d 52 (10th Cir., 1953); Quackenbush v. Ford Motor Co., 167 App. Div. 433, 153 N. Y. S. 131 (1915).

result is that the modern tort liability of manufacturers to remote consumers is based upon general principles of negligence, i.e., a duty, based upon broad considerations of economic principle and public policy, to use reasonable care under the circumstances to minimize foreseeable danger, irrespective of privity. As it was so aptly put by Dean Prosser:

> Cardozo's opinions struck through the fog of the "general rule" and its various exceptions, and held the maker liable for negligence. 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. But its reasoning and fundamental philosophy was clearly that the manufacturer, by placing the car upon the market, assumed a responsibility to the consumer, resting not upon the contract but upon the relation arising from his purchase, and the foreseeability of harm if proper care were not used. Legal writers have been quick to supply the justification that the manufacturer derives an economic benefit from the sale and the subsequent use of the chattel, and his duty is analogous to that of a possessor of land toward his business visitors; and it might be possible to add some notion of a representation of safety in the mere act of offering the goods for sale which, because of the original buyer's reliance upon it, deprives the consumer of possible protection at his hands. Such rationalization adds little, however, to the conclusion that the duty is one imposed by the law because of affirmative conduct likely to affect the interests of another.[39]

Thus the consumer's problem today is not one of showing that the goods are dangerous if negligently made, but to show that the manufacturer actually was negligent.

Status of the Law Today

Generally speaking, the maker of an article for sale or use by others must use reasonable care and skill not only to prevent defects in it caused by unexpected mistakes in the manufacturing process,[40] but also in designing it that it may be reason-

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[39] Prosser, Torts, 502-503 (2d ed. 1955).

[40] Trowbridge v. Abrasive Co., 190 F. 2d 825 (3rd Cir., 1951); Pierce v. Ford Motor Co., 190 F. 2d 910 (4th Cir. 1951); Willey v. Fyrogas Co., 363 Mo. 406, 251 S. W. 2d 635 (1952).

ably safe for the purpose for which it is intended[41] and for other uses which are reasonably foreseeable.[42]

Most courts today place liability on the manufacturer for a product which is "reasonably certain to place life and limb in peril," [43] but a few still speak of "inherently dangerous" chattels.[44] This rule has been extended to cover the maker of component parts of the finished product,[45] and to an assembler of parts.[46] It has even been applied to a second-hand dealer who has reconditioned an automobile for sale.[47] It also is well settled that one who represents a product to be his own, is subject to the same liability as if he were in fact the maker, even though the product was manufactured by some one else.[48] It has even

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[41] United States Radiator Corp. v. Henderson, 58 F. 2d 87 (10th Cir. 1933); Pierce v. C. H. Bidwell Thresher Co., 153 Mich. 323, 116 N. W. 1104 (1908); Coakley v. Prentiss-Wabers Stove Co., supra n. 35; State of Maryland for Use and Benefit of Woodzell v. Garzell Plastics Industries, Inc., 152 F. Supp. 483 (D. C. Mich., 1957); Rogers v. White Metal Rolling and Stamping Corp., 249 F. 2d 262 (2d Cir., 1957); Workstel v. Stern Brothers, 3 Misc. 2d 858, 156 N. Y. S. 2d 335 (1956); Gosnell v. Zink, 325 P. 2d 965 (Okla., 1958); Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla., 1956).

[42] Wolcho v. Arthur J. Rosenbluth & Co., 81 Conn. 358, 71 A. 566 (1908); Clement v. Crosby & Co., 148 Mich. 293, 111 N. W. 745 (1907) (stove polish intended for use on a cold stove applied to hot stove); Farley v. Edward E. Tower Co., 271 Mass. 230, 171 N. E. 639 (1930) (combs to set hair after wet wave "before retiring" used when hair was dried by hair-drier); Lovejoy v. Minneapolis-Moline Power Implement Co., 79 N. W. 2d 688 (Minn., 1956). Cf. Tingey v. E. F. Houghton & Co., 30 Cal. 2d 97, 179 P. 2d 807 (1947) (maker bound to anticipate contamination of product in course of ordinary use).

[43] There is a question as to whether Virginia accepts this doctrine: Robey v. Richmond Coca-Cola Bottling Works, 192 Va. 192, 64 S. E. 2d 723 (1951).

[44] Kalash v. Los Angeles Ladder Co., 1 Cal. 2d 229, 34 P. 2d 481 (1934); Crane Co. v. Sears, 168 Okl. 603, 35 P. 2d 916 (1934); International Derrick and Equipment Co. v. Croix, 214 F. 2d 216 (5th Cir., 1957); Sanders v. Clairol, Inc., 2 N. Y. App. Div. Rep. 2d 857, 155 N. Y. S. 2d 945 (1956); Day v. Barber-Colman Co., 10 Ill. App. 2d 494, 135 N. E. 2d 231 (1956); James v. Hilkrich & Bradsby Co., 299 S. W. 2d 92 (Ky., 1956). However this language appears to mean nothing more than that substantial harm is to be anticipated if the chattel should be defective.

[45] Smith v. Peerless Glass Co., 259 N. Y. 292, 181 N. E. 576 (1932).

[46] Sheward v. Virtue, 20 Cal. 2d 410, 126 P. 2d 345 (1942); C. D. Herme, Inc. v. R. C. Tway Co., 294 S. W. 2d 534 (Ky., 1956); Markel v. Spencer, 5 N. Y. App. Div. Rep. 2d 400, 171 N. Y. S. 2d 770 (1958); Sinatra v. National X-Ray Products Corp., 26 N. J. 546, 141 A. 2d 28 (1958).

[47] Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N. W. 855 (1928).

[48] In the leading case a meat packer supplying canned beef under its trade name was held liable for harm to a consumer resulting from a piece of metal in the can, even though the beef was packed by a South American company and there was no way for the supplier to inspect the contents of the can. Burkhardt v. Armour & Co., 115 Conn. 249, 161 A. 385 (1932). Cf. Swift & Co. v. Blackwell, 84 F. 2d 130 (4th Cir. 1936); Green v. Equitable Powder Mfg. Co., 95 F. Supp. 127 (W. D. Ark., 1951); Armour & Co. v.

been suggested that this rule applies even though the defendant has indicated that the goods were made for him by someone else, if he fails to name the actual manufacturer.[49]

While liability is still limited in the majority of jurisdictions to products creating a risk to "life and limb," an ever-increasing number of jurisdictions is granting recovery against the manufacturer for property damage.[50] This is so not only where the product causing the damage also involves undue risk of personal injury,[51] but also where no risk of harm to persons is involved, as in the case of defective animal food.[52] It has even been held that there is liability where the damage is to the article itself.[53]

Leasure, 177 Md. 393, 191 A. 2d 572 (1939); Thornhill v. Carpenter-Morton Co., 220 Mass. 593, 108 N. E. 474 (1915); Tiedje v. Haney, 184 Minn. 569, 239 N. W. 611 (1931); Swift & Co. v. Hawkins, 174 Miss. 253, 164 So. 231 (1935); Wilson v. Faxon, Williams & Faxon, 208 N. Y. 108, 101 N. E. 799 (1913); Commissioner of the State Ins. Fund v. City Chemical Corp., 290 N. Y. 64, 48 N. E. 2d 262 (1943).

[49] Restatement, Torts, sec. 400, comment (d) (Supp. 1948).

[50] Dunn v. Ralston Purina Company, 272 S. W. 2d 479 (Tenn. App. 1954); Williams v. Oklahoma Tire & Supply Co., 85 F. Supp. 260 (W. D. Ark., 1949); U. S. Radiator Corp. v. Henderson, supra n. 41; Burns v. Ralston Purina Co., 210 Ga. 82, 78 S. E. 2d 444 (1953); Dixon v. Montgomery Ward & Co., Inc., 351 Ill. App. 75, 114 N. E. 2d 44 (1953); E. I. DuPont de Nemours & Co. v. Baridon, 73 F. 2d 26 (8th Cir., 1934); Todd Shipyards Corp. v. U. S., 69 F. Supp. 609 (D. C. Maine, 1947); Spence v. Three Rivers Builders & Masonry Supply, 353 Mich. 120, 90 N. W. 2d 873 (1958); Miller v. New Zealand Insurance Co., 98 So. 2d 544 (La., 1957); Ellis v. Lindmark, 177 Minn. 390, 225 N. W. 395 (1929); Seaton Co. v. Oil & Feed Co., 126 Mont. 415 (1952); Dramer v. R. M. Hollingshead Corp., 6 N. J. Super. 255, 71 A. 2d 139 (1950); Schuylerville Wall Paper Co., Inc. v. American Manufacturing Co., 272 App. Div. 856, 70 N. Y. S. 2d 166 (1947); Genesee County Patrons Fire Relief Ass'n v. Sonneborn Sons, Inc., 263 N. Y. 463, 189 N. E. 551 (1934); Murphy v. Sioux Falls Serum Co., supra n. 37; Theurer v. Condon, 34 Wash. 448, 209 P. 2d 311 (1949). Cf. E. I. DuPont de Nemours & Co. v. Ladner, 73 So. 2d 249 (Miss. 1954); Gosness v. Zink, 325 P. 2d 965 (Okl. 1958); Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N. W. 392 (1932); Karl's Shoe Stores, Ltd. v. United Shoe Machinery Corp., 145 F. Supp. 376 (D. C. Mass., 1956).

[51] Genessee County Patrons Fire Relief Assn. v. L. Sonneborn Sons, supra n. 50.

[52] Ellis v. Lindmark, supra n. 50; Schuylerville Wallpaper Co. v. American Mfg. Co., supra n. 50; Dunn v. Ralston Purina Company, supra n. 50; Colvin v. John Powell & Co., 163 Neb. 112, 77 N. W. 2d 900 (1956); G. Bernd & Co. v. Rahn, 94 Ga. App. 713, 96 S. E. 2d 185 (1956). Cf. Quaker Oats Co. v. Davis, 33 Tenn. App. 373, 232 S. W. 2d 840 (1949).

[53] "The manufacturer's duty depends not upon the results of the accident, but upon the fact that his failure to properly construct the car resulted in an accident . . . The particular class of injury should have no bearing whatever upon the question of liability." Quackenbush v. Ford Motor Co., supra n. 38, 153 N. Y. S. at 133. Contra: Judson Pacific-Murphy, Inc. v. Thew Shovel Co., 127 Cal. App. 2d Supp. 828, 275 P. 2d 841 (1954); Fentress v. Van Etta Motors, 323 P. 2d 227 (Cal. App., 1958).

However, the article must cause an actual accident,[54] for if recovery were allowed against the manufacturer "merely because an article with latent defects turned out to be bad when used in 'regular service' without any accident occurring, there would be nothing left of the citadel of privity and not much scope for the law of warranty." [55] And a manufacturer's liability for harm to one not in privity with him caused by the negligent construction of his product does not extend to interference with a contractual relationship.[56]

There is no liability when the injuries were occasioned not by negligence or defects in the manufacture of the article, but by improper operation or use of it; [57] or where the injured person tampered with an integral part of the machine in some manner which the manufacturer could not reasonably foresee.[58] Also, if the article has been used for a long time, which would indicate that it had been all right when manufactured and might have weakened or deteriorated through use and handling by various persons,[59] or that part of the machine simply has worn out after long use,[60] the manufacturer is not liable. Neither is

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[54] A. J. P. Contracting Corp. v. Brooklyn Builders Supply Co., 171 Misc. 157, 11 N. Y. S. 2d 662 (1939), aff'd. 258 App. Div. 747, 15 N. Y. S. 2d 424 (2d Dept. 1939), affd. 283 N. Y. 692, 98 N. E. 2d 412 (1940); Poldon Engineering and Manufacturing Co. v. Zell Electric Manufacturing Co., 1 Misc. 2d 1016, 155 N. Y. S. 2d 115 (1957).

[55] Trans World Airlines v. Curtiss-Wright Corporation, 1 Misc. 2d 477, 148 N. Y. S. 2d 284, 290 (1955).

[56] Donovan Construction Co. v. General Electric Co., 133 F. Supp. 870 (D. Minn., 1955). Contra: Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275 (1922) (recovery for negligent conduct resulting in harm to contractual relations was allowed due to the foreseeability that the plaintiff would be injured).

[57] Gilbride v. James Leffel & Co., 37 Ohio L. Abs. 457, 47 N. E. 2d 1015 (1942) (boiler collapsed and scalded plaintiff's decedent to death, but the record showed that the failure was due to improper operation, and that the collapse of the boiler was caused by the scale in it which entered it when filling it with contaminated water); Jamieson v. Woodward and Lothrop, 247 F. 2d 23 (C. A. D. C., 1957); Marker v. Universal Oil Products Co., 250 F. 2d 603 (10th Cir., 1957).

[58] Borg-Warner Corp. v. Heinz, 128 F. 2d 657 (1942) (manufacturer of refrigerator not liable to workman working on machine who undertook to remove a needle valve and was struck in the face by a burst of sulfur dioxide gas from the machine).

[59] Gorman v. Murphy Diesel Co., 29 A. 2d 145 (1942) (an internal combustion engine which had been used by three different owners for over sixteen months before it exploded). Cf. Okker v. Chrome Furniture Mfg. Corp., 26 N. J. Super. 295, 97 A. 2d 699 (1953); Hale v. Depaoli, 33 Cal. 2d 228, 201 P. 2d 1 (1948).

[60] "There is no duty upon the manufacturer to furnish a machine that will not wear out. Common sense and everyday experience teaches us that

recovery granted where the defect is known to the user[61] or it should be quite obvious to him,[62] or where the immediate buyer is notified of the danger or discovers it for himself[63] and resells the goods without warning. However, where the product sold was an extremely dangerous one, it has been held that the manufacturer has not been relieved of responsibility even by the buyer's actual discovery before resale.[64] Nor is recovery barred where the defect could have been discovered by a reasonable inspection by the dealer or any other intervening purchaser and where that inspection was not made.[65]

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machinery will wear out. The remedy remains in having the machine inspected periodically so that worn parts may be replaced." Auld v. Sears, R. & Co., 261 App. Div. 918, 25 N. Y. S. 2d 491, 493, aff'd. 288 N. Y. 515, 41 N. E. 2d 927 (1941). Cf. International Derrick & Equipment Co. v. Croix, 241 F. 2d 216 (5th Cir., 1955), cert. den. 350 U. S. 989, 76 S. Ct. 475, 100 L. Ed. 855 (1956); Oklahoma Tire & Supply Co. v. Williams, 181 F. 2d 675 (8th Cir., 1950); Reed & Barton Corp. v. Maas, 73 F. 2d 359 (1st Cir., 1934); Solomon v. White Motor Co., 153 F. Supp. 917 (W. D. Pa., 1957) held that the use of a chattel for a long period of time results in a conclusive denial that the article was "imminently dangerous" or involved an "unreasonable risk" of bodily harm. But, Hewitt v. General Tire & Rubber Company, 3 Utah 2d 354, 284 P. 2d 471 (1955) held that the passage of time is not a factor in determining the "imminently" or "unreasonably" dangerous character of an article and is immaterial when negligence is proved. Cf. Kuhr Bros. v. Spahol, 89 Ga. App. 885, 81 S. E. 2d 491 (1954); Beadles v. Servel, Inc., 344 Ill. App. 133, 100 N. E. 2d 405 (1951).

[61] Youtz v. Thompson Tire Co., 46 Cal. App. 2d 672, 116 P. 2d 636 (1941); Gutelius v. General Electric Co., 37 Cal. App. 2d 455, 99 P. 2d 612 (1940); Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638, 100 P. 2d 723 (1940).

[62] Jamieson v. Woodward & Lothrop, 247 F. 2d 23 (D. C. Cir. 1957); Campo v. Scofield, 301 N. Y. 468, 95 N. E. 2d 902 (1950); Yaun v. Allis-Chalmers Mfg. Co., 253 Wis. 558, 34 N. W. 2d 853 (1948); Dempsey v. Virginia Dare Stores, 239 Mo. App. 355, 186 S. W. 2d 217 (1945); Sawyer v. Pine Oil Sales Co., 155 F. 2d 855 (5th Cir., 1946); Lewis v. Cratty, 231 Iowa 1355, 4 N. W. 2d 259 (1942); Johnson v. Murray Co., 90 S. W. 2d 920 (Tex. Civ. App. 1936). Contra: O'Connell v. Westinghouse X-Ray Co., 388 N. Y. 486, 41 N. E. 2d 177 (1942), where the court held that the fact that a defect is obvious should not vitiate a duty otherwise owing to the plaintiff; the obviousness of the danger should rather raise the question of plaintiff's contributory fault and such a question is properly for a jury.

[63] Foster v. Ford Motor Co., supra n. 30; Ford Motor Co. v. Wagoner, 83 Tenn. 392, 192 S. W. 2d 340 (1946); Trust Co. of Chicago v. Lewis Auto Sales, 306 Ill. App. 132, 28 N. E. 2d 300 (1940); Harper v. Remington Arms Co., 156 Misc. 53, 280 N. Y. S. 862 (1935), affd. 248 App. Div. 713, 290 N. Y. S. 130 (1936). Cf. Scurfield v. Federal Laboratories, 335 Pa. 145, 6 A. 2d 559 (1939); Ford Motor Co. v. Atcher, 310 S. W. 2d 510 (Ky., 1957).

[64] Kentucky Independent Oil Co. v. Schnitzler, 208 Ky. 507, 271 S. W. 570, 39 A. L. R. 979 (1923) (gasoline mixed with kerosene); Clement v. Crosby & Co., supra n. 42; Farley v. Edward E. Tower & Co., supra n. 42. Cf. Petzold v. Roux Laboratories, 256 App. Div. 1096, 11 N. Y. S. 2d 565 (1939) (inadequate warning).

[65] Fredericks v. American Export Lines, 227 F. 2d 450 (2d Cir., 1953); Pierce v. Ford Motor Co., supra n. 40; Ellis v. Lindmark, supra n. 50; Rosebrock v. General Electric Co., 236 N. Y. 227, 140 N. E. 571 (1923).

Proof of negligence

Although there is a very broad basis for liability, it is extremely difficult to prove actual negligence. "How could this be shown of a bottler employing hundreds of people in a large plant which turns out thousands of bottles weekly by mass production methods? The courts have answered by allowing an inference of negligence by means of the maxim *res ipsa loquitur*." [66] The general requisites which must be found in any particular case to give rise to the use of this rule are:

> (1) The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.[67]

Most courts[68] regard *res ipsa loquitur* as nothing more than one form of circumstantial evidence.[69] Justice Pitney, in following this view, has said: "*Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." [70] In food

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[66] Wilson, Products Liability, 43 Cal. L. R. 614, 636 (1955).

[67] Prosser, op. cit., n. 39, at 201.

[68] Pickwick Stages Corp. v. Messinger, 44 Ariz. 174, 36 P. 2d 168 (1934); Zentz v. Coca-Cola Bottling Co., 39 Cal. 2d 436, 247 P. 2d 344 (1952); Levine v. Union & New Haven Trust Co., 127 Conn. 435, 17 A. 2d 500 (1941); Delaware Coach Co. v. Reynolds, 6 Terry, Del., 226, 71 A. 2d 69 (1950); Dalton Coca-Cola Bottling Co. v. Watkins, 70 Ga. App. 790, 29 S. E. 2d 281 (1944); Shinofield v. Curtis, 245 Iowa 1352, 66 N. W. 2d 465 (1954); Potomac Edison Co. v. Johnson, 160 Md. 33, 152 A. 633 (1930); Liberatore v. Framingham, 315 Mass. 538, 53 N. E. 2d 861 (1944); Pattinson v. Coca-Cola Bottling Co., 353 Mich. 253, 52 N. W. 2d 688 (1952); Johnson v. Coca-Cola Bottling Co., 235 Minn. 471, 51 N. W. 2d 573 (1952); Frazier v. Ford Motor Co., 276 S. W. 2d 95 (Mo., 1955); Smith v. Coca-Cola Bottling Co., 97 N. H. 522, 92 A. 2d 658 (1952); Willdauer v. Rudnevitz, 119 N. J. L. 471, 197 A. 252 (Ct. Err. & App., 1938); George Foltis, Inc., v. The City of New York, 287 N. Y. 108, 38 N. E. 2d 455 (1941); McGraw v. Southern Ky. Co., 205 N. C. 873, 175 S. E. 286 (1934); Koktavy v. United Fireworks Mfg. Co., 160 Ohio St. 461, 117 N. E. 2d 16 (1954); Ritchie v. Thomas, 190 Ore. 95, 224 P. 2d 543 (1950); Motte v. First Nat'l Stores, Inc., 76 R. I. 349, 70 A. 2d 822 (1950); Guthrie v. Carter, 190 Va. 354, 57 S. E. 2d 45 (1950); Wright v. Volan, 130 W. Va. 466, 43 S. E. 2d 364 (1947).

[69] "When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant upon the occurrence, we speak of it as a case of 'res ipsa loquitur,' when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence." Cullen, J. in Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 927, 52 L. T. A. 922, 82 Am. St. Rep. 630 (1901).

[70] Sweeney v. Erving, 228 U. S. 233, 240, 33 Sup. Ct. 416, 418, 57 L. Ed. 815, Ann. Cas. 1914D, 905 (1912).

cases, the inference of negligence created has usually been treated as having some evidentiary weight. This was expressed well by a Rhode Island court[71] as follows:

> If a person is injured by a food product and he can show, by proper probative evidence, that he bought that food product in the original package in which it was put up by the maker and that in that original package was a substance which was harmful or injurious to the human body and he shows that to the satisfaction of the jury, then a presumption arises that the manufacturer of that food product was negligent in its manufacture.[72]

Occasionally the case is of such a type that the inference of negligence is so strong that, even though the manufacturer produced evidence of the use of the most scrupulous care in the production of the article, he would be held liable. Thus, in *Pillars v. R. J. Reynolds Co.*,[73] the court said: "We can imagine no reason why, with ordinary care, human toes could not be left out of chewing tobacco, and if toes are found in chewing tobacco, it seems to us that somebody has been very careless."[74]

However, where there is some possibility of tampering, such as in the case of a removable cap of a soft-drink bottle, some courts require the plaintiff to show affirmatively that there has been no opportunity for tampering,[75] while others have applied the doctrine of *res ipsa loquitur* after the introduction of evidence showing the usual way in which the bottles are handled and distributed.[76] In the case of exploding bottles, it usually

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[71] Minutilla v. Providence Ice Cream Co., 50 R. I. 43, 144 A. 884 (1929) (glass in ice cream).

[72] Id. at 47, 48, 144 Atl. at 886. Cf. Atlanta Coca-Cola Bottling Co. v. Sinyard, 45 Ga. App. 272, 164 S. E. 231 (1932); Coca-Cola Bottling Co. of Shelbyville v. Creech, 245 Ky. 414, 53 S. W. 2d 745 (1932).

[73] Supra, n. 25.

[74] Id. at 500, 78 So. at 366.

[75] Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S. W. 2d (1942); Coca-Cola Bottling Co. v Rowland, 16 Tenn. App. 184, 66 S. W. 2d 272 (1933); Jordan v. Coca-Cola Bottling Co. of Utah, 218 P. 2d 660 (1950); East Kentucky Beverage Co. v. Stumbo, 313 Ky. 66, 230 S. W. 2d 106 (1950); Nichols v. Louisiana Coca-Cola Bottling Co., 46 So. 2d 695 (La. App., 1950). Cf. Newport News Coca-Cola Bottling Co. v. Babb, 190 Va. 360, 57 S. E. 2d 41 (1950); Pepsi-Cola Bottling Co. of Norfolk, Inc. v. McCullers, 189 Va. 89, 52 S. E. 2d 257 (1949).

[76] Dr. Pepper Co. v. Brittain, 234 Ala. 548, 176 So. 286 (1937); Claxton Coca-Cola Bottling Co. v. Coleman, 68 Ga. App. 302, 22 S. E. 2d 768 (1942); Duval v. Coca-Cola Bottling Co. of Chicago, 329 Ill. App. 290, 68 N. E. 2d 479 (1946); Coca-Cola Bottling Works of Evansville, Inc. v. Williams, 111 Ind. App. 502, 37 N. E. 2d 702 (1941); Glasgow Coca-Cola Bottling Works, Inc. v. Reed, 312 Ky. 731, 229 S. W. 2d 438 (1950); Seale v. Coca-Cola Bottling Works of Lexington, 297 Ky. 450, 179 S. W. 2d 598 (1944); Underhill v.

is necessary to show that each person who had the control of the bottle handled it properly.[77]

The products liability cases seem to have led to a marked relaxing in the requirement of exclusive control in the application of the *res ipsa loquitur* doctrine.[78] It has even been suggested that it has been so liberally applied in products cases that the courts are in effect imposing liability without fault.[79] Others have said that the frequent use of the doctrine is a "thinly concealed circumvention of the theory of absolute liability," [80] or an "imposition of strict liability under cover of a fiction of negligence." [81]

However, even with all this relaxation of the requirements, it is still necessary to prove causal connection between the defendant's conduct and the plaintiff's harm. In a federal case involving a shampoo,[82] the plaintiff only showed that after its use her scalp became irritated, and that shortly thereafter her hair fell from her scalp, eyebrows and eyelashes, and that after a year the hair from her entire body fell out. Her experts, who analyzed the shampoo, testified that it did not contain excessive alkalinity. Three specialists in dermatology, called by the de-

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Anciaux, 226 P. 2d 794 (1951); Beaumont Coca-Cola Bottling Co. v. Guillot, 222 S. W. 2d 141 (Tex. Civ. App., 1949); Texas Coca-Cola Bottling Co. v. Wimberley, 108 S. W. 2d 860 (Tex. Civ. App. 1937). But, in Texas & Pac. Ry. Co. v. Behymer, 189 U. S. 468, 470, 23 S. Ct. 622, 57 L. Ed 905 (1903), Justice Holmes said: "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not." Cf. Trembley v. Coca-Cola Bottling Co., 285 App. Div. 539, 138 N. Y. S. 2d 332 (3d Dept., 1955); Saglimbeni v. West End Brewing Co., 274 App. Div. 201, 80 N. Y. S. 2d 635 (3d Dept., 1948).

[77] Gerber v. Faber, 54 Cal. App. 2d 674, 129 P. 2d 485 (1942); Miami Coca-Cola Bottling Co. v. Reisinger, 68 Sp. 2d 589 (Fla., 1953); Dunn v. Hoffman Beverage Co, 126 N. J. L. 556, 20 A. 2d 352 (1941); Hankins v. Coca-Cola Bottling Co., 151 Tex. 303, 249 S. W. 2d 1008 (1952); Bernstein v. Metropolitan Bottling Co., 45 N. J. Super. 365, 132 A. 2d 825 (1957); Coca-Cola Bottling Works, Inc. v. Crow, 291 S. W. 2d 589 (Tenn., 1956).

[78] Nichols v. Nold, 174 Kan. 613, 258 P. 2d 317 (1953) (all persons handling bottle before it exploded joined as defendants); Loch v. Confari, 372 Pa. 212, 93 A. 2d 451 (1953) (both bottler and retailer joined). Contra: Burr v. Sherwin-Williams Co., 42 Cal. 2d 682, 268 P. 2d 1041 (1954).

[79] Peairs, The God in the Machine—A Study in Precedent, 29 B. U. L. Rev. 37, 64 (1949).

[80] Gregory, Trespass to Negligence to Absolute Liability, 37 Va. L. R. 359, 381 (1951).

[81] Dickerson, Products Liability and the Food Consumer 132 (1951).

[82] J. R. Watkins Co. v. Raymond, 184 F. 2d 925 (8th Cir., 1950). Cf. Karr v. Inecto, Inc., 247 N. Y. 360, 160 N. E. 398 (1928); Bish v. Employers Liability Assurance Corp., Ltd., 236 F. 2d (5th Cir., 1956).

fendant, stated the shampoo did not cause plaintiff's condition. The court said:

> This testimony shows no causal connection between the use of the shampoo and the resulting falling out of the plaintiff's hair. The mere suffering of the illness did not tend to prove that the shampoo was poisonous or infectious.[83]

And, of course, the defendant still has the defenses of contributory negligence[84] and assumption of risk.[85]

Violation of statute as negligence per se.

If a defendant violates a statute designed to protect individuals against harm from a particular source, and the harm contemplated by the statute occurs on account of the violation, liability may result, even where the statute itself provides no civil remedy.[86] Although some courts hold that violation of a statute is merely evidence of negligence,[87] the prevailing view is that the breach of the statutory provisions is negligence in itself, without regard to actual negligence or willfulness.[88]

Most of the cases have arisen under the law regarding the manufacturer and safety of food and drugs, since virtually all states have comprehensive laws regulating the manufacture and sale of adulterated and mis-branded food and drugs.[89] Liability based on violation of these statutes has been held to be as far reaching as liability on actual negligence; thus lack of privity of contract with a remote consumer is no bar to recovery.[90] Similar

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[83] J. R. Watkins Co. v. Raymond, supra, n. 82 at 928.

[84] Stevens v. Allis-Chalmers Co., supra, n. 61; Sitta v. American Steel and Wire Division of United States Steel Corp., 245 F. 2d 12 (6th Cir., 1958).

[85] Stultz v. Benson Lumber Co., 6 Cal. 2d 688, 59 P. 2d 100 (1936); Oettinger v. Norton Co., 160 F. Supp. 399 (D. C. Pa., 1957).

[86] Texas & Pac. Ry. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874 (1916).

[87] Jones v. Co-operative Ass'n., 109 Me. 448, 84 A. 985 (1912); Guinan v. Famous Players-Lasky Corp., 267 Mass. 501, 167 N. E. 235 (1929); Evers v. Davis, 86 N. J. L. 196, 90 A. 677 (1914); Clark v. Boston & Me. R. R., 64 N. H. 323, 10 A. 676 (1897).

[88] Martin v. Herzog, 228 N. Y. 164, 126 N. E. 814 (1920); Larkins v. Kohlmeyer, 229 Ind. 391, 98 N. E. 2d 896 (1951); Schell v. Du Bois, 94 Ohio St. 93, 113 N. E. 664, L. R. A. 1917A, 710 (1916); Annis v. Britton, 232 Mich. 291, 205 N. W. 128 (1925).

[89] Salthe, State Food, Drug and Cosmetic Legislation and Its Administration, 6 Law. & Contemp. Prob. 165, 167 (1939).

[90] Criswell Baking Co. v. Milligan, 77 Ga. App. 2d 861, 15 S. E. 2d 136 (1948); Kelly v. John R. Dailey Co., 56 Mont. 63, 181 P. 326 (1919); Portage v. Strohmeyer & Arpe Co., 243 N. Y. 458, 15 N. E. 309 (1926).

holdings have resulted from violations of legislation designed to insure the purity of animal food.[91]

The other principal statutes which have given rise to liability of this type are ones forbidding the sale of kerosene which has a flash point lower than a specified minimum temperature,[92] legislation relating to insecticides, fungicides and rodenticides,[93] and various acts relating to the labeling of poison and other harmful products.[94]

Warranty[95]

A Brief History.

It has been said of warranty that, "A more notable example of legal miscegenation could hardly be cited." [96] For, in its inception, breach of warranty was a tort.[97] How remote the action was from an action of contract appears plainly from a remark of Coke, J.: "If one sells a thing to me, and another warrants it to be good and sufficient, upon that warranty made by parol, I shall not have an action of deceit; but if it was by deed, I shall have an action of covenant." [98] In *Cross v. Gardner*,[99] Lord Holt largely fixed the law of express warranty in its modern form. He held that an affirmation of title in the seller, though not known

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[91] Pinegrove Poultry Farm, Inc., v. Newton By-Products Manufacturing Co., 248 N. Y. 293, 162 N. E. 84 (1928); White v. Rose, 241 F. 2d 94 (10th Cir., 1957).

[92] General Oil Co. v. Crowe, 54 Ga. App. 302, 53 S. E. 2d 761 (1936).

[93] McClanahan v. California Spray-Chemical Corp., 194 Va. 842, 75 S. E. 2d 712 (1953).

[94] Peterson v. Standard Oil Co., 55 Ore. 511, 106 P. 337 (1910).

[95] See also: Skeel, Product Warranty Liability, 6 Clev.-Mar. L. R. 94 (1957); Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Col. L. R. 653 (1957); Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. R. 117 (1943); Sprill, Privity of Contract as a Requisite for Recovery on Warranty, 19 N. C. L. R. 551 (1941); Llewellyn, On Warranty of Quality & Society, 36 Col. L. R. 699 (1936), 37 Col. L. R. 341, 408 (1937); Schneider, Effect of Advertising on the Manufacturer's Liability, 22 Wash. U. L. Q. 406 (1937); Bohlen, Misrepresentation as Deceit, Negligence or Warranty, 42 Harv. L. R. 886 (1927); Williston, Liability for Honest Misrepresentation, 24 Harv. L. R. 415 (1911); Ames, History of Assumpsit, 2 Harv. L. R. 1 (1888).

[96] Note, 42 Harv. L. R. 414 (1929).

[97] The earliest reported case is Fitz. Ab. Monst. de Faits, pl. 160 (1383).

[98] Y. B. 11 Ed. IV, 6, pl. 11; see also Moor v. Russell, 2 Show. 284 (1690) in which the court held that there need be no allusion to consideration, and that if it was alleged, it counted for nothing.

[99] 1 Show. 68, Carthew 90, 3 Mod. Rep. 261 (1689). Cf. Medina v. Stoughton, 1 Ld. Raym. 593, 1 Salk. 210 (1700); Williamson v. Allison, 2 East 446 (1802).

to be false and though not put in the form of a warranty or express promise, was ground for liability. This action was still in tort, and as late as 1797, one finds Lord Kenyon talking of breach of warranty as a form of "fraud." [100]

It was in *Stuart v. Wilkins*[101] that the further step was taken of allowing the action of assumpsit for the enforcement of an express warranty. It would appear that there was an unreported discussion in this case as to whether this would also apply to an implied warranty, but that Lord Mansfield felt that this was still exclusively a matter of tort.[102] Shortly thereafter, in the leading case of *Gardiner v. Gray*,[103] Lord Ellenborough stated the fundamental principle of the implied warranty of merchantable quality:

> I am of opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, whether the commodity purchased by the plaintiff be of such a quality as can reasonably be brought into the market to be sold . . . under that denomination.[104]

Thus the elements of *scienter* and reliance, as required by *Derry v. Peek*[105] for an action in deceit, were no longer necessary. Instead, the only thing considered was the intent of the parties.

After this decision, the law was rapidly rounded out by other cases. The seller's warranty was held to mean not only that the goods delivered must be genuine according to the name,

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[100] Jendwine v. Slade, 2 Esp. 572 (1797).

[101] 1 Douglas 18 (1778). It would appear from the language used that this form of pleading had been recognized somewhat earlier. Prosser in The Implied Warranty of Merchantable Quality, 27 Minn. L. R. 117, 119 (1943) placed the date as c. 1750.

[102] Parkinson v. Lee, 2 East 314, 102 Eng. Rep. 389 (1802) in which this discussion was mentioned.

[103] 4 Camp. 144, 171 Eng. Rep. 46 (1815).

[104] Id. at 145. Cf. Holcombe v. Hewson, 2 Camp. 391, 170 Eng. Rep. 1194 (1813); Laing v. Fidgeon, 6 Taunt. 108, 4 Camp. 169, 128 Eng. Rep. 974 (1815).

[105] 14 A. C. 337, 58 L. J. Ch. 864 (1889).

kind or description specified,[106] but that they must be of a quality to pass in the market under that description,[107] and be reasonably fit for the ordinary uses to which such goods are put.[108] It was recognized as a dealer's warranty only[109] for which trade usage had to be taken into account.[110] The implied warranty of fitness for the buyer's particular purpose developed as something separate and distinct from that of merchantable quality.[111] Finally, in *Jones v. Just,*[112] the whole matter was summed up as follows:

> First, where goods are in esse, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer. . . .
>
> Secondly, where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty. . . .
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> Thirdly, where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.
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> Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. . . .
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> Fifthly, where a manufacturer undertakes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting,

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[106] Bridge v. Wain, 1 Stark 504, 171 Eng. Rep. 543 (1816); Nichols v. Godts, 10 Exch. 191, 23 L. J. Ex. 314 (1854); Allan v. Lake, 18 Q. B. 560, 118 Eng. Rep. 212 (1852).

[107] Wieler v. Schilizzi, 17 C. B. 614, 189 Eng. Rep. 1219 (1856); Josling v. Kingsford, 13 C. B. (N S.) 444, 32 L. J. C. P. 94, 143 Eng. Rep. 177 (1856).

[108] Jones v. Bright, 5 Bing. 533, 130 Eng. Rep. 1167 (1829); Beer v. Walker, 46 L. J. Q. B. 677, 34 L. T. 278 (1877).

[109] Burnby v. Bollett, 16 M. & W. 644, 153 Eng. 1548 (1847). Cf. La Neuville v. Nourse, 3 Camp. 351, 170 Eng. Rep. 1407 (1813).

[110] Shepherd v. Kain, 5 B. & Ald. 240, 106 Eng. Rep. 1180 (1821); Frith v. Mitchell, 4 F. & F. 464 (1865).

[111] Jones v. Bright, supra n. 108; Randall v. Newson, 2 Q. B. D. 102 (1877).

[112] L. R. 3 Q. B. 197, 9 B. & S. 141, 37 L. J. Q. B. 89 (1868).

it is an implied term in the contract that he shall supply a merchantable article.[113]

It was about this time that the idea appeared that warranties arose by implication of law from what had been said and done, and were independent of any intent on the part of the seller to contract with regard to them, or to be bound by them.[114] This concept, readily accepted with regard to express warranties,[115] was equally rapidly applied to those "implied" for reason of public policy. Thus, it has often been said that implied warranties of quality arise by operation of law and are independent of any intention to agree upon their terms as a matter of fact;[116] and there are many cases in which to hold that the warranty is a term of the contract is "to speak the language of pure fiction." [117]

Status of the Law Today

The common law of the past century was codified in the Sale of Goods Act[118] and the Uniform Sales Act.[119] Since, at that time, the rule as to the necessity of privity seemed almost axiomatic, no provision was made to extend liability on warranty to a subvendee.[120] However, it seems clear that neither act was intended to exclude such liability.[121]

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113 Id., Q. B. 202-203.

114 Prosser, op. cit., n. 101, at 121-122.

115 Kenner v. Harding, 85 Ill. 264, 28 Am. Rep. 615 (1877); McClintock v. Emick, Stoner & Co., 87 Ky. 160, 7 S. W. 903, 9 Ky. L. Rep. 995 (1888); Fairbank Canning Co. v. Metzger, 118 N. Y. 260, 23 N. E. 372 (1890); Herron v. Dibrell, 87 Va. 289, 12 S. E. 674 (1891); Hobart v. Young, 63 Vt. 363, 21 A. 612, 12 L. R. A. 693 (1891); Ingraham v. Union R. Co., 19 R. I. 356, 33 A. 875 (1896).

116 Bekkevold v. Potts, 173 Minn. 87, 216 N. W. 790, 59 A. L. R. 1164 (1927); Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163 (1860); Lee v. Cohrt, 57 S. D. 387, 232 N. W. 900 (1930); Linn v. Radio Center Delicatessen, 169 Misc. 879, 9 N. Y. S. 2d 110 (1939); Little v. G. E. Van Syckle & Co., 115 Mich. 480, 73 N. W. 554 (1898); Hooven & Allison Co. v. Wirtz Bros., 15 N. D. 477, 107 N. W. 1078 (1906).

117 Williston, Liability for Honest Misrepresentation, 24 Harv. L. R. 415, 420 (1911).

118 1894.

119 1906.

120 Section 76 of the Uniform Sales Act defines "buyer" thus: "Buyer means a person who buys or agrees to buy goods or any legal successor in interest of such person." It would seem that this definition might have been used as an instrument for extending the rights of subvendees and donees, but it has not been so used. See also Hanback v. Dutch Baker Boy, 70 App. D. C. 398, 107 F. 2d 203 (1939).

121 Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P. 2d 799 (1939). See also Note, 42 Harv. L. R., op. cit., n. 96, at 415.

Nevertheless, most courts still insist that warranty is a contractual obligation[122] and that there can be no breach of warranty where there is no privity of contract.[123] As Professor Gillam wrote in a recent article:

> Doubtless the decisions of these courts are bottomed on conceptions of sound economic policy, but the fact that nothing more substantial than a historical accident explains the contractual character of an action for breach of warranty affords logical justification for reaffirmation of the tort basis of waranty, and to recognize the tort basis of warranty is to abandon privity of contract as an essential element of an action for breach of warranty.[124]

Although a few well-known writers have opposed removal of the privity requirement, particularly with reference to general products,[125] the majority over the past twenty-five years have

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[122] Drury v. Armour & Co., 140 Ark. 371, 216 S. W. 40 (1919); Senter v. B. F. Goodrich Co., 127 F. Supp. 705 (D. Colo., 1954); Delgaudio v. Ingerson, 19 Conn. Supp. 151, 110 A. 2d 626 (1954); Coca-Cola Bottling Works of Evansville v. Williams, 111 Ind. App. 502, 37 N. E. 2d 702 (1941); Lajoie v. Bilodeau, 148 Me. 59, 93 A. 2d 719 (1953); Cloverland Farms Dairy, Inc. v. Ellin, 195 Md. 663, 75 A. 2d 116 (1950); Bolitho v. Safeway Stores, Inc., 109 Mont. 213, 95 P. 2d 443 (1939); Smith v. Coca-Cola Bottling Co., 92 N. H. 97, 25 A. 2d 125 (1942); Lombardi v. California Packing Sales Co., 112 A. 2d 701 (R. I. 1955); Jordan v. Coca-Cola Co. of Utah, 117 Utah 578, 218 P. 2d 660 (1950); Holley v. Baking Co., 128 W. Va. 531, 37 S. E. 2d 729 (1946); Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N. W. 2d 788 (1952); Connecticut Pie Co. v. Lynch, 57 F. 2d 447 (D. C. Cir., 1932).

No warranty, but prima facie case in negligence: Seale v. Coca-Cola Bottling Works, 297 Ky. 450, 179 S. W. 2d 598 (1944); Johnson v. Stoddary, 310 Mass. 232, 37 N. E. 2d 505 (1941); Alston v. J. L. Prescott Co., 10 N. J. Super. 116, 76 A. 2d 686 (1950); Chysky v. Drake Bros., 235 N. Y. 468, 139 N. E. 576 (1923); Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S. W. 2d 721 (1942); Norfolk Coca-Cola Bottling Works v. Land, 189 Va. 35, 52 S. E. 2d 85 (1949).

Warranty approved in dicta but case decided on negligence: Underhill v. Anciaux, 68 Nev. 69, 226 P. 2d 794 (1951); Studebaker v. Nail, 82 Ga. App. 779, S. E. 2d 198 (1950).

Warranty on label only: Randall v. Goodrich-Gamble Co., 238 Minn. 10, 54 N. W. 2d 769 (1952); Simpson v. Oil Co., 217 N. C. 542, 8 S. E. 2d 813 (1940); Whitehorn v. Nash-Finch Co., 67 S. D. 465, 293 N. W. 859 (1940).

Warranty accepted in language of courts but restricted by all the defenses available in action for negligence: Magic City Bottling Co. v. Tolbert, 34 Ala. App. 516, 41 So. 2d 619 (1949); Southwestern Coca-Cola Bottling Co. v. Northern, 65 Ariz. 172, 177 P. 2d 219 (1947); Dobrenski v. Blatz Brewing Co., 41 F. Supp. 291 (W. D. Mich., 1941).

[123] "To sustain a finding that there was a breach of warranty, express or implied, there must have been evidence of a contract between the parties, for without a contract there could be no warranty." Welshausen v. Charles Parker Co., 83 Conn. 231, 233, 76 A. 271, 273 (1910).

[124] Gillam, Products Liability in a Nutshell, 37 Ore. L. R. 119, 148 (1958).

[125] Pound, New Paths of the Law, 39-40 (1940); Williston, Sales, 244 (Rev. ed., 1948) (stating that the imposition of liability to remove consumers and users "seems somewhat severe"); Leidy, Another New Tort, 38 Mich. L. R. 964, 986 (1940); Peairs, The God in the Machine—A Study in Precedent, 29 B. U. L. Rev. 37, 76-78 (1949).

been clearly in favor of discarding this concept as a basis for imposition of liability.[126] This has clearly become a basic problem of social policy as well as one of law.

It was in the food cases that strict liability, i.e., warranty liability without privity of contract, was first imposed. As Llewellyn has pointed out, "The emotional drive and appeal of the cases centers in the stomach." [127] A large minority of jurisdictions[128] disregard the requirement of privity of contract, or avoid it by means of some legal fiction. Some of the means used by the minority courts to arrive at the end of liability:

(1) In some jurisdictions the privity rule is repudiated as contrary to public policy.[129]

(2) It has been held that the manufacturer's warranty to the retailer inures to the consumer's benefit.[130]

(3) Some courts have simply brushed it aside or ignored it.[131]

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[126] Wilson, Products Liability, 43 Calif. L. R. 614, 640-649 (1955); Dickerson, Products Liability and the Food Consumer, 134, 142, 277 (1951); Miller, Liability of a Manufacturer for Harm Done by a Product, 3 Syracuse L. R. 106, 118-119 (1951); Spruill, Privity of Contract as a Requirement for Recovery on Warranty, 19 N. C. L. Rev. 551, 565-566 (1941); Feezer, Manufacturer's Liability for Injuries Caused by His Products, 37 Mich. L. R. 1, 24 (1938); Jeanblanc, Manufacturer's Liability to Persons Other Than Their Immediate Vendees, 24 Va. L. R. 134, 157 (1937); Llewellyn, Warranty of Quality and Society, 36 Col. L. R. 699, 704 (1936); Llewellyn, Cases on Sales 341 (1930); Perkins, Unwholesome Food as a Source of Liability, 5 Iowa L. Bull. 86, 95 (1920).

[127] Llewellyn, Cases on Sales 342 (1930).

[128] Klein v. Duchess Sandwich Co., supra, n. 121; Florida Coca-Cola Bottling Co. v. Jordan, 62 So. 2d 910 (Fla., 1953); Williams v. Paducah Coca-Cola Bottling Co., 343 Ill. App. 1, 98 N. E. 2d 164 (1951); Anderson v. Tyler, 223 Iowa 1033, 274 N. W. 48 (1937); Nichols v. Nold, 174 Kan. 613, 258 P. 2d 317 (1953); Le Blanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952); Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939); Helms v. General Baking Co., 164 S. W. 2d 150 (Mo. App. 1942); Rogers v. Toni Home Permanent Co., 105 Ohio App. 53 (1957), aff'd. 167 Ohio St. 244, 4 Ohio Opinions 2d 291, 147 N. E. 2d 612 (1958); Ada Coca-Cola Bottling Co. v. Asbury, 206 Okla. 269, 242 P. 2d 417 (1952); Lock v. Confair, 361 Pa. 158, 63 A. 2d 24 (1949); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S. W. 2d 828 (1942); Baum v. Murray, 23 Wash. 2d 890, 162 P. 2d 801 (1945); Coca-Cola Bottling Co. of Puerto Rico v. Torres, 255 F. 2d 149 (1st Cir., 1958).

[129] "Liability in such case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life." Jacob E. Decker & Sons v. Capps, supra, n. 130 at 829.

[130] Klein v. Duchess Sandwich Co., supra, n. 121; Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P. 2d 1094 (1957).

[131] Parish v. Great A&P Tea Co., N. Y. Mun. Ct. (June 29, 1958); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1922); Holyfield v. Joplin Coca-Cola Bottling Co., 170 S. W. 2d 451 (Mo. App.

(4) Other courts have said that the warranty between the parties to the original sale "runs with the goods or with the title." [132]

(5) Another approach is to find that there is a third party beneficiary contract between the manufacturer and his vendee in favor of the consumer.[133]

(6) Also there may be a theoretical assignment by the dealer of the producer's warranty.[134]

(7) Still others avoid the privity rule by finding that the retailer is the consumer's agent to buy[135] or that he is the manufacturer's agent to sell.[136]

(8) In like manner, the actual buyer has been held to be an agent to purchase for the consumer.[137]

(9) In some cases the maker was said to have represented the goods to be suitable by placing them on the market.[138]

(10) Sometimes warranty is confused with negligence.[139]

1943); Amarillo Coca-Cola Bottling Co., Inc. v. Loudder, 207 S. W. 2d 632 (Tex. Civ. App. 1947); Nelson v. West Coast Dairy Co., 5 Wash. 2d 284, 105 P. 2d 76 (1940). In an interesting case in Mississippi, the court found neither negligence nor warranty, but just a mouse in a bottle of Coca-Cola bought from a retailer and bottled by the defendant, the court said: "A sma' mousee caused the trouble in this case. The wee, sleekit, cow'rin, tim'rous beastie drowned in a bottle of coca-cola." And appellee "did not get joy from the refreshing drink. He was in the frame of mind to approve the poet's words:

> The best-laid schemes o' mice an' men
> Gang aft aglay
> An' lea'e us nought but grief an' pain,
> For promis'd joy."

Jackson Coca-Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914).

[132] Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927); Dothan Chero-Cola Bottling Co. v. Weeks, 16 Ala. App. 639, 80 So. 734 (1918).

[133] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N. E. 557 (1928).

[134] Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S. W. 2d 445 (1936).

[135] Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 P. 1050 (1929).

[136] Timberland Lumber Co. v. Climax Mfg. Co., 61 F. 2d 391 (2d Cir., 1932).

[137] Gearing v. Berkson, 223 Mass. 257, 111 N. E. 785, L. R. A. 1916D, 1006 (1916); Colby v. First Nat. Stores, 307 Mass. 252, 29 N. E. 2d 920 (1940); Brussel v. Grand Union Co., 14 N. J. Misc. 751, 187 Atl. 582 (1936).

[138] Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N. W. 382, 17 A. L. R. 649 (1920); Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633, 48 L. R. A., N. S. 213, Ann. Cas. 1915C, 140 (1913); Nock v. Coca-Cola Bottling Works of Pittsburgh, 102 Pa. Super. 515, 156 A. 537 (1931).

[139] Hertzler v. Manshum, 228 Mich. 416, 200 N. W. 155 (1924); Ward v. Morehead Sea Food Co., 171 N. C. 33, 87 S. E. 958 (1916).

(11) A few courts consider food cases as a special exception to the rule.[140]

(12) Other courts have based liability on the advertising or labeling of the products. These cases will be discussed later in this article.

It seems likely that the public policy in favor of protecting food consumers is the basic consideration back of all the decisions which impose strict liability. It has been suggested in this connection that:

> * * * courts wanting to dispose of the privity requirement for reasons of policy will sound technically more convincing if they eschew such feeble fictions as third-party beneficiaries and warranties running with the goods. They would better direct their energies toward examining the historical, legal and social justifications for imposing such a requirement and, if fictions are helpful, adopt assumptions better suited to their purpose.[141]

Even the majority of those courts, which recognize strict liability without privity of contract as to food, have refused to extend it to any other type of products. However, there have been a few decisions extending the manufacturer's strict liability to animal food,[142] soap,[143] a grinding wheel,[144] a dangerous crop-dusting compound likely to drift,[145] hair dye, [146] and possibly to a

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[140] Hertzler v. Manshum, supra n. 159; Mazetti v. Armour & Co., supra n. 138.

[141] Dickerson, op. cit., n. 126, at 99; see also Welch v. Schiebelhuth, 169 N. Y. S. 2d 313 (1957).

[142] McAfee v. Cargill, Inc., 121 F. Supp. 5 (S. D. Cal., 1954); International Milling Co. v. Jernigan, 191 S. W. 2d 526 (Tex. Civ. App. 1945). Contra: Cohan v. Associated Fur Farms, Inc., supra n. 122.

[143] Krupar v. Procter & Gamble Co., 113 N. E. 2d 605 (Ohio App. 1953), rev'd on other grounds, 160 Ohio St. 489, 117 N. E. 2d 7 (1954); Worley v. Procter & Gamble Co., 253 S. W. 2d 532 (Mo. App. 1952).

[144] DiVello v. Gardner Machine Co., 102 N. E. 2d 289 (Ohio 1951). Contra: Wood v. General Electric Co., 159 Ohio St. 273, 112 N. E. 2d 8, 9 (1953) (a defective electric blanket causing house to burn down) in which the court said: "Although a sub-purchaser of an inherently dangerous article may recover from its manufacturer for negligence, in the making and furnishing of the article, causing harm to the sub-purchaser or his property from a latent defect therein, no action may be maintained against such manufacturer by such sub-purchaser for such harm, based upon implied warranty of fitness of the article so purchased."

[145] Chapman Chemical Co. v. Taylor, 215 Ark. 630, 222 S. W. 2d 820 (1949). Contra: Burr v. Sherwin-Williams Co., 42 Cal. 2d 682, 268 P. 2d 1041 (1954) (privity of contract is required in an action for a breach of either express or implied warranty).

[146] Graham v. Bottenfield's Inc., 176 Kan. 68, 269 P. 2d 413 (1954).

beverage bottle,[147] and a shampoo.[148] In a few cases there has been a strained attempt to find an agency relationship,[149] but in the discussion of one of them, *Freeman v. Navarre,*[150] the court said:

> While the decision [*McAfee v. Cargill, Inc.*[151]] speaks in terms of the extension of an exception, the rule of privity of contract—at least in the field of food, whether for human or animal consumption—seems to have been so emasculated that little is left except vestigial remains. Since the *McAfee* case was concerned with an injury to a chattel [a prize dog], it is interesting to speculate where the line between the rule of privity and the "exceptions" to it is to be drawn. Would the distinction be made on the basis of whether the chattel is a living animal or an inanimate object? The case simply illustrates the trend farther away from the rule of privity in warranty cases. With this in mind, and with some emphasis upon the well-known principle that the courts do not favor a multiplicity of law suits, it appears that a realistic, judicial analysis and re-appraisal of the privity rule would be quite appropriate.[152]

Thus it appears that this court would agree with Prosser when he wrote: "If the producer is to be required to guarantee his product, no further justification will be needed than that public opinion will have arrived at the point where it places full responsibility for the injury upon him." [153] It is "only by some violent pounding and twisting" [154] that warranty can be made to yield the desired result.

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[147] Nichols v. Nold, supra n. 128, 258 P. 2d at 323, in which the warranty count was interpreted as pertaining "to the bottle as well as to the contents," the court saying that it was not "greatly concerned about the privity of contract. Each of the defendants intended the bottle of Pepsi-Cola to be sold and it was alleged in the petition that it was sold." Contra: Escola v. Coca-Cola Bottling Co. of Fresno, 24 Cal. 2d 453, 10 P. 2d 436 (1944); Soter v. Griesedieck Western Brewery Co., 200 Okl. 302, 193 P. 2d 575, 4 A. L. R. 2d 458 (1948); Anheuser-Busch, Inc. v. Butler, 186 S. W. 2d 996 (Tex. Civ. App. 1944).

[148] Raymond v. J. R. Watkins Co., 88 F. Supp. 932, 934 (Minn., 1950), the court saying, in dicta, "Whether the sale is made directly to a particular purchaser, or to an agent of such purchaser, or to the public generally, it seems to the writer of this opinion that the applicable law attaches to the sale and the consequences of the manufacturer's conduct, irrespective of what is termed privity of contract."

[149] Timberland Lumber Co. v. Climax Mfg. Co., supra n. 136; Hall Manufacturing Co. v. Purcell, 199 Ky. 375, 251 S. W. 177 (1923); Wisdom v. Morris Hardware Co., supra n. 135.

[150] 47 Wash. 2d 760, 289 P. 2d 1015 (1955).

[151] Supra n. 142.

[152] Freeman v. Navarre, supra n. 150, 289 P. 2d at 1018.

[153] Prosser, Torts, 511 (2d ed. 1955).

[154] Patterson, The Apportionment of Business Risks through Legal Devices, 24 Col. L. Rev. 335, 358 (1924).

Advertising.

Perhaps the most logical attempts at removing the necessity for privity of contract are the so-called "advertising and labeling cases." Williston,[155] after acknowledging the fact that warranty is today considered to be contractual, and that "there can be no doubt but that the seller may expressly promise to be answerable for some alleged quality of the articles sold, or that if he makes a promise for good consideration, he enters into a contract," goes on to say that:

> This, however, does not either upon authority or reason exhaust the possibilities of express warranties. It should not be the law, and by the weight of modern authority, it is not the law that a seller who by positive affirmation induces a buyer to enter into a bargain can escape from liability by convincing the court that his affirmation was not an offer to contract. A positive representation of fact is enough to render him liable. The distinction between warranty and representation which is important in some branches of the law is not appropriate here. The representation of fact which induces a bargain is a warranty.[156]

And later on he writes:

> If it be granted that a sub-purchaser as such is not entitled to the benefit of a warranty given to the original buyer, it yet may be asked may not the original seller by means of labels, advertisements or otherwise, bind himself by a warranty to anyone who thereafter buys his goods. Certainly manufacturers often make representations to the public, which if made directly to an immediate buyer, would amount to warranties . . . A warranty is in many cases imposed by a law not in accordance with the intention of the parties; and in its origin was enforced in an action sounding in tort, based on the plaintiff's reliance on deceitful appearances or representations, rather than on a promise . . . It must be admitted, however, that most courts might require the existence of a direct contractual relation. This relation, however, might under some circumstances exist between manufacturer and a consumer who is neither a purchaser nor a sub-purchaser.[157]

These remarks by Williston were incorporated in an article by Professor Spruill, who then went on to say:

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[155] 1 Williston, Sales (Rev. ed., 1948).

[156] Id. at 197.

[157] Id. at 244a.

> What is important is that statements are made by one who professes a reasonable certainty of knowledge, or whose position makes accurate information peculiarly available to him. Not only parties to the contract itself, but those interested in and closely connected with the subject matter who, because of such connection, are in a position to furnish accurate information, or who purport to impart it, may well be held to answer here for even innocent information. There are situations in which action is commonly taken in business negotiations upon the assumed existence of certain facts. Business proceeds not upon the assumption that representations are merely honestly and cautiously made, but that they are true. As applied to the problem under consideration this principle might be stated thus: One in, or apparently in, a position to know, who, actuated by self-interest, makes a representation intended to induce, and reasonably inducing another to purchase or to use goods, is an insurer of the truth of the matter so represented.[158]

Judge Skeel,[159] in an article discussing his opinion in the *Rogers v. Toni Home Permanent*[160] case, wrote:

> The representation made by a manufacturer seeking to induce the use of his product (where because of economic reasons he must sell his product through a distributor or retailer) and where such ultimate consumer relies on his representation as the inducing cause of the purchase, amounts to a warranty in favor of the ultimate consumer. Certainly the corner drug store or other retailer of . . . Permanent Wave could have no use for such product, nor would he be induced to buy it because of such representations of the advantage to be gained by its use, except as the ultimate consumer may, in response to the manufacturer's representations, demand the product. But the . . . Home Permanent Company, in inducing through direct advertising the use of its product by the ultimate consumer, does so for its own benefit. It is only secondarily interested in the retailer as a channel through which the product is made available to the public responding to the demand which its advertising creates.[161]

And later on he continues:

> Where a manufacturer induces the purchase of his products by an ultimate consumer by representations as to their quality, purposes and uses, which are relied on by the purchaser, and where such representations are untrue, so that the purchaser is damaged in using the product for the pur-

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158 Spruill, op. cit., n. 126, at 557.

159 Skeel, Product Warranty Liability, 6 Clev.-Mar. L. R. 94 (1957).

160 Supra n. 128; see also Markovich v. McKesson and Robbins, Inc., 149 N. E. 2d 181 (Ohio App., 1958).

161 Skeel, op. cit., n. 159, at 105.

> pose as advertised, the common law theory of express warranty should be available to the purchaser regardless of privity. If this is not true, then where the dealer sells at the request of the buyer without express warranty . . . then even though the plaintiff was injured because the product did not square with the representations that induced the sale, he would be without a remedy if unable to prove fault in the process of manufacture. . . .[162]

Probably the leading case in support of this view is *Baxter v. Ford Motor Co.*,[163] in which the plaintiff lost an eye when a pebble struck the windshield on his car causing a piece of glass to fly into it. The sales literature had contained the statement, "All of the new Fords have a triplex shatter-proof glass windshield, so made that it will not fly or shatter under the hardest impact. This is an important safety factor because it eliminates the danger of flying glass, the cause of most of the injuries in automobile accidents." The court found that the plaintiff had a right to rely on the representations made by the Ford Motor Company in its sales literature "even though there was no privity of contract." [164] In a second opinion, after a new trial, the court seemed to emphasize misrepresentation rather than warranty, remarking that "the falsity of the misrepresentations could not readily be detected" and concluding that "where a person states as true material facts susceptible of knowledge to one who relies and acts thereon to his injury, if the representations are false, it is immaterial that he did not know that they were false or that he believed them to be true." [165]

In two subsequent automobile windshield advertising cases, the plaintiffs failed to recover. In the first, *Chanin v. Chevrolet Motor Company*,[166] the windshield was advertised as "shatter-proof," yet the plaintiff was injured by flying glass. The court held that no action of warranty would lie in favor of a remote

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[162] Id. at 114.

[163] 168 Wash. 459, 12 P. 2d (409) (1932); second opinion, 179 Wash. 123, 35 P. 2d 1090 (1934).

[164] Id., 12 P. 2d, at 412.

[165] Id., 35 P. 2d, at 1092. In a later Washington case, the court denied recovery for property damage resulting from the installation of a defective furnace which had been sold to the contractor from whom the plaintiff had purchased his house. This court said that there could be no recovery on grounds of breach of warranty in the absence of privity of contract, and that the Baxter decision was based on fraud. Dobbin v. Pacific Coast Coal Co., 25 Wash. 2d 190, 170 P. 2d 642 (1946).

[166] 89 F. 2d 889 (7th Cir. 1937).

purchaser and that an action in deceit would require allegations of conscious misrepresentation. They refused to consider the possibility that extensive advertising had brought about a contractual relation for the reason that it was not sufficiently alleged in the complaint. In the other case, *Rachlin v. Libby Owens Ford Glass Co.*,[167] the manufacturer had described the windshield as "safety glass," contrasting it with ordinary glass which "breaks into jagged, dangerous, razor-edged chunks that fly through the air." The windshield shattered when the car was run into by another car, but the court held that the words did not amount to a representation that the glass was unbreakable, or that no possible type of collision could "cause it to fly about in dangerous fragments."

In a later case, *Bahlman v. Hudson Motor Car Co.*,[168] the manufacturer's advertising emphasized that the car was "a rugged fortress of safety," improved with a seamless steel roof making it a "smooth, solid unit with the body shell" with "no seams or joints in the roof." The plaintiff negligently ran his car off the road, overturning it, and injuring his head on a seam welding the two halves of the roof together. The court held that contributory negligence was no defense, and he was allowed to recover against the manufacturer. The court stating:

> Whether the result is best justified by holding the privity concept inapplicable because of its historical origins . . . or that the requirements of privity are satisfied by the commercial advertising and merchandising methods of the defendant, or by finding the dealer under the circumstances defendant's agent to warrant its products, . . . or by holding that the express warranty is similar to a covenant running with the land and follows the product to the ultimate consumer . . . or by application of the third party beneficiary status to the transaction between defendant and its retail dealer . . . we have no occasion to decide. It is sufficient to state that the liability . . . is imposed on the maker of false statements and may be enforced by the ultimate consumer of the product to whom the statements are directed.[169]

In another Washington case, *Murphy v. Plymouth Motor Corp.*,[170] the plaintiff rolled his car, bending the top left side and breaking the glass in the windshield and door. He introduced sales literature showing a car being rolled at sixty miles per hour

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[167] 96 F. 2d 597 (2d Cir. 1938).

[168] 290 Mich. 683, 288 N. W. 309 (1939).

[169] Id. at 313.

[170] 3 Wash. 2d 180, 100 P. 2d 30 (1940).

and an advertising photo illustrating a freight car resting partly on top of the automobile, all of which was to indicate the strength of the body. However, the court said that there was no express or implied warranty that the car would always remain intact when overturned at high speed.

The statement, "Tide is kind to hands," has produced two law suits. In *Worley v. Procter & Gamble Mfg. Co.*,[171] the court said:

> In the case of food products sold in original packages, and other articles dangerous to life, if defective, the manufacturer, who alone is in a position to inspect and control their preparation, should be held as a warrantor, whether he purveys his product by his own hand, or through a network of independent distributing agencies . . . The liability thus imposed springs from representations directed to the ultimate consumer and not from the breach of any contractual undertaking on the part of the vendor.[172]

However, the court held that the scope of the warranty was limited "to the absence in the preparation in question of ingredients injurious to the skin of normal persons using the soap in a normal manner."[173] But, the representation was found to constitute negligence in *Lehner v. Procter & Gamble Co.*,[174] in that it tended "to build up in the public mind the belief that this product is harmless to all users." In another granulated soap case, the court held that the "guarantee of quality" on the box "reached beyond the dealers to persons in the position of plaintiff."[175]

In *Simpson v. American Oil Co.*,[176] on cans of insecticide, along with the directions for use, was the statement: "Amox . . . is not poisonous to human beings, but is sure death to insects . . . Note with all its insect killing power Amox may be freely used indoors." The plaintiff developed boils after using it. The court stated:

> Here we have written assurances that were obviously intended by the manufacturer and distributor of Amox for the ultimate consumer, since they are intermingled with instructions as to the use of the product; and the defendant was so anxious that they should reach the eye of the consumer that it had them printed upon the package in which

[171] Supra n. 143.

[172] Id. at 537.

[173] Id. at 538.

[174] 206 Misc. 1103, 136 N. Y. S. 2d 121 (1954).

[175] Free v. Sluss, 87 Cal. App. 2d 933, 197 P. 2d 854 (1948).

[176] 217 N. C. 543, 8 S. E. 2d 813 (1940).

> the product was distributed. The assurances that the product as used in a spray was harmless to human beings, while deadly to insects, was an attractive inducement to the purchaser for consumption, and such purchase in large quantities was advantageous to the manufacturer. We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer for whom it was intended.[177]

Similarly, where a wire rope supporting a scaffold broke, killing the purchaser, and it was shown that representations were made in the manufacturer's manual as to the tensile strength of the rope, the court said that the plaintiff could recover by way of breach of express warranty "provided the wire rope was used . . . for a purpose intended." [178] In a later case involving injuries resulting from a defective steering mechanism in a car, the court said that recovery could be obtained "either on the theory of breach of implied warranty of fitness for purpose and merchantability, or upon the basis of common law negligence." [179]

There are several cases involving only property damages where lack of privity has not barred recovery.[180] In *Laclede Steel Co. v. Silas Mason Co.*,[181] in which iron and aluminum scrap pressed together was marked "scrap iron having value for melting purposes only," the open hearth furnaces of the subpurchaser were damaged by overheating due to the mixture. The court said that "the inclusion of the aluminum washers was the same as the inclusion of a foreign substance in canned food," and that:

> There is a trend in our Louisiana jurisprudence, as well as over the whole United States, for the "magic of the

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[177] Id. at 815.

[178] Mannsz v. Macwhyte Co., 155 F. 2d 445 (3d Cir. 1946).

[179] Magee v. General Motors Corp., 124 F. Supp. 606 (W. D. Pa., 1954).

[180] Graham v. John R. Watts & Son, 238 Ky. 96, 36 S. W. 2d 859 (1931) (clover seed with alfalfa label; misrepresentation was "a standing one addressed to the purchaser as the ultimate consumer."); Hoskins v. Jackson Grain Co., 63 So. 2d 514 (Fla. 1953) (mislabeled watermelon seed; "liability cannot be affected by the fact that the two were not acquainted, or had not dealt directly with each other"); Cornelli Seed Co. v. Ferguson, 64 So. 2d 162 (Fla. 1953); U. S. Pipe & Foundry Co. v. Waco, 130 Tex. 126, 108 S. W. 2d 432, cert. den. 302 U. S. 749, 58 S. Ct. 266, 82 L. Ed. 579 (1937) (cast iron pipe).

[181] 67 F. Supp. 751 (W. D. La., 1946).

> metaphysics of privity" to be no more applied. . . . The defendant knew it was selling ferrous scrap at ferrous prices, to be consumed by melting. It advertised its sale, calling attention to the prohibition by the rules and regulations of the O. P. A. and W. P. B. of packing in combination ferrous and non-ferrous materials. It compressed and mixed scrap into bundles, with its own hydraulic pressers, and the movement by rail was immediately from defendant's Louisiana plant to the complainant's plant on a bill of lading reciting "having value for remelting purposes only." This is warranty by the defendant, direct and implied, to the complainant.[182]

These advertising and labeling cases have brought into sharp focus the manufacturer's duty to warn of any danger in his product. (This is usually involved in the "negligent advertising" cases, but is also sometimes applied in those in which the count is based on warranty.) Thus the manufacturer must make elaborate tests to ascertain any danger which may result from reasonable use of his product. In a Massachusetts case[183] involving a combustible paint, the defendant maintained that he had no actual knowledge of the explosive character of the paint, since he was not the actual manufacturer, but merely sold the product under his name. The courts held that there was no need to prove actual knowledge, since the manufacturer or one who represents himself as such, must be presumed to know the nature and quality of the resultant compound which he solicits the public to purchase. Since this question is generally based on the exercise of reasonable care,[184] it is possible to defeat this presumption of knowledge of dangerous characteristics, generally in a case involving a long history of successful use.[185]

Once the need for some warning has been ascertained, the general view is that the manufacturer is held responsible for all damage which is the foreseeable result of the failure to warn.[186] However, some courts have recently held that the warning should be given to the general buying, or even using public,[187] "to those

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[182] Id. at 758. Cf., Pedroli v. Russell, 320 P. 2d 873 (Cal. App., 1958).

[183] Thornhill v. Carpenter Morton Co., 220 Mass. 593, 108 N. E. 474 (1915).

[184] Hopkins v. E. I. Du Pont de Nemours & Co., 199 F. 2d 930 (3d Cir. 1952); Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A. 2d 850 (1945); Nishida v. E. I. Du Pont de Nemours & Co., 245 F. 2d 768 (5th Cir., 1957).

[185] Cleary v. John M. Maris Co., 173 Misc. 954, 19 N. Y. S. 2d 38 (Sup. Ct., 1940); Minion Hat Co. v. Gabriel, 199 F. Supp. 908 (D. C. N. Y., 1957).

[186] West Disinfecting Co. v. Plummer, 44 App. D. C. 345 (1916); Cf. Smith v. United States, 155 F. Supp. 605 (D. C. Va., 1957).

[187] E. I. Du Pont de Nemours & Co. v. Baridon, 73 F. 2d 26 (8th Cir. 1934); Altorfer Bros. Co. v. Green, 236 Ala. 427, 138 So. 415 (1938); Beadles

whom the manufacturer, through his advertising and representations, invites to purchase or use the product." [188]

Mere directions as to use are not sufficient if it is foreseeable that the directions may be ignored.[189] However, if the plaintiff knew, or had reason to know, of the danger from an independent source, the manufacturer's failure to warn or his insufficient warning would not be the proximate cause of the injury and the manufacturer would not be liable.[190]

In *E. I. DuPont de Nemours & Co. v. Baridon*,[191] the court listed five elements which must appear in order to justify the plaintiff's recovery: (1) The plaintiff must show that the use of the product, as recommended, was likely to cause injury; (2) that the manufacturer knew or should have known this fact; (3) that the plaintiff used the product strictly in accordance with directions and recommendations; (4) that this use constituted the proximate cause of the injury; and (5) that the plaintiff had no knowledge of the danger inherent in the use of the product.

An early example of insufficient warning was the case of *Henry v. Crook*,[192] in which a child was burned while playing with a sparkler. The wrapper stated that "The sparks are harmless. Do not touch glowing wire. Safe and Sane." The court said that it was a jury question whether the warning "do not touch glowing wire," coupled with the assurance that the article was harmless, was sufficient.

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v. Servel, Inc., 344 Ill. App. 133, 100 N. E. 2d 405 (1951); Martin v. Bengue, Inc., 25 N. J. 359, 136 A. 2d 626 (1957). Cf. Foster v. Ford Motor Co., 139 Wash. 341, 246 Pac. 945 (1926) (manufacturer absolved by warnings in operator's manual).

[188] Dillard and Hart, Product Liability: Directions for Use and the Duty to Warn, 41 Va. L. R. 145, 161 (1955); Cf., Wright v. Carter Products, Inc., 244 F. 2d 53 (2d Cir., 1957).

[189] Farley v. Edward E. Tower & Co., 271 Mass. 230, 171 N. E. 639 (1930); Maize v. Atlantic Refining Co., supra n. 184; Pease v. Sinclair Refining Co., 104 F. 2d 183 (2d Cir. 1937); Rosebrock v. General Electric Co., 236 N. Y. 227, 140 N. E. 571 (1923); Moran v. Dake Drug Co., 134 N. Y. Supp. 995 (Sup. Ct. 1912), aff'd. 155 App. Div. 879, 139 N. Y. Supp. 134 (4th Dept., 1913); Lovejoy v. Minneapolis-Moline Power Implement Co., 79 N. W. 2d 688 (Minn., 1956); Tampa Drug Co. v. Wait, 103 So. 2d 603 (Fla., 1958).

[190] O'Connell v. Westinghouse X-Ray Co., 261 App. Div. 8, 24 N. Y. S. 2d 268 (2d Dept., 1940), 288 N. Y. 486, 41 N. E. 2d 177 (1942); Pease v. Sinclair Refining Co., supra n. 189; Alexander v. Wrenn, 158 Va. 486, 164 S. E. 715 (1932); Clinchfield Coal Corp. v. Ray, 121 Va. 318, 93 S. E. 601 (1917); Mossrud v. Lee, 163 Wis. 229, 157 N. W. 758 (1916).

[191] Supra n. 187.

[192] Supra n. 181; Moran v. Dake Drug Co., supra n. 189; Martin v. Bartell Drug Co., 155 Wash. 317, 284 Pac. 96 (1930); Maize v. Atlantic Refining Co., supra n. 184. Contra: Crist v. Art Metal Works, 230 App. Div. 114, 234 N. Y. Supp. 496 (1st Dept., 1930).

Such decisions are only as they should be. In industry today, it is possible to control operations with an amazing degree of accuracy. Products today are tested with sonic and ultrasonic devices, magnetic flux equipment, X-ray, nuclear methods, infrared, and numerous other testing devices and methods. If a product is sold, and is unsafe due to some defect, it is very possible that the inspector was careless when it passed through the line. The same is true of the analytical equipment today. There are spectrophotometers, spectroscopes, spectrographs, electron microscopes, X-ray diffraction equipment and many others to identify the components of a product. If the product causes harm due to deleterious ingredients, again the manufacturer logically should be held liable. In this area, however, there are a rapidly increasing number of suits based on allergies to an ingredient in the product. Generally, the manufacturer is not liable if it is an allergic reaction found in only an insignificant percentage of the population,[193] but if the allergy is one common to a large number of possible users, or has very serious effects, the seller probably will be liable.[194] This undoubtedly is how it will remain until more of the antigens and their exact nature are identified and evaluated. But it is probable that the manufacturers would make a greater effort through their research facilities to ascertain these antigens and their effects if they knew that they were to be held liable.

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[193] Bennett v. Pilot Products Co., 235 P. 2d 525, 26 A. L. R. 2d 958 (1951) (1 in 1000); Briggs v. National Industries, 92 Cal. App. 2d 542, 207 P. 2d 110 (1949); Walstrom Optical Co. v. Miller, 59 S. W. 2d 895 (Tex. Civ. App., 1933); Barrett v. S. S. Kresge Co., 144 Pa. Super. 516, 19 A. 2d 502 (1941); Stanton v. Sears Roebuck & Co., 312 Ill. App. 496, 38 N. E. 2d 801 (1942); Cumberland v. Household Research Corp. of America, 145 F. Supp. 782 (D. C. Mass., 1956); Merrill v. Benate Vues Corp., 235 F. 2d 893 (10th Cir., 1956).

[194] Zirpola v. Adam Hat Stores, 122 N. J. L. 21, 4 A. 2d 73 (1939) (4 to 5%); Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N. E. 2d 697, 121 A. L. R. 460 (1939); Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N. W. 48 (1913); Carter v. Yardley & Co., 319 Mass. 92, 64 N. E. 2d 693 (1946); Wright v. Carter Products, supra, n. 188; Braun v. Raux Distr. Co., 312 S. W. 2d 758 (Mo. 1958).