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HOW STRICT IS THE MANUFACTURER'S LIABILITY? RECENT DEVELOPMENTS*

WALTER H. E. JAEGER**

I. INTRODUCTION

The purpose of this article is to examine the extent to which the manufacturer is strictly liable for injuries caused by his defective product. Traditionally, where the injured plaintiff was able to prove negligence, recovery could be had in tort.¹ In recent times, liability for breach of express, implied, or constructive warranties has been greatly expanded.² And it has even been suggested that as to certain categories

* This article is based upon an address on products liability sponsored by the Student Bar Association of Marquette University Law School and given before its student body.

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¹ *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

² Any number of articles have dealt with this expanding liability. Among them may be mentioned: Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L. Q. REV. 343 (1929); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499 (1961); Condon, *Progress of Products Liability Law*, 31 N.Y.S. B. BULL. 119 (1959); Feezer, *Tort Liability of Manufacturers and Vendors*, 10 MINN. L. REV. 1 (1925); Feezer, *Tort Liability of Manufacturers*, 19 MINN. L. REV. 752 (1935); Fricke, *Personal Injury Damages in Products Liability*, 6 VILL. L. REV. 1 (1960); Ehrenzweig, *Products Liability in the Conflict of Laws*, 69 YALE L. J. 794 (1960); Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1958); Green, *Should the Manufacturer of General Products Be Liable Without Negligence?* 24 TENN. L. REV. 928 (1957); Hotes, *Advertised-Product Liability*, 8 CLEV.-MAR. L. REV. 81 (1959); Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE L. REV. 1 (1963); Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 RUTGERS L. REV. 493 (1962); James, *General Products—Should Manufacturers Be Liable Without Negligence?* 24 TENN. L. REV. 923 (1957); James, *The Liability of Manufacturers for Faulty Goods*, J. BUS. L. 287 (1960); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Lucey, *Liability Without Fault and the Natural Law*, 24 TENN. L. REV. 952 (1957); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L. J. 554 (1961); Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446 (1964); Noel, *Manufacturers' Negligence of Design or Directions for Use of a Product*, 71 YALE L. J. 816 (1962), discussed in Keeffe, *Practicing Lawyer's Guide to the Current Law Magazines*, 49 A.B.A.J. 109 (1963); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products*, 24 TENN. L. REV. 938 (1957); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960); Rossi, *The Cigarette-Cancer Problem: Plaintiff's Choice of Theories*

of goods, the tort liability of the manufacturer should be strict,³ even verging on the absolute.⁴ But even with all the pressure, and the tremendous attention being focussed upon the manufacturer's liability, there are still ways and means whereby it may be avoided.⁵ A number of these will be explored in the course of this discussion; primary emphasis will be on the more recent cases.

If the action is brought in tort, the law requires that the plaintiff prove his case in negligence and if he fails, judgment will be given for the manufacturer. As sustaining this burden is often fraught with difficulty, the manufacturer enjoys a certain immunity even where his defective product causes injury. Furthermore, in some jurisdictions the manufacturer is permitted to show contributory negligence and assumption of risk to defeat plaintiff's action.

When it comes to warranty, the traditional lack of privity which was also available in the earlier cases in tort is still available in many jurisdictions whether the warranty be express, implied-in-fact, or constructive. In addition, the express disclaimer and merger provisions often save the manufacturer harmless. And a failure to give timely notice has defeated what might otherwise have been valid claims.

This leads to the conclusion that although much is being said and written about the "strict" liability of the manufacturer, the comprehensive protection of the user or consumer of defective products that would result therefrom is far from achievement.

II. TORT LIABILITY

In the decade which followed the ill-starred decision in *Winterbottom v. Wright*,⁶ the judge-made *obiter dicta* requirement of privity impeded recovery of damages claimed because of injuries suffered by the plaintiff's use of defective goods.⁷ However, in *Thomas v. Win-*

Explored, 34 So. CAL. L. R. 399 (1961); Russell, *Manufacturers' Liability to the Ultimate Consumer*, 21 KY. L. J. 388 (1933); Ruud, *Manufacturers' Liability for Representations Made by Their Sales Engineers to Subpurchasers*, 8 U.C.L.A. L. REV. 251 (1961); Skeel, *Advertised-Product Liability*, 8 CLEV.-MAR. L. REV. 2 (1959); Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C. L. REV. 551 (1941); Willis, *Product Liability Without Fault*, 15 FOOD DRUG COSM. L. J. 648 (1960); Wilson, *Products Liability*, 43 CALIF. L. REV. 614 (1955). A comprehensive bibliography on products liability has been published in 7 PRAC. LAW. 70 (May 1961).

³ *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 67, 27 Cal. Rptr. 697, 377 P. 2d 897 (1962); *Vandermark v. Ford Motor Co.*, 37 Cal. Rptr. 896, 391 P. 2d 168 (1964), *affirming* 33 Cal. Rptr. 175, 34 Cal. Rptr. 723 (Cal. App. 1963).

See RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 10, 1964), where the extension of strict liability as to products other than those "for intimate bodily use" is approved. In this connection, see 7 NACCA News Letter, No. 6, July 1964, p. 159.

⁴ *Green v. American Tobacco Co.*, 154 So. 2d 169 (Fla. 1963).

⁵ As for example, disclaimer, notice, and "forum shopping."

⁶ 10 Mees. & W. 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (1842).

⁷ What adds to the irony of this judicially created requirement is that the *Winterbottom* case involved neither a manufacturer nor a retailer. The defendant was a contractor who supplied mail coaches to the Postmaster Gen-

chester,⁸ the court early recognized the inequity of this doctrine and disregarded the so-called requirement.⁹ The manufacturer was held liable to a consumer where a bottle of belladonna had been mislabelled "dandelion," causing injury to the plaintiff. Some fifty years later, in *Huset v. J. I. Case Threshing Mach. Co.*,¹⁰ a federal court declared that a party who makes or sells "an article of merchandise designed and fitted for a specific use is liable to the person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the *manufacturer* or vendor in its construction or sale."¹¹

But the real expansion in consumer protection was initiated by the classic pronouncement in *MacPherson v. Buick Motor Co.*,¹² made by the Court of Appeals of New York: "The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser."¹³ Answering its own question, the court added this oft-quoted statement: "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."¹⁴

The next half century saw the well-nigh universal elimination of the alleged privity requirement in at least three categories of tort actions:

eral for the carriage of mail bags from one locality to another and also undertook to keep the mail coaches in a fit, proper, safe, and secure condition for this purpose. Plaintiff Winterbottom was a coachman whose services were engaged by a third party who had a contract with the Postmaster General to carry the mail. While Winterbottom was driving the mail coach, the coach broke down, throwing him from his seat and causing him to be injured for life. The plaintiff declared that he had relied on the contract between the Postmaster General and defendant whereby the latter had undertaken to keep the mail coaches in a proper state of repair. This duty having been violated by the defendant Wright, plaintiff Winterbottom sought judgment in the amount of his damages. The court sustained the defendant's demurrer since plaintiff could establish no privity.

Chief Baron Abinger declared that if Winterbottom was found to have a right of action, then "every passenger, or even any person passing along the road, who is injured by the upsetting of the coach" could sue; by way of dictum, he observed that there was "no privity of contract between these parties," and therefore defendant should have judgment.

Sharing this view, Baron Alderson was of the opinion that if the plaintiff could sue, "there is no point at which such actions would stop." He concluded that "the only safe rule is to confine the right to recover to those who enter into the contract."

⁸ 6 N.Y. 397 (1852).

⁹ Many of the subsequent cases will be found in FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* (1961), and HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* (1961).

¹⁰ 120 Fed. 865 (8th Cir. 1903).

¹¹ *Id.* at 867.

¹² 217 N.Y. 332, 111 N.E. 1050 (1916).

¹³ *Id.* at 335, 111 N.E. at 1051.

¹⁴ *Id.* at 390, 111 N.E. at 1053.

1. Products of an inherently dangerous or harmful character;
2. Defective goods that are imminently dangerous; and
3. Where fraud or deceit is present.

While the courts are in substantial agreement that the absence of privity is no bar to the maintenance of actions falling within any of the aforementioned groups, there is anything but uniformity in the answers given to the question: What is negligence? Many of the cases hold that the mere presence of a noxious substance in food or drink will establish a prima facie case of negligence;¹⁵ nevertheless, a number of jurisdictions still allow the manufacturer to overcome this by a showing of due care and the possibility of the introduction of the foreign substance by an intermediate wholesaler, retailer, or other third party.¹⁶ This works to the greatest advantage of manufacturers or bottlers of certain types of beverages.¹⁷ This is recognized as an acute difficulty and comprehensively discussed in the astute opinion rendered in *Manzoni v. Coca Cola Bottling Co.*¹⁸ by Justice Smith of the Supreme Court of Michigan.¹⁹

A number of courts have considered *res ipsa loquitur* as a means of amplifying the liability of the manufacturer.²⁰ Here, circumstantial evidence has increasingly been the basis for affording recovery. Greater

¹⁵ *Dr. Pepper Co. v. Brittain*, 234 Ala. 548, 176 So. 286 (1937) ("a black substance," possibly a fly, which was unwholesome); *Alabama Coca-Cola Bottling Co. v. Smith*, 29 Ala. App. 324, 195 So. 560 (1940) (beverage containing spider); *Gardner v. Sumner*, 40 Ala. App. 340, 113 So. 2d 523 (1959) (root beer contained piece of cigar); *Coca-Cola Bottling Co. v. Cromwell*, 203 Ark. 933, 159 S.W. 2d 744 (1942) (insect legs resembling those of a spider, judgment for plaintiff affirmed); *Miami Coca-Cola Bottling Co. v. Todd*, 101 So. 2d 34 (Fla. 1958) (foreign substance); *Cordell v. Macon Coca-Cola Bottling Co.* 56 Ga. App. 117, 192 S.E. 228 (1937) (beverage contained flies); *Patargias v. Coca-Cola Bottling Co.*, 332 Ill. App. 117, 74 N.E. 2d 162 (1947) (containing mouse); *Manzoni v. Detroit Coca-Cola Bottling Co.*, 363 Mich. 235, 109 N.W. 2d 918 (1961) ("mold spores"); *Migliozzi v. Safeway Stores, Inc.*, 51 N.J. Super. 313, 144 A. 2d 1 (1958) (foreign substance); *Smith v. Coca-Cola Bottling Co.*, 152 Pa. Super. 445, 33 A. 2d 488 (1943) (spider); *Wichita Coca-Cola Bottling Co. v. Tyler*, 288 S.W. 2d 903 (Tex. Civ. App. 1956) (mouse); *cf. Coca-Cola Bottling Co. v. Negron Torres*, 255 F. 2d 149 (1st Cir. 1958); *Jackson Coca-Cola Bottling Co. v. Chapman*, 106 Miss. 864, 64 So. 2d 791 (1914); *Caskie v. Coca-Cola Bottling Co.*, 373 Pa. 614, 96 A. 2d 901 (1953), citing *Rozumailski v. Philadelphia Coca-Cola Bottling Co.*, 296 Pa. 114, 145 Atl. 700 (1929).

¹⁶ *Nickols v. Continental Baking Co.*, 34 F. 2d 141 (3d Cir. 1929) (dead cockroach in loaf of bread, but defendant showed due care in making loaf).

¹⁷ *Sanders v. Nehi Bottling Co.*, 30 F. Supp. 332 (D. Tex. 1939) (ginger ale bottle); *Stewart v. Crystal Coca-Cola Bottling Co.*, 50 Ariz. 60, 68 P. 2d 952 (1937) (bottle exploded); *Trust v. Arden Farms Co.*, 50 Cal. 2d 217, 324 P. 2d 583 (1958); *Coca-Cola Bottling Co. v. Rowland*, 16 Tenn. App. 184, 66 S.W. 2d 272 (1932).

¹⁸ 363 Mich. 235, 109 N.W. 2d 918 (1961).

¹⁹ Discussed in Jaeger, *Privty of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE L. REV. 1, 84 (1963).

²⁰ This aspect is discussed in *Vandermark v. Ford Motor Co.*, 33 Cal. Rptr. 175 (Ct. App. 1963); *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W. 2d 449 (1961); and *Grant v. Malkerson Sales, Inc.*, 259 Minn. 419, 108 N.W. 2d 347 (1961).

and greater inroads have been made upon the requirement of "exclusive management and control" by the manufacturer; and no matter how much care has been displayed in the course of manufacture, the fact that the bottle has exploded, in the absence of fault, negligence, or mishandling by the plaintiff, is a sufficient basis for a number of courts to allow a recovery in tort. This has been extended to instances where the mere presence of an unwholesome or deleterious substance in a product intended for human use or consumption is deemed to speak for itself.²¹ But as will be noted, there is a wide divergence in the manner in which the doctrine is applied and many jurisdictions still adhere to the view that once the manufacturer or processor proves due care, he cannot be held liable.²² Yet, the trend is unmistakably in the direction of greater consumer protection.²³

In addition to the question as to what constitutes negligence, there is a further inquiry as to when is a product "dangerous." The "imminently or inherently dangerous" characterization has become very broad,²⁴ and covers a wide range of products.²⁵ These run all the way from a coffee urn whose defective handle resulted in burns to the user,²⁶ to a common hair comb.²⁷ Yet, on the other hand, some defectively made products which have resulted in injury have not been deemed within the exception. Thus, where a woman's shoe had a high heel which caused injury, the court found that the heel would not be

²¹ Canada Dry Ginger Ale Co. v. Jochum, 43 A. 2d 42 (Munic. Ct. App. D.C. 1945); Eisenbeiss v. Payne, 42 Ariz. 262, 25 P. 2d 162 (1933) (doctrine applied where putrified mouse was found in beverage); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P. 2d 436 (1944); McClelland v. Acme Brewing Co., 92 Cal. App. 2d 698, 207 P. 2d 591 (1949); Nichols v. Nold, 174 Kan. 613, 258 P. 2d 317 (1953), 38 A.L.R. 2d 887; Redmond v. Ouachita Coca-Cola Bottling Co., 76 So. 2d 553 (La. App. 1954); Ryan v. Zweck-Wollenberg Co., 266 Wis. 630, 64 N.W. 2d 226 (1954) (bursting bottle); Zarling v. La Salle Coca-Cola Bottling Co., 2 Wis. 2d 596, 87 N.W. 2d 263 (1958); Weggeman v. Seven-Up Bottling Co., 5 Wis. 2d 503, 93 N.W. 2d 467 (1958), 94 N.W. 2d 645 (1959).

²² See cases cited notes 16 and 17 *supra*.

²³ This trend is clearly demonstrated by the opinions in Sams v. Ezy-Way Food-liner Co., 157 Me. 10, 170 A. 2d 160 (1961); Sofman v. Denham Food Serv., Inc., 37 N.J. 304, 181 A. 2d 168 (1962); Greenberg v. Lorenz, 9 N.Y. 2d 195, 213 N.Y.S. 2d 39 (1961); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942).

²⁴ As pointed out in FRUMER & FRIEDMAN, *op. cit. supra* note 9, and HURSH, *op. cit. supra* note 9.

²⁵ From the modest beginning more than a century ago in Thomas v. Winchester, 6 N.Y. 397 (1852), involving poison, by way of MacPherson v. Buick Motor Co., *supra* note 12, where a defectively mounted wheel caused the damage, to Midwest Game Co. v. M.F.A. Milling Co., 320 S.W. 2d 547 (Mo. 1959), where deficient fish food caused the death of certain trout.

²⁶ Hoenig v. Central Stamping Co., 247 App. Div. 895, 287 N.Y.S. 118, *aff'd*, 273 N.Y. 485, 6 N.E. 2d 415 (1936).

²⁷ Farley v. Edward E. Tower Co., 271 Mass. 230, 171 N.E. 639 (1930), where combs used by a beauty-parlor operator in giving plaintiff a "water wave" burned plaintiff's head while plaintiff was under hair dryer. Under the circumstances, the combs could be described as inherently dangerous. Cf. Treacy v. F. W. Woolworth Co., 253 App. Div. 899, 1 N.Y.S. 2d 919 (1938), where combs exploded in plaintiff's hair. *Contra*, Smith v. S. S. Kresge Co., 79 F. 2d 361 (8th Cir. 1935).

"reasonably certain to place life or limb in peril,"²⁸ though negligently manufactured.

Although originally it was generally thought that the defective condition of the product would have to cause personal injury,²⁹ the more recent and better rule is that recovery may be had for property damage caused by such defective product.³⁰ Logically enough, it has been held that privity of contract is devoid of any significance where the liability of the manufacturer for an injury caused by his product is to be determined pursuant to the traditional principles of the law of tort, as in *Carter v. Yardley & Co.*³¹ There, the Supreme Court of Massachusetts said quite simply: "The time has come for us to recognize that the asserted general rule [requiring privity] no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth."³²

In summary, then, the *strict* liability of the manufacturer, except as to certain categories of products, is qualified by the requirement that the plaintiff prove negligence, the dangerously defective characteristics of the product which has injured him, and his damages in terms of a financial amount. Even so, many jurisdictions, while having discarded the so-called privity requirement in negligence cases, will allow such defenses as due care, contributory negligence, and assumption of risk.³³ These, it is safe to say, are dwindling.

III. STRICT LIABILITY AND WARRANTY

Following the lead of *Winterbottom v. Wright*,³⁴ the courts undertook to shield the manufacturer from liability for damage resulting from the sale and use of defectively made merchandise. By resorting to the artificial strictures of the so-called privity "requirement," which had not been considered in the earlier cases, many worthy and otherwise legitimate causes of action were defeated.³⁵ The same "judicial

²⁸ *Timpson v. Marshall, Meadows & Stewart, Inc.*, 198 Misc. 1034, 101 N.Y.S. 2d 583, 585 (Sup. Ct. 1950); *accord*, *Cook v. A. Garside & Sons, Inc.*, 145 Misc. 577, 259 N.Y.S. 947 (1932); *Sherwood v. Lax & Abowitz*, 145 Misc. 578, 259 N.Y.S. 948, *aff'd without opinion*, 239 App. Div. 799, 262 N.Y.S. 909 (1932).

²⁹ It was so argued in *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y. 2d 5, 226 N.Y.S. 2d 363 (1962).

³⁰ *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W. 2d 873 (1958), where the court, speaking through Justice Voelker, engages upon a comprehensive and discerning analysis of the case law.

³¹ 319 Mass. 92, 64 N.E. 2d 693 (1946), 164 A.L.R. 559.

³² 64 N.E. 2d at 700.

³³ Discussed by the court in *Manzoni v. Detroit Coca-Cola Bottling Works Co.*, 363 Mich. 235, 109 N.W. 2d 918 (1961).

³⁴ 10 Mees & W. 109, 11 L.J. Ex. 415, 152 Eng. Rep. 402 (1842).

³⁵ In the absence of privity, the courts declined to entertain any action based on breach of warranty, even in food cases; *e.g.*, *Chysky v. Drake Bros. Co.*, 235 N.Y. 468, 139 N.E. 576 (1923). The case was criticized by Judge Starke in *Parish v. Great Atl. & Pac. Tea Co.*, 13 Misc. 2d 33, 177 N.Y.S. 2d 7 (N.Y. Munic. Ct. 1958), and overruled by *Greenberg v. Lorenz*, 9 N.Y. 2d 195,

inventiveness"³⁶ which first created the privity requirement is now ascending to new heights to destroy it. A parallel process is discernible in the United States Supreme Court's exhorting the inferior federal tribunals to fashion a remedy³⁷ in labor relations cases under the "national labor laws."³⁸

Borrowing a page from the judicial opinions dealing with the absence of privity in negligence cases,³⁹ the courts, gradually at first, but with an ever-increasing tempo, undertook to discard the privity requirement entirely, or to circumvent it by indulging in fictions and exceptions.⁴⁰ As might be expected, food and beverage sales constituted the earliest departures from the doctrine of privity.⁴¹ As early as 1942,

213 N.Y.S. 2d 39 (1961), and *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y. 2d 432, 191 N.E. 2d 81 (1963).

³⁶ This expression was used by the Supreme Court of the United States in its opinion in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957).

³⁷ "§ 301 [of the Labor-Management Relations Act, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958)] is more than jurisdictional . . . [I]t authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements. . . ." *Id.* at 450-51. "We conclude that the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." *Id.* at 456-57.

³⁸ Setting an example for the lower courts, the Supreme Court's liberal construction of federal labor law reached its apogee in a trilogy of cases: *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). See *Textile Workers Union v. Lincoln Mills*, *supra* note 36, discussed in Jaeger, *Collective Labor Agreements and the Third Party Beneficiary*, 1 B. C. IND. & COM. L. REV. 125 (1960); see also JAEGER, LABOR LAW chs. 1, 2 (1939); *id.* (Supp. 1959); JAEGER, COLLECTIVE LABOR AGREEMENTS (1962).

³⁹ See preceding section.

⁴⁰ The major departures from strict privity in warranty cases appear to fall into one of the following categories: (1) The buyer is the agent of the injured consumer; (2) the vendor is the agent of the manufacturer, or is a conduit between the latter and the consumer; (3) the manufacturer who advertises extensively makes a general offer or warranty to those who use his products; and finally (4) the consumer is the third party beneficiary of the sales contract.

⁴¹ *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P. 2d 799 (1939); *Rubino v. Utah Canning Co.*, 123 Cal. App. 2d 18, 266 P. 2d 163 (1954); *Collum v. Pope & Talbot, Inc.*, 135 Cal. App. 2d 653, 288 P. 2d 75 (1955); *Cliett v. Lauderdale Biltmore Corp.*, 39 So. 2d 476 (Fla. 1949); *Florida Coca-Cola Bottling Co. v. Jordan*, 62 So. 2d 910 (Fla. 1953); *Tiffin v. Great Atl. & Pac. Tea Co.*, 18 Ill. 2d 48, 162 N.E. 2d 406 (1959); *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N.E. 2d 739 (1943); *Patargias v. Coca-Cola Bottling Co.*, 332 Ill. App. 117, 74 N.E. 2d 162 (1947); *Sharpe v. Danville Coca-Cola Bottling Co.*, 9 Ill. App. 2d 175, 132 N.E. 2d 442 (1956); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920), 17 A.L.R. 649; *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P. 2d 930 (1938); *Nichols v. Nold*, 174 Kan. 613, 258 P. 2d 317 (1953), 38 A.L.R. 2d 887; *Cernes v. Pittsburgh Coca-Cola Bottling Co.*, 183 Kan. 758, 332 P. 2d 258 (1958); *Le Blanc v. Louisiana Coca-Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952);

the Supreme Court of Texas did not hesitate to place its precedent-breaking decision on grounds of public policy.

In *Jacob E. Decker & Sons, Inc. v. Capps*,⁴² the court stated specifically: "We believe the better and sounder rule places liability solidly on the ground of a warranty not in contract but imposed by law as a matter of public policy."⁴³ The various members of the Capps family had partaken of certain summer sausage manufactured by Jacob E. Decker and Sons, Inc. All who ate the sausage meat became ill and one child died. Lack of privity was advanced as a defense, but the Supreme Court of Texas rejected this contention and held the manufacturer liable. This is the pattern followed generally in foodstuffs and beverage cases.⁴⁴ Nor does it appear to make much difference whether a tort theory or breach of warranty theory is advanced.⁴⁵ In recent years, similar protection has been extended to the consumer of drugs and other pharmaceuticals,⁴⁶ cosmetics, and certain other chemical products.⁴⁷

Under the statutes,⁴⁸ it has gradually been decided that the warranty of fitness for a particular purpose and the warranty of merchantability of food are to be assimilated. After all, the basic purpose of the purchase of food by a consumer is consumption. In *Sams v. Ezy-Way Food Liner, Inc.*⁴⁹ the Supreme Court of Maine, speaking through its chief justice, made this point very clear.⁵⁰ The Uniform Commercial Code likewise adopted this concept.⁵¹

Miller v. Louisiana Coca-Cola Bottling Co., 70 So. 2d 409 (La App. 1954); Sams v. Ezy-Way Foodliner Co., 157 Me. 10, 170 A. 2d 160 (1961); Rainwater v. Hattiesburg Coca-Cola Bottling Co., 131 Miss. 315, 95 So. 444 (1923); Biedenbarn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939); Seaton Ranch Co. v. Montana Vegetable Oil & Feed Co., 123 Mont. 396, 217 P. 2d 549 (1950); Greenberg v. Lorenz, 9 N.Y. 2d 195, 213 N.Y.S. 2d 39 (1961); Parish v. Great Atl. & Pac. Tea Co., 13 Misc. 2d 33, 177 N.Y.S. 2d 7 (N.Y. Munic. Ct. 1958); Cook v. Safeway Stores, Inc., 330 P. 2d 375 (Okla. 1958); Nock v. Coca-Cola Bottling Works, 102 Pa. Super. 515, 156 A. 537 (1931); Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942); Campbell Soup Co. v. Ryan, 328 S.W. 2d 821 (Tex. Civ. App. 1959); Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913); LaHue v. Coca-Cola Bottling, Inc., 50 Wash. 2d 645, 314 P. 2d 421 (1957).

⁴² 139 Tex. 609, 164 S.W. 2d 828 (1942).

⁴³ *Id.* at 618, 164 S.W. 2d at 832.

⁴⁴ See the discussion in Parish v. Great Atl. & Pac. Tea Co., *supra* note 35, and Greenberg v. Lorenz, *supra* note 35.

⁴⁵ Manzoni v. Detroit Coca-Cola Bottling Works, *supra* note 18.

⁴⁶ Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

⁴⁷ Worley v. Proctor & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W. 2d 532 (1952); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 4 Ohio Op. 2d 291, 147 N.E. 2d 612 (1958).

⁴⁸ Uniform Sales Act and Uniform Commercial Code.

⁴⁹ 157 Me. 10, 170 A. 2d 160 (1961).

⁵⁰ "Reasonably fit for such purpose,' under Clause I, and 'merchantable quality,' under Clause II, are equivalent with respect to food for human consumption. *The test is whether the food is fit to eat.*" *Id.* at 21, 170 A. 2d at 166.

⁵¹ UNIFORM COMMERCIAL CODE § 2-314 [all references are to the 1962 Official Text with comments], where there is a specific reference to food.

A number of jurisdictions have considered that where the manufacturer advertises his product extensively—and certainly the radio and television channels have greatly facilitated this mass advertising—the remote purchaser may hold the manufacturer on his representations. An early case recognizing this principle is *Baxter v. Ford Motor Co.*⁵² Here, plaintiff lost an eye when the shatter-proof [?] windshield on his Ford automobile shattered; he brought his action against the manufacturer and dealer. The trial court directed a verdict for the manufacturer, and on appeal this was reversed. The Supreme Court of Washington held it to be error for the trial court to have excluded certain catalogues and other printed matter furnished to the dealer, which the dealer had distributed, and upon which Baxter had relied in purchasing the Ford. The court seemed inclined to regard the representations made in the sales brochures as an express warranty. The breach of this warranty afforded an adequate basis for recovery.⁵³

In addition to mass advertising by radio and television, the courts have recognized that representations made in labels or tags, leaflets, pamphlets, or brochures have a similar effect and should be similarly treated.⁵⁴ In the original *Baxter* opinion there is a considerable discussion of *Mazetti v. Armour & Co.*⁵⁵ In the latter, strict liability was imposed upon the manufacturer in a food product case. However, in contradistinction to the *Baxter* case, the warranty in *Mazetti* was implied. Again, public policy was the basis, not tort liability.

Two cases, *Rogers v. Toni Home Permanent Co.*⁵⁶ and *Worley v. Procter & Gamble Mfg. Co.*,⁵⁷ argue that the courts should recognize the realities of modern mass merchandising; it is unsound and unjust to permit the manufacturer to persuade the consumer to buy his product by means of mass advertising and then deny the consumer the right to recover in the event the goods fail to correspond to representations made. Assimilated thereto is *Randy Knitwear, Inc. v. American Cyanamid Co.*⁵⁸ Here, in addition to advertising, there were certain tags or labels affixed to the cloth (which had been treated with resin) representing that it was shrinkproof. Again the court emphasized mass advertising and mass distribution and contended that under these changing times and conditions the ancient defense of privity should be discarded in toto. In *Mannsz v. Macwhyte Co.*⁵⁹ the court indicated that there may be liability for breach of a representation contained in an advertising circular, even without proof of the plaintiff's decedent ever

⁵² 168 Wash. 456, 12 P. 2d 409 (1932).

⁵³ The *Baxter* case is often cited and quoted since it represents an early departure from the inhibiting stricture of privity.

⁵⁴ *Randy Knitwear, Inc. v. American Cyanamid Co.*, *supra* note 29.

⁵⁵ 75 Wash. 622, 133 Pac. 633 (1913).

⁵⁶ 167 Ohio St. 244, 4 Ohio Op. 2d 291, 147 N.E. 2d 612 (1958).

⁵⁷ 241 Mo. App. 1114, 253 S.W. 2d 532 (1952).

⁵⁸ 11 N.Y. 2d 5, 226 N.Y.S. 2d 363 (1962).

⁵⁹ 155 F. 2d 445 (3d Cir. 1946).

having seen or relied upon the representation. From an examination of these cases it seems clear that where extensive advertising has resulted in certain representations to the public, sound policy considerations require the imposition of an absolute liability upon the manufacturer.

Another theory that the courts have indulged in is that of regarding the dealer or distributor as the mere conduit or channel through which the contract is made. In *General Motors Corp. v. Dodson*⁶⁰ the court held that an express warranty had been made by the manufacturer as to a certain automobile that was being sold. In *Shanklin Pier, Ltd. v. Betel Products, Ltd.*,⁶¹ defendant's representative told plaintiff's director and architect that two coats of a certain type of preservative manufactured by defendant would be adequate for repainting a pier owned by the plaintiff. The architect was shown a brochure concerning the paint and told that the preservative would have a life of at least seven to ten years. The plaintiff specified two coats of the preservative in its contract for the repair and repainting of the pier. The contractor purchased the paint and applied it. It proved quite unsatisfactory and plaintiff sued manufacturer for damages for breach of an express warranty. The contention that no action for breach of warranty would lie, except between the parties to the sales contract wherein the warranty was made, was rejected by the court. If the manufacturer made an affirmation of fact about his product intended to induce the purchase of it from some third party, then the manufacturer must be held to have made an express warranty upon which the third party may rely; and upon breach thereof, a cause of action accrues to the remote vendee.⁶²

Two other cases which recognize this theory of recovery are *Studebaker Corp. v. Nail*⁶³ and *Spartanburg Hotel Corp. v. Alexander Smith, Inc.*⁶⁴ In the *Nail* case, a customer was furnished with the manufacturer's printed "Standard Warranty." When the automobile he purchased proved defective, the customer brought this action against the manufacturer.⁶⁵ The court concluded that the dealer was the manufacturer's agent for purposes of delivering the warranty to the customer.⁶⁶ The court simply found that the warranty had been made expressly and directly to the customer. Similarly in the *Spartanburg Hotel* case,⁶⁷ a carpet wholesaler had made certain representations regarding the carpet's quality to a prospective customer. When the sale was made, it was billed through a local furniture firm, since the whole-

⁶⁰ 338 S.W. 2d 655 (Tenn. App. 1960).

⁶¹ [1951] 2 K.B. 854.

⁶² See 2 WILLISTON, CONTRACTS § 378A (3d ed. Jaeger rev. 1958), where the rights of third party beneficiaries in connection with warranties are discussed.

⁶³ 82 Ga. App. 779, 62 S.E. 2d 198 (1950).

⁶⁴ 231 S.C. 1, 97 S.E. 2d 199 (1957).

⁶⁵ *General Motors Corp. v. Dodson*, 338 S.W. 2d 655 (Tenn. App. 1960).

⁶⁶ 62 S.E. 2d at 200.

⁶⁷ 231 S.C. 1, 97 S.E. 2d 199 (1957).

saler could not sell directly. Here again, it was concluded that the sale was a direct one from the wholesaler to the hotel and that the method of settlement adopted had no significance. Quoting from the *Nail* case,⁶⁸ the court noted that the evidence would permit the finding that the wholesaler had made an oral express warranty directly to the hotel.⁶⁹

In *United States Pipe & Foundry Co. v. City of Waco*,⁷⁰ a pipe manufacturer and a contractor convinced the city to specify new and cheaper pipe produced by the manufacturer as a substitute for the customary cast iron pipe which the city could not afford. Numerous oral representations were made regarding the capacity of the pipe. When the contractor was awarded the contract to install the pipe, he purchased it from the manufacturer. The pipe soon proved not to possess the necessary capacity, and the city sued the manufacturer, contractor, and engineer for damages based upon breach of express warranty. The Supreme Court of Texas affirmed the judgment of the courts below for the city.⁷¹ In *Odell v. Frueh*,⁷² there was a similar situation where the manufacturer had made certain representations concerning his product to officials of the school district and the architect. The contractor bought these materials from the manufacturer, but was held entitled to recover from the manufacturer for breach of express warranty, although the warranty had not been made to him.

A subpurchaser was denied recovery in *Fleenor v. Erikson*.⁷³ While recognizing the right to recover from a manufacturer for breach of express warranty, the court found that the statements attributed to the sales representative were actually made after the contract had been concluded. Since no new consideration had been shown, the Supreme Court of Washington affirmed the trial court's judgment for the defendant manufacturer.⁷⁴ However, the court also found that lack of privity would not have been a substantial basis for denying recovery to a subpurchaser in a suit grounded on breach of an express warranty. In passing, it might be noted that were the *Fleenor* case to be decided under the Uniform Commercial Code,⁷⁵ it is probable that an opposite decision would be reached.⁷⁶

Holding conversely, the High Court of Australia in *International*

⁶⁸ 82 Ga. App. 779, 62 S.E. 2d 198 (1950).

⁶⁹ 97 S.E. 2d at 202.

⁷⁰ 130 Tex. 126, 108 S.W. 2d 432, cert. denied, 302 U.S. 749 (1937).

⁷¹ *Ibid.*

⁷² 146 Cal. App. 2d 504, 304 P. 2d 45 (1956).

⁷³ 35 Wash. 2d 891, 215 P. 2d 885 (1950).

⁷⁴ *Ibid.*

⁷⁵ UNIFORM COMMERCIAL CODE § 2-213; cf. § 2-207.

⁷⁶ UNIFORM COMMERCIAL CODE § 2-313, comment 7, reads: "The precise time when words . . . of affirmation are made . . . is not material. . . . [I]f language is used after the closing of a deal . . . the warranty becomes a modification and need not be supported by consideration." This, of course, changes the common law; see 1 WILLISTON, CONTRACTS ch. 6 (3d ed. Jaeger rev. 1957), dealing with consideration.

*Harvester Co. of Australia PTY., Ltd. v. Carrigan's Hazeldene Pastoral Co.*⁷⁷ expressly rejected the argument that the local dealer was the agent of the manufacturer of a hay baler which proved unsatisfactory. An action for breach of express warranty was held not to lie against the manufacturer.

IV. CIGARETTES, CANCER AND STRICT LIABILITY: A CASE STUDY

It is probable that there is no area of products liability which is so opaque and confused, and where the extent of the manufacturer's responsibility for injury is in so much doubt, as in the case of tobacco products, especially cigarettes. While there is no doubt today that the great majority of jurisdictions hold the manufacturer strictly, if not absolutely, liable for purveying unwholesome food, it is only quite recently that cigarettes have been treated as analogous.

One of the most recent decisions makes the manufacturer's liability more nearly absolute than has been the case heretofore. In *Green v. American Tobacco Co.*,⁷⁸ the Supreme Court of Florida in a lucid and far-reaching opinion by Chief Justice E. Harris Drew expressly rejected foreseeability as an appropriate test in determining the manufacturer's liability.

Originally, the widow of the deceased cigarette smoker and the administrator of his estate brought an action against the manufacturer of Lucky Strike cigarettes which had caused lung cancer from which death resulted. Among the various theories of liability on which the action was based, only two survived defendant manufacturer's motion for a directed verdict. These were breach of implied warranty and negligence, as to which the jury was instructed:

The manufacture of products which are offered for sale to the public in their original package for human consumption or use *impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold*, but such implied warranty does not cover substances in the manufactured product, the harmful effects of which no developed human skill or foresight can afford knowledge.⁷⁹

The Lucky Strike cigarettes used by decedent were found to be the cause of his cancer, but the jury also found that it was not possible for defendant manufacturer to know that its cigarettes would be the cause. Accordingly, judgment was given for defendant manufacturer. The United States Court of Appeals for the Fifth Circuit held that the manufacturer should not be held liable where no developed human skill or foresight could afford knowledge of the ultimately injurious consequences.⁸⁰ A forceful and carefully reasoned dissent, based on a pene-

⁷⁷ 32 A.L.J.R. 160 (Austl. 1958).

⁷⁸ 154 So. 2d 169 (Fla. 1963).

⁷⁹ 325 F. 2d 673, 676 (5th Cir. 1963).

⁸⁰ 304 F. 2d 70 (5th Cir. 1962).

trating analysis of Florida precedents,⁸¹ together with a petition for rehearing, induced the court to refer the case to the Supreme Court of Florida for an answer to the question being certified:⁸²

'Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes of contracting cancer of the lung?'⁸³

The high court of Florida ruled that the manufacturer's actual knowledge or opportunity to obtain knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty. The court declared that the Florida decisions⁸⁴ conclusively established this principle and that the question certified must therefore be answered in the affirmative.

It might have been assumed that upon receiving the answer to its question, the Fifth Circuit would have simply remanded the case to the district court for determination of damages. Defendant manufacturer argued that a verdict should be directed in its favor since there was no evidence that Lucky Strikes are not reasonably fit for human consumption. However, the majority adopted a different course and observed that the jury had not made a sufficient finding on the question of reasonableness; that is, "whether or not the cigarettes were 'reasonably fit and wholesome.'"⁸⁵

The court then noted that the jury had found that "the smoking of Lucky Strike cigarettes on the part of the decedent, Green, was a proximate cause of the development of cancer in his left lung which

⁸¹ Including *Cliett v. Lauderdale Biltmore Corp.*, 39 So. 2d 476 (Fla. 1949); *Sencer v. Carl's Markets, Inc.*, 45 So. 2d 671 (Fla. 1950); *Florida Coca-Cola Bottling Co. v. Jordan*, 62 So. 2d 910 (Fla. 1953); *Hopkins v. Jackson Grain Co.*, 63 So. 2d 514 (Fla. 1953); *Miami Coca-Cola Bottling Co., Inc. v. Todd*, 101 So. 2d 34 (Fla. 1958); *Carter v. Hector Supply Co.*, 128 So. 2d 390 (Fla. 1961).

Authorities cited from other jurisdictions in the dissenting opinion are: *Arnaud's Restaurant, Inc. v. Cotter*, 212 F. 2d 883 (5th Cir. 1954), cert. denied, 348 U.S. 915 (1955); *Doyle v. Fuerst & Kraemer*, 129 La. 838, 56 So. 906 (1911); *LeBlanc v. Louisiana Coca-Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952).

⁸² This procedure was authorized by FLA. STAT. ANN. § 25.031 (1961).

⁸³ 154 So. 2d at 170.

⁸⁴ Including *Berger v. Berger*, 76 Fla. 503, 80 So. 296 (1918); *Smith v. Burdine's, Inc.*, 144 Fla. 500, 198 So. 223 (1940); *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So. 2d 313 (1944); *Lambert v. Sistrunk*, 58 So. 2d 434 (Fla. 1952); *Food Fair Stores v. Macurda*, 93 So. 2d 860 (Fla. 1957); *Carter v. Hector Supply Co.*, *supra* note 81; *Sencer v. Carl's Markets, Inc.*, *supra* note 81.

⁸⁵ 325 F. 2d at 677.

caused his death."⁸⁶ However, the court suggested that the jury's findings might be "consistent with the standard of reasonableness,"⁸⁷ quoting its earlier opinion in *Lartigue v. R. J. Reynolds Tobacco Co.*:⁸⁸ "Strict liability on the warranty of wholesomeness, without regard to negligence, 'does not mean that goods are warranted to be foolproof or incapable of producing injury.'"

The same circuit judge who had dissented in the earlier opinion⁸⁹ now concurred in part and dissented in part, stating: "The majority opinion in this case is a careful and accurate portrayal of the status of the case as it now stands before us. And it is a correct interpretation of the holding of the Supreme Court of Florida. . . . I cannot join, however, in its conclusion that we should not render judgments for plaintiffs on the issue of liability."⁹⁰

Dissenting Judge Cameron then took his brethren to task for suggesting that *Lartigue* was an authoritative precedent for its opinion in the *Green* case, particularly with regard to the quotation which, says the dissenting opinion, is taken out of context: "It is fair to say, I think, that the majority's entire reliance on *Lartigue* and the principles it stands for are in direct conflict with the decisions of Florida courts, including the specific holding of its Supreme Court in its answer to the question we certified to it. . . ."⁹¹

What makes the majority opinion especially difficult to understand is that the *Lartigue* decision was handed down some six weeks before the Florida court's opinion in *Green* was filed. It is open to conjecture whether the *Lartigue* case truly represents Louisiana law, which the

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ 317 F. 2d 19, 37 (5th Cir. 1963).

⁸⁹ 304 F. 2d at 77.

⁹⁰ 325 F. 2d at 679.

⁹¹ *Id.* at 680, citing 154 So. 2d at 172-73. The dissent continues:

"The majority here finds itself, I submit with deference, in the anomalous position of resting its decision as to the most crucial point in this case upon *Lartigue*, which in turn went astray because it bottomed its holding on the portion (304 F. 2d at 73-77) of this Court's *original* opinion which was rejected by the Florida Supreme Court upon our submission to it. The vital language of *Lartigue* (317 F. 2d 37-39) was based upon, and in considerable part repeated, these rejected holdings of this Court's original opinion.

"It follows, it therefore seems to me, that whatever may be the force of *Lartigue*—decided two months before the Florida Supreme Court answered our question—in deciding a Louisiana case, it is no authority at all in this case based upon Florida law. Under that law it is not true that 'By and large, the standard of safety of the goods is the same under the warranty theory as under the negligence theory.' The direct opposite is true. The instruction given by the court below and its accompanying Question No. 4 were predicated directly upon the negligence theory. Florida rejects that theory and holds that sales of goods for human consumption are not covered by the law of sales with its *caveat emptor* or the law of negligence with its doctrines of reasonable care. Instead, they are controlled entirely by the law of contracts. The contract here was between the Tobacco Company and Green. The warranty embodied by the law in every sale the Company made to him was that the cigarettes purchased by him would not do him harm."

federal court was supposed to be applying. In one particular, this would seem not open to question; said the Fifth Circuit quite aptly: "Louisiana courts were quick to get around the notion of privity as a necessary element in holding a manufacturer liable on his warranty. . . . Making an Erie [R.R. v. Tompkins⁹²] educated guess, we hold that . . . Louisiana courts would classify cigarettes with food and drink."⁹³ The latter statement seems to express the general view as to the status of tobacco products.⁹⁴

But before taking leave of Lady Nicotine, and to emphasize the confusion that attends the law of implied warranty in this field, a short resumé of the rather curious decision in *Pritchard v. Liggett & Myers Tobacco Co.*⁹⁵ will be undertaken.⁹⁶ Plaintiff Pritchard had been smoking Chesterfield cigarettes for more than thirty years and had relied on numerous representations and assurances by the manufacturer that the "nose, throat and accessory organs" are "not adversely affected by smoking Chesterfields."⁹⁷ Many similar statements emphasizing the innocuous nature of Chesterfields were made on television commercials and published in various periodicals.⁹⁸ The United States District Court for the Western District of Pennsylvania dismissed the action and the plaintiff, who was suffering from cancer of the lung, appealed. An examination of the Pennsylvania cases⁹⁹ was undertaken by the Third Circuit (as diversity of citizenship requires), and the trial court's judgment was reversed and the case remanded on the ground that there were jury questions:

From the evidence, the jury could very well have concluded that there was a breach of an implied warranty of merchantability. . . .

In Pennsylvania, one who supplies a product to another and knows or should know that the foreseeable use is dangerous to human life unless certain precautions are taken, and who realizes or should realize that the user will not in the exercise of reasonable vigilance recognize the danger, is under a duty to warn the user of such consequences and to advise proper precautions.¹⁰⁰

⁹² 304 U.S. 64 (1938).

⁹³ 317 F. 2d at 35.

⁹⁴ The cases cited are in Jaeger, *Products Liability—Tobacco, General Practice Section*, A.B.A. Newsletter, 1964, vol. 1, no. 3, pp. 1, 2.

⁹⁵ 295 F. 2d 292 (3d Cir. 1961).

⁹⁶ Discussed in Jaeger, *Privity of Warranty: Has the Tocsin Sounded?* 1 DUQUESNE L. REV. 1 (1963).

⁹⁷ 295 F. 2d at 296-97, where verbatim quotations appear in the opinion.

⁹⁸ Including *Life*, *Saturday Evening Post*, *Time*, and *The Pittsburgh Press*.

⁹⁹ *Magee v. General Motors Corp.*, 124 F. Supp. 606 (W.D. Pa. 1954), *aff'd per curiam*, 220 F. 2d 270 (3d Cir. 1955); *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A. 2d 517, 530-34 (1949); *Caskie v. Coca-Cola Bottling Co.*, 373 Pa. 614, 96 A. 2d 901, 903 (1953).

¹⁰⁰ 295 F. 2d at 297-99, citing *Hopkins v. E. I. Dupont De Nemours & Co.*, 199 F. 2d 930 (3d Cir. 1952); *Maize v. Atlantic Ref. Co.*, 352 Pa. 51, 41 A. 2d 850 (1945), 160 A.L.R. 449; RESTATEMENT, TORTS § 388 (1934).

And in a separate concurring opinion, the following appears :

If a manufacturer assures his potential public that his product is harmless and it is proved that it is not harmless, he can be held, no doubt, for breach of warranty.^[101] And when a person makes to another a statement of fact which he does not know to be true, intending that the other shall act in reliance on the truth of that statement, he is liable for negligent misrepresentation.¹⁰²

Upon remand, the trial lasted for some six weeks. The case was then submitted to the jury on interrogatories, to which the following answers were made: (1) Smoking Chesterfield cigarettes caused the plaintiff's cancer; (2) defendant manufacturer was not negligent; (3) the plaintiff had given timely notice that he intended to treat his injury as having been caused by defendant company's breach of warranty. The jury also found that no express warranty had been made (this in spite of the many assurances that Chesterfields were "harmless") and that there was no breach of implied warranty. Finally, the plaintiff was found to have assumed the risk of injury by smoking. It does seem curious that if there was no breach of warranty, the jury found that notice of such a breach was timely.¹⁰³

In *Ross v. Philip Morris & Co.*,¹⁰⁴ the most recent decision of any moment dealing with cigarettes, the plaintiff had been smoking Philip Morris for some twenty years, his use increasing to three and four packages a day. In 1952, he was operated on for cancer and brought this action based on implied warranty under the law of Missouri.

From a judgment for the manufacturer in the trial court, the plaintiff appealed, alleging breach of implied warranty. On the defense of privity, the court cited and discussed *Morrow v. Caloric Appliance Corp.*,¹⁰⁵ where the Supreme Court of Missouri, en banc, "struck down the privity requirement rule which had previously been applied in Missouri."¹⁰⁶ On appeal, the plaintiff argued that under Missouri law the manufacturer of cigarettes owes the ultimate consumer an "absolute duty" to have its product "fit and wholesome for human consumption." Also, it was contended that the manufacturer is "absolutely liable," is "an insurer of the fitness and wholesomeness of its product," and acts at its peril, regardless of knowledge, "actual or constructive," and "even regardless of the possibility or impossibility of the manufacturer obtaining knowledge, that its product contains harmful, dangerous, deleterious or carcinogenic substances and ingredients."¹⁰⁷ *Green v. Ameri-*

¹⁰¹ Citing PA. STAT. ANN. tit. 12A, § 2-313 (Supp. 1960); UNIFORM COMMERCIAL CODE § 2-313; UNIFORM SALES ACT § 12.

¹⁰² 295 F. 2d at 301-02.

¹⁰³ It appears that further motions were made following the judgment (1) to amend, and (2) for a partial new trial. These are discussed in Jaeger, *supra* note 96, n. 28.

¹⁰⁴ 328 F. 2d 3 (8th Cir. 1964).

¹⁰⁵ 372 S.W. 2d 41 (Mo. 1963).

¹⁰⁶ 328 F. 2d at 7.

¹⁰⁷ *Ibid.*

*can Tobacco Company*¹⁰⁸ was largely the basis for these claims of the plaintiff.

But the trial court specifically refused to follow the Supreme Court of Florida in its *Green* opinion and this was partly the basis for the appellant's brief. The Eighth Circuit did not feel that the Supreme Court of Missouri "would blindly follow Florida law on this subject—if such law should (as it has) subsequently turn out to be contrary to the first enunciations by the Fifth Circuit."¹⁰⁹

In conservative judicial vein, the court made a modest appraisal of the situation when it said:

The field of implied warranty is in a state of flux, and it is obvious that Missouri has joined the liberal trend toward allowing recovery from a manufacturer for breach of such a warranty under factual situations once governed by the rigid *caveat emptor* doctrine—let the buyer beware. However, after exhaustive study of all relevant Missouri authorities^[110], we are convinced that, on the facts of this case, the trial court correctly charged the jury and properly refused plaintiff's instruction which would have made defendant an *absolute insurer*—without regard to 'reasonableness' and without regard to 'developed human skill or foresight.'¹¹¹ (Emphasis added.)

The court considered "a vast array" of non-judicial authorities, including the *Restatement of Torts* where the rule of absolute liability is qualified by a statement that it "applies only where the defective condition of the product makes it *unreasonably dangerous* to the consumer."¹¹² Finding itself limited solely to a determination of the applicable Missouri law, the court summarized: "Under such law, a manufacturer, in the proper factual situation, is held as an absolute insurer against *knowable* dangers, and thus has an incentive to keep abreast of scientific knowledge."¹¹³

V. NOTICE OF BREACH OF WARRANTY

In the preceding sections, considerable space has been devoted to the limitation of the manufacturer's liability occasioned by the strict

¹⁰⁸ 154 So. 2d 169 (Fla. 1963); see also Florida cases cited notes 81 and 84 *supra*.

¹⁰⁹ The court added: "Indeed . . . this case is to be decided under Missouri law, and neither the *Green* case, the *Lartigue* case (which approved a similar instruction as is controverted here), nor the *Pritchard* case (which also used a similar instruction below and *is now again on appeal*) is dispositive or decisive of the present controversy." 328 F. 2d at 12. (Emphasis added.)

¹¹⁰ Including *Morrow v. Caloric Appliance Corp.*, *supra* note 105; *Holyfield v. Joplin Coca-Cola Bottling Co.*, 170 S.W. 2d 451 (Mo. App. 1943); *Carter v. St. Louis Dairy Co.*, 139 S.W. 2d 1025 (Mo. App. 1940); *Bell v. S. S. Kresge Co.*, 129 S.W. 2d 932 (Mo. App. 1939); *Fantroy v. Schirmer*, 296 S.W. 235 (Mo. App. 1927); *Worley v. Procter & Gamble Mfg. Co.*, 241 Mo. App. 1114, 253 S.W. 532 (1952); *Midwest Game Co. v. M. F. A. Milling Co.*, 320 S.W. 2d 547 (Mo. 1959); *Albers Milling Co. v. Carney*, 341 S.W. 2d 117 (Mo. 1960); *Borman v. O'Donley*, 364 S.W. 2d 31 (Mo. App. 1962).

¹¹¹ 328 F. 2d at 12.

¹¹² RESTATEMENT (SECOND), TORTS § 402A (Tent. Draft No. 7, 1962).

¹¹³ 328 F. 2d at 13.

application of privity. Now, a further limitation—the necessity of giving timely notice of the breach of warranty in order to hold the vendor—will be considered. At common law, the decisions were far from uniform as to the effect of acceptance and retention of goods which had been sold upon the right of action for breach of warranty.¹¹⁴ It was basically a question of fact as to whether acceptance of defective goods amounted to a waiver of the rights of the buyer, especially in regard to breach of warranty.¹¹⁵

Today, both the Uniform Sales Act and the Uniform Commercial Code require the buyer to give notice to the vendor of a breach of warranty within "a reasonable time" after he discovers or should have discovered a breach. The pertinent provision of the Uniform Sales Act reads:

In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.¹¹⁶

Of the aforementioned provision, Professor Williston observes:

This section of the Statute treats the seller's tender of the goods as an offer of them in full satisfaction, but the buyer is allowed a reasonable time for accepting the offer. Moreover, if he declines to take the goods in full satisfaction he need not return them. The practical advantages of the statutory rule and its ease and certainty of application commend it.¹¹⁷

A rather strict interpretation given this provision of the Uniform Sales Act in some jurisdictions to the effect that the nature of the defect, the damage caused thereby, and the intent to hold the vendor liable would have to be disclosed in the notice¹¹⁸ led to a change in terminology

¹¹⁴ WILLISTON, SALES §§ 488, 489 (rev. ed. 1948), for an elaborate citation of the authorities.

¹¹⁵ *North Alaska Co. v. Hobbs, Wall & Co.*, 159 Cal. 380, 120 Pac. 27 (1911). In *Reininger v. Eldon Mfg. Co.*, 114 Cal. App. 2d 240, 250 P. 2d 4 (1952), the court said: "Prior to the Uniform Sales Act it was a pure question of fact whether the receipt and retention by the buyer was made in such a way as to indicate he was assenting to the tender of nonconforming goods. It has never been the law in California that mere acceptance of defective goods with knowledge of their defects cuts off a buyer's right of action for breach of an express warranty as a matter of law. . . ." 5 WILLISTON, CONTRACTS § 714 (3d ed. Jaeger rev. 1961).

¹¹⁶ UNIFORM SALES ACT § 49. RESTATEMENT, CONTRACTS § 412 (1932) reads: "Under a contract for the sale of goods, the failure of the buyer, after acceptance of goods tendered as performance of the contract, to give notice to the seller of the latter's breach of any promise or warranty, within a reasonable time after the buyer knows or has reason to know of such breach, discharges the seller's duty to make compensation."

¹¹⁷ 5 WILLISTON, *op. cit. supra* note 115, at 399.

¹¹⁸ The purpose of the notice requirement, as the courts have signaled, "is to

of the comparable Uniform Commercial Code provision which reads:

- (3) Where a tender has been accepted
 (a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy¹¹⁹

It is clear that the Code intends to liberalize the notice requirement, especially to preserve the rights of non-commercial buyers who can hardly be expected to be aware of technical niceties.¹²⁰ However, under either statute the quantitative element in the question "what is a reasonable time?" will, it is safe to predict, continue to plague the courts, as the case law so abundantly indicates.¹²¹

advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have an early warning." American Mfg. Co. v. United States Shipping Bd., 7 F. 2d 565 (2d Cir. 1925) (L. Hand, J.), quoted with approval in Columbia Axle Co. v. American Auto Ins. Co., 63 F. 2d 206 (6th Cir. 1933), in Whitefield v. Jessup, 31 Cal. 2d 826, 193 P. 2d 1 (1948), and in Reininger v. Eldon Mfg. Co., 114 Cal. App. 2d 240, 250 P. 2d 4 (1952).

¹¹⁹ UNIFORM COMMERCIAL CODE § 2-607(3) (a).

¹²⁰ UNIFORM COMMERCIAL CODE § 2-607, comment, reads: "*Purpose of Changes:* To continue the prior basic policies with respect to acceptance of goods while making a number of minor though material changes in the interest of simplicity and commercial convenience

"The time of notification is to be determined by applying commercial standards to a merchant buyer. 'A reasonable time' for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

"The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched"

Indicative of the greater liberality with respect to notice which the Uniform Commercial Code imports into the law is § 1-201: "*General Definitions*

"(25) A person has 'notice' of a fact when

- (a) he has actual knowledge of it; or
 (b) he has received a notice or notification of it; or
 (c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists."

For a general discussion of notice in its many implications, see 6 WILLISTON, CONTRACTS § 887B (3d ed. Jaeger rev. 1962).

¹²¹ United States v. Dewart Milk Prod. Co., 300 Fed. 448 (M.D. Pa. 1924), construing Pennsylvania act—10 month's delay discoverable by inspection is unreasonable; Ruggles v. Buffalo Foundry & Mach. Co., 27 F. 2d 234 (6th Cir. 1928), applying Michigan act—a year's delay in giving notice in a contract for sale of a brine evaporator is unreasonable; Owen v. Sears, Roebuck & Co., 273 F. 2d 140 (9th Cir. 1959), delay of 2 years in giving notice that shirt was defective held unreasonable.

Elkus Co. v. Voeckel, 27 Ariz. 332, 233 Pac. 57 (1925), where goods to retailer contained a defect not readily discoverable, notice given as soon as retailer received complaints from customers was reasonable; Mutual Electric Co. v. Turner Eng. Co., 230 Mich. 63, 202 N.W. 964 (1925), delay of several years held not excessive as a matter of law, in view of constant efforts to obviate cause of complaint; Stewart v. Menzel, 181 Minn. 347, 232 N.W. 522 (1930), delay of 6 months in giving notice of defects in fur coat unreasonable; Laundry Service Co. v. Fidelity Laundry Mach. & Eng'r Co., 187 Minn. 180, 245 N.W. 36 (1932), delay of 5 months in discovery and claiming defects in laundry machine held unreasonable.

Mastin v. Boland, 178 App. Div. 421, 165 N.Y.S. 468 (1917), 3 weeks held reasonable when the buyer did not know the seller's name and address;

VI. EXCLUSION OF MANUFACTURER'S LIABILITY: DISCLAIMER

There is another significant limitation on the liability of the manufacturer for breach of warranty: express exclusion by the use of an integration clause or an express disclaimer. At common law, this was regarded as an exercise of the freedom of contract. However, in more recent times the courts have been less inclined to extend such limiting provisions beyond the precise words used to limit liability.¹²² Of late, some jurisdictions have even declined on grounds of public policy to enforce disclaimers, especially in contracts of adhesion.¹²³

The Uniform Sales Act did not have a specific provision dealing with disclaimers, as does the Uniform Commercial Code,¹²⁴ but there is a general section which authorizes disclaimers.¹²⁵ The Uniform Commercial Code, as pointed out in a recent comprehensive and well-documented article by Professor Cudahy,¹²⁶ makes specific provision for disclaimers:

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be

Ficklen Tobacco Co. v. Friedberg, 196 App. Div. 409, 187 N.Y.S. 561 (1925), a year is an unreasonable time; Stone v. Bleim, 176 N.Y.S. 25 (Sup. Ct. 1919), 10 days not unreasonable as matter of law; Pierce Foundation Corp. Co. v. Eagle Pipe Supply Co., 180 N.Y.S. 88 (Sup. Ct. 1920), 4 months held unreasonable; Kaufman v. Levy, 102 Misc. 689, 169 N.Y.S. 454 (Sup. Ct. 1918), notice given immediately after examination of the goods held unreasonable when examination was deferred for 23 days, where it was customary to examine goods within 10 days; Gleason v. Lebolt, 126 Misc. 216, 212 N.Y.S. 227 (Sup. Ct. 1925), 5 months' delay in discovering defect in diamond and giving notice is reasonable as matter of law.

Walsterholme v. Randall, 295 Pa. 131, 144 Atl. 909 (1929), notice after 11 days reasonable even though material had to be manufactured into cloth within that period; Bodek v. Avrack, 297 Pa. 225, 146 Atl. 546 (1929), 3 months as matter of law unreasonable in sale of blankets; Kull v. General Motors Truck Co., 311 Pa. 580, 155 Atl. 562 (1933), notice of breach of warranty as to age of trucks given 2 years after sale held barred by laches; Patterson Foundry Co. v. Williams Lacquer Co., 52 R.I. 149, 158 Atl. 721 (1932), delay of 6 months in giving notice of defects in lacquer grinding mill held unreasonable.

¹²² 4 WILLISTON, CONTRACTS §§ 602A, 626 (3d ed. Jaeger rev. 1960).

¹²³ Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 67, 27 Cal. Rptr. 697, 377 P. 2d 897 (1963); Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P. 2d 168 (1964); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69 (1960); State Farm Mut. Auto Ins. Co. v. Anderson-Weber, 252 Iowa 1289, 110 N.W. 2d 449 (1961).

¹²⁴ UNIFORM COMMERCIAL CODE § 2-316: "Exclusion or Modification of Warranties."

¹²⁵ UNIFORM SALES ACT § 71.

¹²⁶ Cudahy, *Limitation of Warranty Under the Uniform Commercial Code*, 47 MARQ. L. REV. 127 (1963).

conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. . . .¹²⁷

CONCLUSION

From the recent cases heretofore discussed, it is apparent that the manufacturer's liability is becoming ever stricter, regardless of the theory upon which recovery is based. The cases are primarily significant because they indicate a current and growing trend. However, even with the increased protection afforded the purchaser or consumer, *strict* liability is by no means *absolute* liability, since there are still a variety of defenses available to the manufacturer.

¹²⁷ UNIFORM COMMERCIAL CODE § 2-316.