**Marquette Law Review**

Volume 22
Issue 3 *April 1938*

Article 4

# Torts: Breach of Warranty: Liability of Manufacturer of Defective Chattels

Chester John Niebler

# NOTES

TORTS—BREACH OF WARRANTY—LIABILITY OF MANUFACTURER OF DEFECTIVE CHATTELS.—Though there has been a recent flood of literature concerning the liability of the retailer and the manufacturer to the "ultimate consumer,"[1] the American doctrine is seemingly best summed up with the statement that "today it is virtually impossible to determine what chattels the manufacturer may perpare with impunity."[2] Various standards have been suggested and much progress has been made to achieve form from nebulous hypotheses; but an "about-face" made by the courts during the past ten years, especially in America, has upset, apparently, past gains.[3] The purpose of this note, however, is not to presume to state arbitrarily the ultimate norm or yardstick for measuring liability for a defective chattel, nor to review an involved history of the philosophy establishing such a norm: the conclusions are left to the reader, and the history is brief.[4] Nor is any attempt made to interpret the Sales Act in this article.

That the manufacturer or the retailer may be liable to the person with whom he deals directly is not a new doctrine[5]; at all times has it been a cardinal principle that the seller is responsible to his direct customer for his defective goods, where such defects are not pointed out or apparent to the buyer or where the buyer has no voice in criticizing the goods as to such defects. What is meant here is that if the purchaser takes defective goods directly from the manufacturer as retailer, he may have a cause of action against him, either in tort or in contract.[6] This rule arose out of the primitive business and commercial conditions operative in a simple society, such as prevailed in England and America prior to the Commercial and Industrial Revolutions, when every manufacturer did his own marketing directly with the consumer

---

[1] Note (1937) 24 VA. L. REV. 46; Note (1937) 37 COL. L. REV. 77; Note (1937) 10 MISS. L. J. 82; Note (1929) 26 ILL. L. REV. 99; Llewellyn, *On Warranty of Quality, and Society* (1937) 37 COL. L. REV. 340; Bohlen *Liability of Manufacturers to Persons Other than their Immediate Vendees* (1929) 45 L. Q. REV. 343; Chapman, *Liability for Chattels* (1938) 54 L. Q. REV. 36; Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* (1938) 54 L. Q. REV. 53; Chanin v. Chevrolet Motor Co. 15 F. Supp. 57 (N.D. Ill. 1935) annotated in 111 A.L.R. 1235. See also lay literature, KALLET AND SCHLENK, 100,000,000 GUINEA PIGS (1933); 3 ENCYC. SOC. SCIENCES 280 (1930).

[2] Note (1937) 10 MISS. L. J. 82.

[3] Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* (1938) 54 L. Q. REV. 53; Chapman, *Liability for Chattels* (1938) 54 L. Q. REV. 36; see Child's v. Swingler, (Md. 1938) 197 Atl. 105; Chanin v. Chevrolet Motor Co., 15 F. Supp. 57 (N.D. Ill. 1935).

[4] Stressing codification of conclusions: Chapman, *supra* note 1; see also Bohlen, *supra* note 1.

[5] Winterbottom v. Wright, 10 M. & W. 109 (1842); Flies v. Fox Bros. Buick, 196 Wis. 196, 218 N.W. 855 (1928); Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Mac Pherson v. Buick Motor Car Co., 217 N.Y. 382, 111 N.E. 1050 (1916); Parsonnet v. Kiel's Bakery, 196 Atl. 661 (1938); Lebournais v. Vitrified Wheel Co., 194 Mass. 341, 80 N.E. 482 (1907); Oskeroff v. Rhodes Burford Co., 203 Ky. 408, 262 S.W. 583 (1924); Chanin v. Chevrolet Motor Co., 15 F. Supp. 57 (N.D. Ill. 1935) annotated in 111 A.L.R. 1235.

[6] Bohlen, *Liability of Manufacturers to Persons Other than their Immediate Vendees* (1929) 45 L. Q. REV. 343.

and when trade cartels were still one hundred years away. For such a society, the law was adequate.[7]

With the rise of a business and financial system that brought with it those commercial twins: mass production and mass selling, wherein the manufacturer did the making and the seller did the selling, the courts were met with a serious difficulty—of course more logical and argumentative than real.[8] The Victorians realized that "Big Business" could not be crucified for a single consumer, who was inadvertently injured by defectively manufactured goods. The law could see no apparent nexus between the manufacturer and the distant user: and *ipso facto* was applied the rule that no liability attached where there was no privity. *Winterbottom* v. *Wright*[9] set down the fundamental rule, basing its decision on the negative argument that "unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."[10]

It was an easy rule to apply. It could be used both in tort and in contract,[11] the theory being that in the absence of contractual relations between the parties, no liability can be predicated on the manufacturer's negligence—at least where there is no *scienter* at the time.[12] In order to avoid the censure of "Big Business," the law was averse to helping the defenseless consumer. However, the courts were neither so arbitarary nor so blind as to apply this rule indiscriminately. Not ten years after the *Winterbottom* case it was seen that goods inherently dangerous and those manufactured for internal human consumption[13] possessed an unique characteristic and should be excepted from application of the rule.[14] The social value of placing liability on those who negligently manufactured them was as soon obvious. Exceptions were

---

[7] Llewellyn, *On Warranty of Quality, and Society* (1937) 37 COL. L. REV. 340, 405; Russell, *Manufacturer's Liability to Ultimate Consumers* (1933) 21 KY. L. REV. 388.

[8] CLARK, PRINCIPLES OF MARKETING (1926); Tosdale, *Trends in Manufacturer's Choice of Marketing Channels* (American Management Ass'n., C.M. No. 2, 1930); Note (1937) 37 COL. L. REV. 77, 78, 79.

[9] 10 M. & W. 109 (1842).

[10] *Ibid.*

[11] Child's v. Swingler, (Md. 1938) 197 Atl. 105. This stretching of the dictum of the case of *Winterbottom* v. *Wright* has been severely criticized. "Both Lord Atkin and Lord MacMillan distinguished it out of existence" for the case must "have treated the duty as alleged to arise only from a breach of contract; for as has been pointed out that was the only allegation in *Winterbottom* v. *Wright,* negligence, apart from contract, being neither averred nor proved." Goodhart, *supra* note 1.

[12] Note (1936) 111 A.L.R. 1235.

[13] Thomas v. Winchester, 6 N.Y. 397 (1952). "A dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine and sends it so labeled into market is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label."

[14] Llewellyn, *On Warranty of Quality, And Society* (1937) 37 COL. L. REV. 340, 406. Llewellyn has compiled a more or less complete chart of the exception categories for recovery from the year 1815. Beznor v. Howell, 203 Wis. 1, 233 N.W. 758 (1930): "A manufacturer who makes and sells an article intended to preserve or affect human life is liable to a third person sustaining injury caused by his negligence in preparing, compounding, labeling, or directing the use of such article, if injury to others might have been reasonably foreseen in the exercise of ordinary care."

made then—but only after a difficult battle—to the general rule to read that a manufacturer is not liable for injuries to the person of an ultimate consumer who has purchased from the middleman, unless the article was inherently dangerous to life or limb.[15] Restated—to demonstrate its limitations—"a person who owns or transfers a chattel *which to his knowledge is dangerous* is under a duty to take reasonable care, by warning or otherwise, to protect all persons who are likely, in the contemplation of a reasonable man, to come within the reach of this known danger."[16] Subsequently, the courts stretched a point even to include injuries done to the purchaser's property.[17]

The exception of inherently dangerous chattels inevitably raised the question: What is a dangerous chattel? When is a chattel *inherently* dangerous? Some things may be dangerous by nature (firearms, poisons, etc.) while others may be dangerous by virtue of defective manufacture (poorly erected scaffold, defectively attached wheel, etc.). The distinction is most important, for liability in the first class may be predicated on the theory of *res ipsa loquitur* while liability will attach in the second group only after the defect is proved.[18]

No provision was as yet made for those articles which may become dangerous by reason of just such defective manufacture. It was Justice Cardozo, sitting on the New York bench, who crystallized a legal hint given in 1882[19] into a legal priciple that "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.[20] Goods may become dangerous when negligently made, even though they be harmless in the abstract. An automobile is not in the same category as a firearm; but the automobile may become just as harmful through defective manufacture.[21]

---

[15] Chanin v. Chevrolet Motor Co., 15 F. Supp. 57 (N.D. Ill. 1935); Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928).

[16] Chapman, *Liability for Chattels* (1938) 54 L. Q. Rev. 36. Note that the transferor must have knowledge of the intrinsic danger. The danger here lies in what is inherently dangerous. Not only that which is *ipso facto* dangerous but also that which may be dangerous by its peculiar construction. "It is a wolf in sheep's clothing instead of an obvious wolf." The difference is introduced that that which is inherently dangerous announces itself, as dynamite, but that which is only dangerous because of its abnormality must presuppose knowledge of the abnormality to attach liability.

[17] Bohlen, *supra* note 1; Grant v. Australian Knitting Mills, [1936] A.C. 562; Ellis v. Lindmark, 177 Minn. 390, 225 N.W. 395 (1929). In some cases, the law may impute knowledge on the part of the manufacturer, Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928).

[18] See page 143, *infra*. Particular note should be made of the modifying terms as in some way explaining the distinction. A wheel may be dangerous because it is *negligently* attached; whereas a poison is dangerous *per se*.

[19] Devlin v. Smith, 89 N.Y. 470 (1882), (painter's scaffold negligently constructed). For the same point, *see* Bright v. Barnett & Record Co., 88 Wis. 299, 307 N.W. 418. "Such liability may rest upon the duty which the law imposes on every one to avoid acts imminently dangerous to the lives of others. This liability to third persons is held to exist when the defect is such as to render the construction in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use."

[20] Mac Pherson v. Buick Motor Car Co., 217 N.Y. 382, 111 N.E. 1050 (1916). The guest of the vendee was allowed recovery for injuries due to defective manufacture of an automobile wheel.

[21] *Ibid.*

So also a toy is far from being classified in the same group with a poison, though its use may be just as injurious to life and limb when it is manufactured defectively.[22] Thus the law grew to a state that a manufacturer and retailer may be answerable to the ultimate consumer who used goods that may become dangerous through defective manufacture. "In determining whether a manufactured appliance defective in its construction is inherently dangerous, the extent and manner of its intended use must be considered."[23]

This may be taken to be the state of the law, both in America and England, when the *Mac Pherson* case was settled. Since then, however, the American courts have reverted to the individualistic and Victorian theory for the norm of adjudication; while the English courts have forged laboriously ahead toward the establishment of definite rules,[24] with but one exception.[25] In April 1937, a Mississippi court remarked that "a distinction must be borne in mind between those substances constituting food, drink, or medicine, to be taken internally, and those

[22] Crist v. Art Metal Works, 230 App. Div. 114, 243 N.Y. Supp. 496 (1930) (Ronson gun guaranteed as "absolutely harmless" ignited child's clothes and liability attached); see *Herman* v. *Markham Air Rifle Co.,* 258 Fed. 474 (E.D. Mich. 1918).

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

[24] Chapman, *Liability for Chattels* (1938) 54 L. Q. REV. 36. Mr. Chapman has suggested four rules as guides for English courts. (1) "The owner or possessor of a chattel, who derives an interest in a business or material sense from the user or acquisition of the chattel by another person, owes to that other person a duty to take reasonable care to see that the chattel is safe." (2) "A person who owns or transfers a chattel which to his knowledge is dangerous is under a duty to take reasonable care, by warning or otherwise, to protect all persons who are likely, in the contemplation of a reasonable man, to come within reach of this known danger." (3) "No duty is owed by an owner or transferor of a chattel where it is reasonably possible for the person who suffers damage or some prior recipient to make such an examination of the chattel as would disclose any danger which may exist." (4) "A person who has a chattel in his possession or under his control must exercise reasonable care with regard to it so as to avoid damage to others." These four formulae were severely criticized in a following article: Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* (1938) 54 L. Q. REV. 53.

[25] Dransfield v. British Insulated Cables, Ltd. (1937) 54 T.L.R. 11. The decision was criticized by both Goodhart and Pollock as setting back English law. Dransfield, an employee of the X corporation, was killed while working on an overhead system of trolley wires, owing to the breaking of a 'bull ring' which had been manufactured by the defendants. Hawke, J., came to the conclusion there was negligence in the making of the ring which led to and caused the accident. The defendants had not tested the ring before they delivered it to the X corporation as the breaking of such a ring "had never been known before." Nor had the X corporation tested the ring as they relied on the defendant's skill, whom they recognized as the best manufacturers. They thought that "if they purchased from the manufacturers, as they did, rings of sufficient dimensions to bear the strain which would be put to them, they would be entitled to assume that the goods were fool-proof." The corporation could, however, have discovered the defect in the ring by testing it, as they possessed suitable testing apparatus. The final relevant point to be noted is that it was not part of the defendant's case that the ring could have deteriorated during the period before it was actually used. The widow was denied recovery because the X corporation had the opportunity rather than the mere probability of inspection, coupled with testing means. Goodhart questions: "Why should they who were negligent in making the ring be held not liable for their negligence merely because the intermediate purchasers had an opportunity of making an examination which the manufacturers themselves thought was unnecessary?".

intended for use on external objects. A manufacturer of fertilizer is not under the same liability as a warrantor as those selling foodstuffs, drink, or medicine, to be taken into the body."[26] And the case was dismissed. Though there may be justification for this distinction, as a rule of the theory of recovery, as a method of dismissing the action it has no place: that distinction was adequately riddled by Cardozo in 1917—twenty years before this case![27]

In Wisconsin, the *Mac Pherson* theory has been adopted lock, stock, and barrel. "Under the laws of Wisconsin, the manufacturer of an article, though not inherently dangerous, but due to the negligence of the manufacturer it is *probable* that injuries will result from its proper use, is liable for any injury due to such negligence."[28] An extremely liberal view in this state has imposed, however, no great burden on the manufacturer; and the federal courts have as well used a broad interpretation of the "dangerous instrument" theory to hold the manufacturer responsible for negligently made chattels "whether there were any contractual relations between the parties or not."[29]

## THEORIES FOR RECOVERY

### *a. General*

Out of the body of litigation and text writing has arisen a system of theories upon which recovery for injuries sustained from defective chattels is sought. Doubtlessly, there is always some privity between the retailer and the manufacturer on the one hand, and between the retailer and the consumer on the other. In truth, the retailer in this article is understood to be the middleman. And a misplaced emphasis on that middleman, on the logical lack of privity between the manufacturer and the consumer by the interpolation of the middleman, resulted in the difficulty the courts are wrestling with today. Now it is the problem of again coalescing the reality of business with decades of abstruse argumentation that confronts the law today: the courts wish to preserve the legal distinction in an indistinguishable whole! For if privity is the norm of recovery, the retailer would be held responsible in all cases, despite the fact that the defect was caused by the negligence of the manufacturer.[30] Why the distinction between retailer and manufacturer should be made in any case with the liberal interpleader statutes under the codes is beyond comprehension,[31] except that the lethargic courts are insistent in conserving the age-old language of the law.[32] It must be borne in mind, however, that recovery

[26] Cone v. Virginia-Carolina Chemical Corp., (Miss. 1937) 174 So. 554.
[27] Mac Pherson v. Buick Motor Car Co., 217 N.Y. 382, 111 N.E. 1050 (1916); see Note (1937) 37 COL. L. REV. 77.
[28] Reed & Barton Corp. v. Maas, 73 F. (2d) 359 (C.C.A. 1st, 1934) (coffee urn); Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928); Beznor v. Howell, 203 Wis. 1, 233 N.W. 758 (1930).
[29] Huset v. J. I. Case Threshing Machine Co., 120 Fed. 856 (C.C.A. 8th, 1908); Johnson v. Cadillac Motor Car Co., 261 Fed. 878 (C.C.A. 2d, 1919); Waters-Pierce Oil Co., 212 U.S. 159 (1909); Bird v. Ford Motor Co., 15 F. Supp. 590 (W.D. N.Y. 1936).
[30] Llewellyn, *On Warranty of Quality, And Society* (1937) 37 COL. L. REV. 340. There is always some privity between the retailer and his buyer, merely because there is a sales contract.
[31] Note (1937) 37 COL. L. REV. 77, 84.
[32] Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* 54 L. Q. REV. 53.

is usually denied the consumer against the manufacturer *just because* there does not exist this privity! And the argument of no privity can be used for both tort and contract defenses.[33]

A great deal of emphasis has been placed by the courts on the fact that this lack of privity between the manufacturer and the consumer allows for a period of inspection and thereby creates an intervening cause to absolve the manufacturer. The theory of proximate cause has been stretched to the point of making the middleman the intervening cause.[34] Of course, it is a fundamental principle that an intervening cause or act of negligence may absolve the primary causant or person negligent.[35] Where the middleman does some material work on the chattel before he passes it on to the consumer, the manufacturer may be freed of responsibility.[36]

What constitutes a material alteration is of course problematical. In the *Dransfield* case the "learned judge held that it is the *opportunity of examination* and not the *probability of examination* which insulates the manufacturer against the consequences of his own negligence."[37] To which the writer stated the question: "Why should they, who were negligent in manufacturing, be held not liable for their negligence merely because the intermediate purchasers had an *opportunity* of making an examination which the manufacturers themselves thought was unnecessary?"[38] This theory of inspection by the intermediate purchaser has led to a variety of law. Failure to inspect incoming goods has been held to be such an intervening cause as to relieve the delivering carrier of its liability arising out of its failure,[39] while the failure to inspect has also been held to be one which might in the natural course of things be anticipated as not entirely improbable and such failure of inspection does not break the chain of causation.[40] "If . . . the thing will be used by persons other than the (immediate) purchaser, and used without new tests, then, irrespective of contract, the manufacturer of the thing of danger is under a duty to make it carefully."[41]

---

[33] *Cf.* note 11, *supra,* Roberts v. Anheuser-Busch Assn., 211 Mass. 449, 98 N.E. 95 (1912) (no contractual liability on manufacturer's warranty since there was no privity); Windram Mfg. Co. v. Boston Blacking Co., 233 Mass. 123, 131 N.E. 454 (1921); Note (1929) 26 ILL. L. REV. 99.

[34] *Cf.* Chapman, *Liability for Chattels* (1938) 54 L. Q. REV. 36; Goodhart *supra,* note 1; Mac Pherson v. Buick Motor Car Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[35] *Cf.* Flies v. Fox Bros. Buick Co., 196 Wis. 196, 201, 218 N.W. 855 (1928). Dransfield v. British Insulated Cables, Ltd., (137) 54 T.L.R. 11, where mere inspection by intermediate purchaser was enough to absolve the manufacturer. *Cf.* note 25, supra.

[36] Donoguhue v. Stevenson, [1932] A.C. 562; Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* (1938) 54 L. Q. REV. 53; Dransfield v. British Insulated Cables Ltd., (1937) 54 T.L.R. 11.

[37] Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* (1938) 54 L. Q. REV. 53, 60.

[38] *Ibid.,* 69; *Cf.* note 25 *supra.*

[39] Glynn v. Central R. Co., 175 Mass. 510, 56 N.E. 698 (1900); Missouri, K. & T. R. Co. v. Merrill, 65 Kan. 436, 70 Pac. 358 (1902); Dransfield v. British Insulated Cables, Ltd., (1937) 54 T.L.R. 11.

[40] Penn. R. Co. v. Snyder, 55 Ohio St. 342, 45 N.E. 559 (1896); Moon v. Northern Pac. R. R. Co., 46 Minn. 106, 48 N.W. 679 (1891); Grant v. Australian Knitting Mills, [1936] A.C. 85; Donoghue v. Stevenson, [1932] A.C. 562.

[41] Mac Pherson v. Buick Motor Car Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

As a general proposition, where the causal connection between the manufacturer and the consumer is not materially broken, recovery may he had, providing the other requisites are proved.[42]

Obviously, an injured consumer has the choice of suing on two general theories: Tort and Contract. In considering the latter, the argument of privity assumed gargantuan proportions in American courts, though the English courts have gone a long way to obliterate the artificial and nebulous corporate business practices to ignore that as a defense.[43] To them it makes little difference how the goods become the property of the consumer or how he was injured thereby, so long as such ultimate consumer did not—and was not expected to[44]—make an inspection of the goods and so long as the goods were used for the purpose for which they were manufactured. They argue that where the retailer is merely the conduit or the nexus between the manufacturer and the purchaser, liability may be imposed on the manufacturer even though there is no privity; for a new fiction creates the privity.[45] Not so much a fiction, it is a recognition of a practical reality. The retailer may be the vehicle of business; and the creation of marketing agencies should not release the manufacturer of any liability.[45a]

In studying this problem then, we have come this far that two fundamental facts must be prima facie. They are basic to any recovery, and must be proved before further principles can be applied. They are: (1) The ultimate consumer makes no inspection nor did he change or alter the chattel in any way; (2) the chattel was used for the purpose for which it was manufactured.

### *b. Contract*

The American courts have been unwilling to go as far as the British courts. They are more anxious to preserve the age-old and outworn distinctions between manufacturer and retailer, ignoring the real-

---

[42] *Infra,* at the end of this section. Note (1937) 37 COL. L. REV. 77, 84.

[43] Donoghue v. Stevenson, [1932] A.C. 562; Chapman, *Liability for Chattels* (1938) 54 L. Q. REV. 36; Grant v. Australian Knitting Mills, [1936] A.C. 85. *Contra*: Dransfield v. British Insulated Cables, Ltd., (1937) 54 T.L.R. 11.

[44] Donoghue v. Stevenson, *supra;* Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* (1938) 54 L. Q. REV. 53, 63: "By what test are we to judge whether the purchaser's 'inspection' may reasonably be interposed? It is submitted that such an inspection is reasonably interposed when the purchaser, instead of being entitled to rely on the manufacturer's skill, ought to make an inspection of his own." An opportunity is reasonable not merely because a sufficient length of time has elapsed, but it is reasonable because under the circumstances the purchaser *ought* to make an inspection—especially of perishable goods. Where the retailer is the mere vehicle of transmission of the produce and precluded from inspection or interference therto, so far as the law is concerned there is privity of contract directly between manufacturer and consumer on an extension of agency principles.

[45] Grant v. Australian Knitting Mills, [1936] A.C. 85: test is the *probability* of an intermediate examination being made. The plaintiff himself could have avoided trouble by washing the pants, as is done with infant's wear, but "it was not contemplated that they should be washed first." (p. 105) Because the manufacturer had no foundation to believe that the pants would be washed or inspected by either the retailer or the consumer that liability attached. The pants became the property of the wearer with the same defect they had when they left the maker. *Cf.* note 80, *infra.* The *Dransfield* case seemingly changes this view.

[45a] *Cf.* Miller v. Mead-Morrison Co., 166 Wis. 536, 166 N.W. 316 (1918).

ity that modern business is an entity, a whole, a *continuum,* and not a piecemeal; though one court in a dissenting opinion realized the injustice of a rule that allowed a manufacturer to escape liability by turning "the execution of this duty over to an agent or servant, and though he defaulted recklessly and knowingly in such duty"[46] he may escape responsibility. Still overcome by the weight of the over-ruled and narrowed-down *Winterbottom* v. *Wright*—"negligence, apart from contract, being neither averred nor proved"[47]—the courts see no contractual relation between the manufacturer and the ultimate consumer, where the middleman sells the goods. The injured consumer has no relief against the removed manufacturer, though he may have a cause of action in contract against the "shoe-string-operating" retailer. It should be noted that no attempt is made here to analyze the Sales Act, nor to apply it in the case before us by which some liability may be attached.[48] The consumer's relief in contract lies against the person with whom he contracted, the retailer. This liability rests on the doctrine of warranty, either express or implied. Of course, the underlying conditions heretofore referred to must be complied with.[49] In the last analysis, proof of these legal "catch alls" will establish the contract liability.

For the amount of damages recoverable on the contract theory, it might be argued that the damages on a sale are only the difference in the value of the goods contracted for and the value of the goods delivered, which in most cases is negligible.[50] However, the majority rule may be stated that "undoubtedly, the difference in value supplies the ordinary measure . . . The measure is more liberal where special circumstances are present with proof of special damages."[51] This all on the theory of proximate cause.

*c. Tort*

The contract theory has been quite stable.[52] But it is in the theory of tort liability that the courts have been reluctant to grant relief or to state definite and agreed principles. The old theory of the *Winter-*

---

[46] Miller v. Mead-Morrison Co., 166 Wis. 536, 166 N.W. 316 (1918). Justice Siebecker wrote this dissenting opinion upholding the plaintiff consumer in 1918; though in 1916 in *Kerwin* v. *Chippewa Shoe Mfg. Co.* (163 Wis. 428, 157 N.W. 1101), he wrote the opinion denying relief to a purchaser of defective shoes: "A manufacturer of shoes who fastened the soles with nails in such a way as to give them the appearance of being sewed is not liable to one who was induced by such deception to purchase the shoes and was injured by the nails penetrating his foot causing infection—the nailed sole not being inherently dangerous and the deceptive or negligent manner of constructing the shoe not rendering it so imminently dangerous to life, limb, and health that the manufacturer naturally and probably would produce such an injury."

[47] *Cf.* note 11, *supra.*

[48] For a discussion of this problem the reader is referred to: LLEWELLYN, CASES AND MATERIALS ON SALES (1930) 341; Child's v. Swingler, (Md. 1938) 197 Atl. 105; Grant v. Australian Knitting Mills, [1936] A.C. 85; WILLISTON, SALES (2d. ed.) § 244.

[49] *Supra,* note 42.

[50] *See* Child's v. Swingler, (Md. 1938) 197 Atl. 105, 107: "We conceive the rule . . . to be . . . fair compensation for the injury occasioned" as denying the defendant's prayer for *difference* measure.

[51] Ryan v. Progressive Stores, 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339 (1931).

[52] Note (1929) 26 ILL. L. REV. 99; Roberts v. Anheuser-Busch Assn., 211 Mass. 449, 98 N.E. 95 (1912); Beznor v. Howell, 203 Wis. 1, 233 N.W. 758 (1930).

*bottom* case, which only settled the question of contract liability[53] has been broadened and stretched to place liability on the manufacturer for inherently dangerous goods—but no further. Whether the *Mac Pherson* case would still prevail in the states is a moot question, though its adoption in this state is more than assured.[54] At first, then, there was no liability for defective chattels "for the reason . . . that an injury to any other person than the owner for whom the article is built and to whom it is delivered cannot ordinarily be foreseen or reasonably anticipated;"[55] but the creation of several exceptions, has progressed to ameliorate the harshness of the rule.[56]

In tort, then, theories have been successfully built on the fraud and deceit of the manufacturer brought about through overzealous advertising agencies. Claiming that an automobile was equipped with "shatterproof" glass is a fraud and a deceit on "John Q. Public," when a person is injured through the breaking of such glass.[57] An ordinary negligence case will lie where lack of due care can be proved. Tort liability may rest on either of the age old principles of licensee or invitee[58] though a practical and legal difficulty appears in the application of these real property concepts to chattels.[59] And the exception of dangerous goods has gone so far as to allow the application of the doctrine of *res ipsa loquitur* as a basis for recovery. Merely setting out that he bought something to drink manufactured by the defendant, used it as such drink, and proof of the existence of a mouse therein, lodged liability on the manufacturer.[60] Or buying some underwear, using it for apparel, and consequent injury resulting from such use—even though the defendant manufacturer used the most scientific and modern methods of manufacture—saddled liability on the manufacturer.[61]

---

[53] *Cf.* note 11, *supra.* Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* (1938) 54 L. Q. Rev. 53.

[54] Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928); Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932).

[55] Dictum and review in Flies v. Fox Bros. Buick Co. *supra.*

[56] Ibid, 202.

[57] Bird v. Ford Motor Co., 15 F. Supp. 590 (W.D. N.Y. 1936); *Contra*: Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409 (1932); Chanin v. Chevrolet Motor Co., 15 F. Supp. 57 (N.D. Ill. 1936).

[58] Zieman v. Keickhefer Elevator Co., 90 Wis. 497, 502, 63 N.W. 1021 (1895). "There was no allurement or implied invitation to cause the plaintiff to approach or be near the foot of the elevator shaft, or even in the building."

[59] Chapman, *Liability for Chattels* (1938) 54 L. Q. Rev. 36.

[60] Coca Cola Bottling Co. v. Smith, (Tex. Civ. App. 1936) 97 S.W. (2d) 761. See Anglo-Celtic Shipping Co., Ltd. v. Elliott & Jeffrey, (1926) 42 T.L.R. 297, 299 (Cleaning fluid for ship boilers caused explosion though in ¾ million gallons there was no sign of danger; "Not only was the article dangerous in itself, but instructions failed to give any adequate warning.")

[61] Grant v. Australian Knitting Mills, [1936] A.C. 85. *Cf.* Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932). "The fact that the custom of manufacturers generally was followed is evidence of due care, but it does not establish its exercise as a matter of law. Obviously, manufacturers cannot, by concurring in a careless method of manufacture, establish their own standard of care." Boyce v. Wilbur Lumber Co., 119 Wis. 642, 97 N.W. 563 (1903), Bandekow v. Chicago, B. & Q. R. Co., 136 Wis. 341, 117 N.W. 812 (1908).

A note is worthy on the theory of *res ipsa loquitur* as a basis for recovery since it was pointed out that a recent decision seems to show a back-watering to the distinction between goods manufactured for human consumption and other goods.[62] The basis for the distinction in that case was ground for denying recovery. It is the opinion of this writer—and the settled law in this jurisdiction—that such a distinction is valid; but it is valid only in planning the theory of recovery, not in denying recovery altogether. In other words, goods manufactured for human consumption should be classified as permitting the theory of *res ipsa loquitur* to recover for injuries sustained from defective goods. A greater degree of care, almost absolute liability, should be imposed on him who defectively makes goods which of their very nature are dangerous. If the goods are manufactured for other purposes, recovery should not be denied the injured consumer, but it should rest only with proof of actual negligence and not on the "almost" absolute liability of the *res ipsa loquitur* theory.

The manufacturer sometimes believes that if he conforms his method of manufacture with the universal custom of his trade, proof of such safeguards will relieve him of any liability. But "the fact that the custom of manufacturers generally was followed is evidence of due care, but it does not establish its exercise as a matter of law. Obviously, manufacturers cannot, by concurring in a careless or dangerous method of manufacture, establish their own standard of care."[63]

Of course, all of the damages sustained in the tort is recoverable; they are not limited to the difference in value. It is only in the contract case that the measure of damages raises the issue, since the ordinary rule would permit recovery of a negligible amount.[64]

### *d. Philosophy*

Behind these rules and their evolution is a practical philosophy. The old theory was intent on protecting "Big Business" and anxious to create huge trade cartels; there was to be no sacrifice of the big industry to potentially countless suits by injured consumers. "If this action could be maintained upon the allegations of negligent and improper construction . . . it would follow that anyone actually using it and receiving injury in consequence—a much stronger case than the present—might maintain an action against the manufacturer."[65] The courts really feared that saddling liability on the manufacturer for one injured consumer would open wide the gates to a flood of litigation,[66] though judicial theory was even based on the contradictory that the defect was so unusual and unimaginable that recovery could not be had.[67]

---

[62] *Supra,* note 26.
[63] *Supra,* note 61: Marsh Wood Products Co. case.
[64] *Supra,* notes 50 and 51.
[65] Miller v. Mead-Morrison Co., 166 Wis. 536, 166 N.W. 315 (1918).
[66] Winterbottom v. Wright, (1842) 10 M. & S. 109. *Cf.* notes 10 and 65.
[67] Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N.W. 157 (1909): "unintentional or negligent dropping of a needle into a mixture from which toilet soap is made is so remote a possibility, such an extraordinary occurrence, and serious injury to the consumer from using such soap for toilet purposes such an unusual and remote consequence of such act, that thereby there is no breach of a duty imposed on the manufacturer for the protection of the vendee of his vendee, and no actionable negligence is shown." This infers frequency of

The dire results of such an anti-social policy only perpetuated careless manufacturing methods, and did not place the burden upon him who was most able to bear it. Before absolute liability was put onto the manufacturer for accidents occurring to his employees through Workmen's Compensation Acts, dangerous methods of manufacture were continued. So also with the liability of manufacturers for defectively made chattels. So long as the liability is saddled onto the defenseless consumer, production methods will not be improved.[68]

If the social view were taken to protect society against unscrupulous manufacturers as well as that social view to protect honest manufacturers against unscrupulous claimants, a sounder and more equitable philosophy would uphold the law. The middle rule—*virtus in medio stat*—may be stated in question form: "Who is the better able to bear the loss?". If the manufacturer were better able to bear the loss, he should pay; especially since it was his negligence which caused the injury. But if the placing of the burden on the manufacturer would ultimately ruin business and if the consumer could better bear the loss, he should pay.[69] The difficulty of this nebulous norm is more than apparent, since it establishes no yardstick but the Rule of Reason—a tyrant's whip and a good man's chain. It is, however, a starting point.

This question should be answered along with the following: "Upon whom will the penalty of the loss evoke improvement toward the prevention of future injury?".[70] Today the Coca Cola Company has made the mouse in the bottle a pure myth through improved manufacturing methods.[71] The Buick Motor Car Company carries insurance against loss and defective manufacture and makes the passing of defective automobiles onto the public an impossibility through a most rigid inspection system. The Great Atlantic & Pacific Tea Company today makes it a practical impossibility to bite into a stone in a can of beans. The apparent social values of this standard argues much for its adoption.

## Conclusions

The last mentioned rules suggest that except for a few minor setbacks the growth of the law has been steady and complete, so that it can be safely stated that it is in a more or less definite form. We have come a long way from the primitive business methods of Anglo-Saxon barter, long enough to realize that modern finance and manufacturing is a *continuum,* not a series of unrelated and individual acts. The early fear of a retrogression to unstable principles can be said to be merely isolated and temporary—and in no small degree due to both the leth-

---

occurrence as the measure of liability, though actual negligence can be shown; it is fallacious argument, since extreme frequency of action is the very thing that it to be avoided in most opinions. A true Hobson's choice: Damned if you don't, and damned if you do!

[68] Llewellyn, *On Warranty of Quality, and Society* (1937) 37 Col. L. Rev. 340, 407; Note (1937) 37 Col. L. Rev. 77.

[69] Note (1937) 37 Col. L. Rev. 77.

[70] Ibid.

[71] Llewellyn, *On Warranty of Quality, and Society* (1937) 37 Col. L. Rev. 340 "Experiment seems to show that a mouse, after exposure to what is said to be a standard cleansing process, could no longer be recognizable in evidence as such, even if he remained in the bottle. The mouse has migrated to the pork pie."

argy of the lawyer and the ignorance of the court.[72] Whether we are ready to accept the English view toward a broad and liberal policy is still a matter for the future; though there are some jurisdictions here indicative of greater advance than the English.[73]

At least one thing is certain: the fear of the courts of a flood of litigation for imposing liability on the manufacturer for defectively made goods in unfounded. Even after the extremely liberal *Stevenson* case in 1932[74] it can be stated that "to this fear, the actual facts are the best answer. There has been no flood of litigation since 1932, and the courts have not been forced in a single case to place an unjust burden on the shoulders of a manufacturer. We can therefore face a liberal interpretation of the doctrine in *Donoghue* v. *Stevenson* with equanimity."[75] "It would seem that the number of suspected false claims in the past has not, in fact, been greater than in other fields. Furthermore, activities of the National Bureau of Casualty and Surety Underwriters may be expected to aid materially in the prevention of false defective merchandise claims in the future."[76]

If a prediction may be allowed, it might be stated that future actions against manufacturers for injuries caused by defective goods will grow along the lines of tort liability; while the retailer may be held on the theory of the Sales Act. An actual codification of the rules is to be discountenanced since it inevitably leads to exceptions and is fraught with too many evils. The *Winterbottom* case was an attempt to formulate an easy rule—and it is taking more than one hundred years to remedy the wrong so that by today we have more exceptions than the rule.[77] Generally speaking, the rule today has progressed this far: "You must take reasonable care to avoid acts or omissions which you can reasonably forsee would be likely to injure your neighbor. Who, then, in law, is my neighbor? The answer seems to me—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to acts or omissions which are called into question."[78] Pollock thinks that a manufacturer must use reasonable diligence to insure freedom from possible non-apparent defects which would be likely to make the product noxious or dangerous in use; and if he does not, *any* consumer who sustains damage from such a defect shall recover against the manufacturer.[79]

With the greatest of weight and respect is it said here that proof of the facts is the most essential element. The principles of law are quite

---

[72] Cases have held that the principles are simple but their application to everyday situations proves insurmountable. *Cf.* Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928).

[73] The setback given by the *Dransfield* case may only be temporary. *Cf.* Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* (1938) 54 L. Q. Rev. 53. There is some ground to believe the Wisconsin rule is more liberal than the English here.

[74] Donoghue v. Stevenson, [1932] A.C. 562.

[75] Goodhart, *Dransfield* v. *British Insulated Cables, Ltd.* (1938) 54 L. Q. Rev. 53, 69.

[76] Note (1937) 37 Col. L. Rev. 77, 85-86.

[77] *Ibid.* 82.

[78] Lord Atkin in Donoghue v. Stevenson, [1932] A.C. 562, 580.

[79] Pollock, *The Snail in the Bottle, and Thereafter* (1933) 49 L. Q. Rev. 26.

settled; but the grouping of the facts under a stated theory may be difficult. "The essential point in this regard is that the article should reach the ultimate consumer or user subject to the same defect as it had when it left the manufacturer . . . At most, there might in other cases be a greater difficulty of proof of the fact."[80] Once the legal relations are adequately proved, there is more than ample authority to believe that recovery will lie.

CHESTER JOHN NIEBLER.

---

BANKRUPTCY—PROCEEDINGS UNDER SECTION 77B—VOLUNTARY PETITION FILED BY A DISSOLVED CORPORATION.—Section 77B of the Bankruptcy Act has been in effect for almost four years.[1] Section 77 was adopted a year earlier.[2] The general scheme of each section is the same. Bankruptcy courts are authorized to protect the assets of certain corporation-debtors from the processes usually available to creditors, not merely as a preliminary step in a controlled liquidation of assets, but to preserve the assets and to permit the working out of a plan for reorganization which may include participation by stockholder groups in the future operation of the properties.[3] Each court has wide territorial jurisdiction.[4] Eventually the particular court will have to consider the fairness of any proposed plan for reorganization and must confirm it before the plan can be put into effect. The constitutionality of this general scheme was considered in *Continental Bank* v. *C. R. I. & P. Ry. Co.*[5] The Supreme Court held that Section 77 was a bankruptcy

[80] Grant v. Australian Knitting Mills, [1936] A.C. 85, 106. See, Bourcheix v. Willowbrook Dairy, 268 N.Y. 1, 196 N.E. 617 (1935).

[1] 48 STAT. 912 (1934), 49 STAT. 965 (1935), 50 STAT. 622 (1937), 11 U.S.C.A. § 207[c] (1937).

[2] 47 STAT. 1474 (1933), 49 STAT. 911 (1935), 49 STAT. 1969 (1936), 11 U.S.C.A. § 205 (1937).

[3] The principal reason for enacting Section 77B was probably to provide a scheme for preserving stockholders' equities. But the Section has been used by creditors as well as by stockholders and to promote reorganizations in which stockholder groups have not been interested. It has been used by secured creditor groups to facilitate their reaching the properties covered by their security devices and to permit them to avoid having to resort to the usual processes of foreclosure. *In re* Church Street Bldg. Corp'n., 299 U.S. 24 (1936); *In re* Witherbee Court Corp'n., 88 F. (2d) 251 (C.C.A. 2d, 1937). It has been used by one group of creditors to force recognition by other groups of creditors of interests which might have been endangered by a foreclosure sale or by a continuation of the foreclosure receivership. *In re* Knickerbocker Hotel Co., 81 F. (2d) 981 (C.C.A. 7th, 1936).

[4] See Subsection (a) of the statute; see also (1937) 21 MARQ. L. REV. 87; Texas Co. v. Hauptman, 91 F. (2d) 449 (C.C.A. 9th, 1937).

[5] 294 U.S. 648 (1935). The statute provides in Subsection (b) that any plan must be submitted before confirmation for approval by prescribed majorities of each class of creditors and stockholders that will be affected by the plan. In any event no plan is to be confirmed which is not fair and feasible. [Subsection (f).] Provision is also made for approval on condition where the prescribed majorities to not consent. [Subsection (b) (4) and (5).] It is suggested here that protests against confirmation of particular plans are not likely to be decided on "constitutional" grounds. See Downtown Investment Co. v. Boston Metropolitan Bldg., 81 F. (2d) 314, 323 (C.C.A. 1st, 1936). The Court has already approved the general plan of the Section. The confirming of any plan that is not fair and feasible is an abuse of discretion. See Tennessee Publishing Co. v. American Nat'l Bank, 299 U.S. 18 (1936).