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Sales -- Implied Warranty -- Cigarette Manufacturer's Liability for Lung Cancer

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lingering, ominous cloud of illegality under the Robinson-Patman Act.

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Sales—Implied Warranty—Cigarette Manufacturer's Liability for Lung Cancer

Plaintiff's decedent initiated suit in the United States District Court for the Southern District of Florida to recover damages for personal injuries resulting from lung cancer allegedly incurred by smoking Lucky Strike cigarettes. Shortly thereafter, he died from this condition and this claim[1] was consolidated with another brought under the Florida wrongful death statute.[2] The district court submitted the case to the jury on theories of negligence and breach of implied warranty.[3] In addition to rendering a general verdict for defendant, the jury answered specific interrogatories[4] to the effect that the fatal lung cancer was proximately caused by the smoking of Lucky Strikes and that, as of the time of the discovery of the cancer, defendant could not by the reasonable application of human skill and foresight have known of the danger to users of his product. Judgment was entered for defendant, and on appeal the Fifth Circuit Court of Appeals affirmed,[5] holding defendant not liable as an in-

[1] Under Florida survival law, decedent's claim passed to the executor of his estate. FLA. STAT. ANN. § 45.11 (Supp. 1962).

[2] FLA. STAT. ANN. §§ 768.01, .02 (1959).

[3] The complaint asserted liability under six separate counts: breach of implied warranty; breach of express warranty; negligence; misrepresentation; battery; and violation of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301-392 (1958), the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-77 (1958), and the Florida Food, Drug and Cosmetic Act, FLA. STAT. ANN. § 500.01 (1962). The trial court directed verdict for defendant on all except the implied warranty and negligence counts.

[4] The questions submitted and answered were: "(1) Did the decedent Green have primary cancer in his left lung? [Answered, YES] .... (2) Was the cancer in his left lung the cause or one of the causes of his death? [Answered, YES] .... (3) Was the smoking of Lucky Strike cigarettes on the part of the decedent, Green, a proximate cause or one of the proximate causes of the development of cancer in his left lung? [Answered, YES] .... (4) Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known that users of Lucky Strike cigarettes, such as the decedent Green would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung? [Answered, NO] ...." Green v. American Tobacco Co., 304 F.2d 70, 71-72 (5th Cir. 1962).

[5] Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962).

surer under implied warranty for those consequences of the use of his product "of which no developed human skill and foresight could afford knowledge."[6] Petition for re-hearing was granted[7] and the legal question of absolute liability[8] was certified to the Supreme Court of Florida.[9] That court found that the common law[10] of Florida did impose absolute liability under the conditions posited in the question for breach of the implied warranty of merchantability.[11] The knowledge of defendant, either actual or implied, of the hazard of his product was held to be immaterial under this theory.

Although this is the first time a plaintiff has succeeded at this stage of cancer litigation against a cigarette manufacturer,[12] the

[6] *Id.* at 76.

[7] 304 F.2d at 85.

[8] The question certified: "Does the law of Florida impose upon 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?" 304 F.2d at 86. Note that the question is phrased in terms of the "reasonable" application of human skill and foresight. This accords with the question as submitted to the jury, but seems to conflict with other language of the opinion. See note 7 *supra* and accompanying text. See also Comment, 63 COLUM. L. REV. 515, 530, n.77 (1963), noting the inconsistency and offering the possible explanation that where a product is for human consumption, "reasonable" application of skill is equivalent to the absolute standard of the law of implied warranty. *Cf.* Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rep. 320 (Dist. Ct. App. 1960).

[9] Pursuant to statutory certification procedure. FLA. STAT. ANN. § 25.031 (1961).

[10] The Uniform Sales Act has not been adopted in Florida.

[11] Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).

[12] To date there have been six other decisions in cigarette-lung cancer litigation. In none has plaintiff recovered. Cooper v. R. J. Reynolds Tobacco Co., 158 F. Supp. 22 (D. Mass. 1957), *aff'd*, 256 F.2d 464 (1st Cir.), *cert. denied*, 358 U.S. 875 (1958), held that plaintiff was not in privity. Ross v. Phillip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958), *modified*, Civil No. 9494 (W.D. Mo. 1959), originally held that plaintiff was not in privity, but the decision was modified in light of the subsequent holding of the Missouri Supreme Court that privity is not required in Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547 (Mo. Sup. Ct. 1959). In Pritchard v. Liggett & Myers Tobacco Co., 134 F. Supp. 829. (W.D. Pa. 1955), *rev'd*, 295 F.2d 292 (3d Cir. 1961), it was held that the evidence was sufficient for the jury on the questions of negligence, implied warranty, and express warranty. See note 36 *infra*. In Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th

holding of the Florida court merely represents the extension of familiar principles of law to a new class of products.[13] There is no novelty in the idea that a vendor's liability under the theory of implied warranty turns upon whether or not the product is *in fact* unmerchantable, rather than upon any consideration of defendant's knowledge or the general foreseeability of the hazard involved.[14] An otherwise qualified plaintiff is ordinarily able to make out his case upon a showing that his injury resulted from a defect in the product and that such defect was present when the product left the control of the manufacturer.[15] Thus, the holdings of the court in the instant case that "no reasonable distinction can . . . be made between the physical or practical impossibility"[16] of obtaining knowledge of the danger and that liability attaches where the product "is not in fact merchantable"[17] is not a surprising application of legal principles. In Florida, then, liability is strictly imposed upon a manufacturer for injuries caused by a substance in his product, the harmful propensities of which were hitherto unsuspected even when the substance is both common and natural to the entire generic class to which the

Cir. 1963), it was held that there is no warranty liability for unknowable hazards. See text accompanying note 23 *infra*. The remaining two cases, Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961), and Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960), are not germane to the present discussion.

[13] The principles are familiar in that Florida is one of an apparently increasing number of jurisdictions which does not require privity in the food cases. See RESTATEMENT (SECOND), TORTS, Explanatory Notes § 402A-1, 2 (Tent. Draft No. 7, 1962) (listing twenty-four such jurisdictions). See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1103-10 (1960). Although Dean Prosser's primary inquiry is into the problems posed by privity requirements, the importance of this article as a starting point in any research into general considerations of the law of implied warranty cannot be over-emphasized.

[14] See, *e.g.*, Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961); Brown v. Globe Labs., 165 Neb. 138, 84 N.W.2d 151 (1957); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). See generally 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.01[1] (1963); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

[15] Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. Mun. App. 1962); Athens Canning Co. v. Ballard, 365 S.W.2d 369 (Tex. Civ. App. 1963). See also Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943). The argument has been advanced, however, that imposition of such absolute and automatic liability in cases where the product cannot be made free from defects is at least subject to question. 1 FRUMER & FRIEDMAN, *op. cit. supra* note 14, at § 16.01[1].

[16] Green v. American Tobacco Co., 154 So. 2d 169, 171 (Fla. 1963).

[17] *Ibid.*

product belongs. It is to such products as these that we direct present attention; for here is a liability which, definitionally, is more stringent even than "liability without fault." It imposes liability for *deviation from the perfect* under circumstances in which perfection is a scientific impossibility.[18]

Reluctance to saddle a class of defendants with liability of such a nature could be expected and it is not surprising that much recent attention has been focused on the problem. Courts and writers have taken a new look at the rapidly expanding field of "products liability," particularly the warranty of merchantability, and have speculated as to whether its scope should be so broad as to impose liability for every imperfect product and whether such defenses as contributory negligence and assumption of the risk should be available to the manufacturer.

The answers proposed have been as diverse as their proponents, but there seems to be a strong feeling among most that the "warranty" is *not* one of perfection. Some argue that the warranty is founded upon the presumed intent of the parties to the sale and that it arises only because of the superior opportunity of the manufacturer to discover and remedy defects before they can cause injury. Under this view, they would find no liability for the carcinogens contained in cigarettes, since the manufacturer cannot be said to warrant against a totally unknown hazard.[19] Another argument is that strict liability exists only for the foreseeable risks attending the use of the product.[20] The Fifth Circuit has applied this "foreseeability" limi-

[18] Such liability may perhaps be justified in cases involving unexpected effects of new drugs such as the tranquillizer thalidomide, the use of which precipitated thousands of deformities in new-born infants. There would necessarily have to be a balancing of policy considerations militating *in favor* of liability as a deterrant to premature marketing of such products and *opposed* to its imposition on the theory that it would impede the development of new products on the part of a liability-conscious manufacturer. The "impediment to research" argument was rejected by the court in Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rep. 320 (Dist. Ct. App. 1960). See 9 WAYNE L. REV. 383, 389-90 (1963).

[19] This is the rationale employed by some courts in denying liability of a retail merchant for defective food in sealed containers. Scruggins v. Jones, 207 Ky. 636, 269 S.W. 743 (1925); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933). Williston argues that this view is opposed both to the weight of authority and general principles of the common law. 1 WILLISTON, SALES, § 242 (rev. ed. 1948).

[20] See generally Harper, *The Foreseeability Factor in the Law of Torts*, 7 NOTRE DAME LAW. 468 (1932); 9 WAYNE L. REV. 383 (1963).

tation in *Lartigue v. R. J. Reynolds Tobacco Co.*[21] There the court said: "[T]here must be a foreseeability of harm.... [The manufacturer] is an insurer against foreseeable risks—but not against *unknowable* risks."[22] Still others take the position that liability is limited to the harm which flows from the "contemplated use" of the product, and defendant can avoid liability by proving to the jury that plaintiff's use is excessive or otherwise "uncontemplated."[23]

There are other views, equally well thought-out,[24] but the great majority of them share in contemplating some limitation on liability

[21] 317 F.2d 19 (5th Cir. 1963). Construing Louisiana law, the court rejected defendant's contention that recovery of plaintiff, if any, must be based on the statutory warranty against redhibitory vices (hidden defects). 317 F.2d at 29. It was held that there was in addition to this statutory warranty another—of "wholesomeness"—implied by law, and that for breach of this warranty, strict delictual (tortious) liability attached. 317 F.2d at 30. The court found, however, that such liability had never been imposed even in the food cases in Louisiana except where harm was a foreseeable consequence of a defective condition. 317 F.2d at 35. It has been forcefully argued that such a test as this frees the manufacturer from warranty liability unless he is *negligent*. FRUMER & FRIEDMAN, *op. cit. supra* note 14, at § 16.03[4][a].

The *Lartigue* court quotes at length from the opinion which it rendered in the *Green* case; and the holdings are very nearly indistinguishable. Both apparently assume that the applicable warranty was breached, but condition the resultant liability upon "knowledge of consequences" (*Green*) or "foreseeability of harm" (*Lartigue*).

[22] 317 F.2d at 36-37.

[23] Nelson v. Union Wire Rope Corp., 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963) (material hoist used to carry passengers); Vincent v. Nicholas E. Tsiknas Co., 337 Mass. 726, 151 N.E.2d 263 (1958) (beer can opener used on glass jar). See also Weston, *Contributory Negligence in Product Liability*, 12 CLEV.-MAR. L. REV. 424 (1963); Bushnell, *Illusory Defense of Contributory Negligence in Product Liability*, 12 CLEV.-MAR. L. REV. 412 (1963); 61 MICH. L. REV. 1180 (1963).

[24] A product may not be legally defective until science discovers the danger. Suggested in Dickerson, *The Basis of Strict Products Liability*, 16 FOOD DRUG COSM. L.J. 585, 594 (1961). Strict liability does not mean *strict* liability; the former differs from negligence only in that specific acts of negligence need not be proven, the latter is the kind imposed under workmen's compensation and is not applicable in this area. *Id.* at 592-93. Goods of first quality not required to satisfy the standard of "merchantability." 1 WILLISTON, SALES, § 243 (rev. ed. 1948). Warranty extends only to the "reasonable expectations" of consumer. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER, § 4.3 (1951). Substance not deleterious if "natural" to the product. Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936) (chicken bone in chicken pie); Brown v. Nebiker, 229 Iowa 1223, 296 N.W. 366 (1941) (sliver of pork bone in pork chop); Adams v. Great Atlantic & Pacific Tea Co., 251 N.C. 565, 112 S.E.2d 92 (1960) (crystallized corn kernel in corn flakes). See concurring opinion of Goodrich, J., in Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961). No liability for defect in an established product where defendant can have no knowledge of risk. Comment, 63 COLUM. L. REV. 515, 535 (1963).

in this area. In addition, the majority also seems to be in agreement on at least two essential points: first, that this is liability in *tort,* not contract, and that the law would be well served by the elimination of often misleading contractual language and concepts from the area;[25] and second, that while this new liability should be strict in the sense that plaintiff need not prove negligence to justify his recovery, it should *not* be strict in the sense that no defenses are available.[26]

It is generally conceded that the defense of assumption of the risk is applicable in actions brought under strict liability. Whether the court denominates the liability as contractual[27] or tortious,[28] it is recognized that where plaintiff voluntarily and unnecessarily proceeds in the face of a perceived risk, his recovery ought to be precluded. Of course, in cases such as *Green,* where there could have been no recognition of the danger, the defense is obviously inapplicable, but there is no logical reason why it should not apply to *future* plaintiffs—those who begin to use the product, or continue to use it in a climate of general knowledge that its use is likely to result in a given injury.[29]

The applicability of the defense of contributory negligence as a bar to recovery in these suits is less clear. Courts, trapped in the crippling concepts of contractual "warranty" are plainly reluctant to allow the use of purely tort theories,[30] and are forced to adopt

[25] See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer), supra* note 13. See also RESTATEMENT (SECOND), TORTS, § 402A, question 5 at 32 (Tent. Draft No. 6 1961), explaining deletion of word "warranty" from the section.

[26] See generally 1 FRUMER & FRIEDMAN, *op. cit. supra* note 14, at § 16.01[3].

[27] *E.g.,* Chapman v. Brown, 198 F. Supp. 78 (D.C. Hawaii 1961), *aff'd,* 304 F.2d 149 (9th Cir. 1962); Walker v. Hickory Packing Co., 200 N.C. 158, 16 S.E.2d 668 (1941). In a footnote to its opinion in *Green,* the Florida court noted without comment that the question of assumption of the risk was not raised in the case. 154 So. 2d at 170 n.2(a).

[28] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 67, 27 Cal. Rep. 697, 377 P.2d 897 (1963) (by implication). See generally 1 FRUMER & FRIEDMAN, *op. cit. supra* note 14, at § 16A[3][a]; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer), supra* note 13 at 1148 n.290 (1960).

[29] See generally PROSSER, TORTS, § 55 (2d ed. 1955).

[30] *But cf.* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 67, 27 Cal. Rep. 697, 377 P.2d 897 (1963). This was the first court to describe manufacturer's product liability as purely tortious. *Cf.* 1 FRUMER & FRIEDMAN, *op. cit. supra* note 14, at § 16A[2] (discussing implications of *Greenman*).

some other rationale such as "improper use"[31] to bar the recovery of the undeserving plaintiff.[32] There is an important line of cases, to which later reference will be made, which permit proof of contributory negligence as a defense to an award of consequential damages while refusing to allow its assertion in bar of the action.[33]

Such is the state of the law today. The courts, despite their instinctive dislike of extensive imposition of liability without fault, are being gradually pushed ever farther along the path indicated years ago in the *MacPherson* case.[34] The increasing complexities of modern life have forced some fettering of the right to freely engage in unrestricted enterprise. The imposition of absolute liability in tort upon the manufacturer for all his products is the easily recognizable trend.[35] The *Green* decision is but indicative of this trend.

In fairness, it must be conceded that both plaintiff and defendant in the cigarette cases can marshall equally valid and convincing arguments in support of their respective positions. For the plaintiff who took up smoking years ago, it might be contended that he was "encouraged" to adopt the habit.[36] Or, assuming no enticement, the

[31] *E.g.,* Nelson v. Union Wire Rope Corp., 39 Ill. App. 2d 73, 187 N.E. 2d 425 (1963); Vincent v. Nicholas E. Tsiknas Co., 337 Mass. 726, 151 N.E.2d 263 (1958). See generally 1 FRUMER & FRIEDMAN, *op. cit. supra* note 14, at §§ 16.01[3], 19.08[1].

[32] There are, however, cases which permit assertion of contributory negligence even in the warranty context. Sloan v. F. W. Woolworth Co., 193 Ill. App. 620 (1915); Parish v. Great Atlantic & Pacific Tea Co., 13 Misc. 2d 33, 177 N.Y.S.2d 7 (Mun. Ct. 1958). *Contra,* Hansen v. Firestone Tire and Rubber Co., 276 F.2d 254 (6th Cir. 1960); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939). See also Chapman v. Brown, 198 F. Supp. 78 (D.C. Hawaii 1961), *aff'd,* 304 F.2d 149 (9th Cir. 1962), where the court viewed contributory negligence as inapplicable unless it "practically amounts to an assumption of the risk." 198 F. Supp. at 86. See generally Prosser, *supra* note 13, at 1147-48; Weston, *supra* note 23.

[33] Razey v. J. B. Colt Co., 106 App. Div. 103, 94 N.Y.S. 59 (1905); Walker v. Hickory Packing Co., 220 N.C. 158, 6 S.E.2d 668 (1941). The rationale as expressed by Williston: "If the buyer's own fault or negligence contributed to the injury, as by using the goods with knowledge of their defects, he cannot recover consequential damages, since such damages were under the circumstances not proximately due to the breach of warranty." 3 WILLISTON, SALES § 614b (rev. ed. 1948).

[34] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). This case was the first to allow recovery from a remote vendor for pure negligence, and without regard to privity. Although not concerned with warranty, it is generally considered to be the landmark case in the area of products liability.

[35] "The assault upon the citadel ... is proceeding in these days apace." Prosser, *supra* note 13, at 1148.

[36] In the *Pritchard* case, the court discusses at length some of the adver-

argument remains that defendant is in a better position to absorb and pass on to the consuming public the losses occasioned by use of his product.[37] In favor of the "future" plaintiff referred to above, it could be asserted that, notwithstanding the climate of general knowledge in which he began to smoke, he could never, as a matter of law, assume the risk that his use of a *marketed product in its intended manner* would fatally injure him. Even if it were conclusively proven and announced daily that smoking causes cancer, it might still be argued that such public information should not insulate a manufacturer who is deliberately, *and for profit,* flooding the market-place with millions of potential killers.

Answering the first plaintiff above, defendant can righteously maintain that the defect was an "unknowable" one; that chemically, the defect was natural to and inseparable from the product; that he merely *processed* the product and added nothing to it which might cause injury; and that, while the standard of merchantability is admittedly higher than that of commercial acceptability when products destined for intimate human use are involved, it is still not an absolute guarantee of perfection. He may further contend that, although his position does enable him to pass his losses to the consuming public, this argument is valid only so long as there are a limited number of plaintiffs. As claims increase, his efforts to remain in business by distributing the loss would necessarily drive him into bankruptcy; and this, he can argue, is a result contrary to the policy favoring the satisfaction of a legitimate public demand in a free enterprise system. Each of these arguments can be as validly asserted against the "future" plaintiff; and to his claim, defendant could also affirmatively plead assumption of the risk.

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tising claims made by Liggett & Myers to the effect that smoking would "make you feel better," and that in order to "Play Safe—Smoke Chesterfield." 295 F.2d at 297. The court thought that a jury might find therein an express warranty, and reversed the directed verdict for defendant on this and other grounds. *Ibid.* The second trial ended in a verdict for defendant, the jury finding in answer to special interrogatories (1) That there had been no express warranty, (2) nor a breach of the warranty implied by law. They did expressly find that plaintiff had *assumed the risk.* N.Y. Times, Nov. 10, 1962, p. 27, col. 1.

[37] See the famous concurring opinion of Traynor, C. J., in Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944). Dean Prosser indicates that there has been a growing acceptance of the rationale even by some critics who initially denounced it as socialistic. Prosser, *supra* note 13, at 1120. See generally PROSSER, *op. cit. supra* note 29, § 56.

The likelihood of legislation outlawing the sale of cigarettes and their relegation to the present status of opiates seems slight, at least in the foreseeable future. Thus, unless science is able to afford a cure for cancer, the problem will be a continuing one. The courts, sensing this, have been understandably reluctant to open the way for the flood of litigation which is certain to follow the first successful plaintiff. But relief of some kind must eventually be granted, and the time for serious consideration of the alternatives is at hand. Several possibilities suggest themselves.

First, of course, the legislature might grant statutory exemption from liability to this class of manufacturer, though it seems unlikely from a public policy standpoint. Or, courts could accept the *Green* rationale, and permit recovery in cases where defendant is unable to assert assumption of the risk. This will subject manufacturers to an immediate inundation of suits by "old" users. The privity requirements[38] and similar barriers[39] prevalent in many states would serve to hold early recoveries down to some extent; and by the time the tort concept of the action achieves more general acceptance, most plaintiffs will be members of an "assuming" class. Losses might thus be distributed to the public with only a temporary requirement of a prohibitive price increase. Again, the situation might be solved by the manufacturers themselves. If they become convinced that plaintiffs will be more and more successful as time passes, they might direct their efforts toward limiting the award of damages. They would thus admit their liability and seek, through legislation, some form of regulated award similar to that now in effect in the area of workmen's compensation. In light of the historical trend toward ever-higher damage verdicts they might, by conceding liability now, avoid terrific loses in the future.

[38] North Carolina, for example, still requires privity for maintenance of an action on implied warranty, despite a strong dictum in Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951), to the contrary. Our latest pronouncement indicates that no change is impending. Wyatt v. North Carolina Equipment Co., 253 N.C. 355, 117 S.E.2d 21 (1960).

[39] Discussion of the other "barriers" in plaintiff's path is beyond the scope of this note. Throughout, it has been assumed that plaintiff was "otherwise qualified," and no attempt has been made to treat problems such as privity, proof of causation, effect of disclaimers, survival of the action, the requirement of service of adequate notice of breach to defendant, nor those related to the statute of limitations. Each could easily be the subject of a separate note or comment. The present effort has simply been an attempt to critically view the destination toward which the current law seems inevitably bound.

As the matter now stands, courts seem too concerned with *absolutes*. Both opinions in the *Green* case arrived at "total" resolutions of the question of liability—each diametrically opposed to the other. Neither recognized that, if all parties are to be justly treated, the situation is one which demands compromise. It is submitted that the best solution lies in judicial acceptance of the logic implicit in Williston's statement regarding the award of consequential damages.[40] For out-of-pocket expenses occasioned by use of a product, unmerchantable due to some common class defect, the courts should allow virtually automatic recovery. The question of damages beyond this amount, however, should be treated as a matter for separate consideration. So treated, this recovery should either be denied outright, or at the very least be deemed subject to a counter-attack by the manufacturer utilizing the classic tort defenses of contributory negligence and assumption of the risk.[41]

HENRY S. MANNING, JR.

Torts—Employer's Duty to Infant Independent Contractor

In a recent Pennsylvania case,[1] the administratrix of the estate of a deceased thirteen year old boy brought a wrongful death and survival action against the boy's employer, a newspaper publisher. The administratrix charged that the defendant was negligent in "that it permitted and caused him to travel a dangerous route in close proximity to a busy highway with a newspaper bag over his shoulders containing approximately 75 newspapers . . . ."[2] In an effort to avoid the effect of the workmen's compensation statute it was alleged that the deceased had been employed as an independent contractor. The defendant filed a motion to dismiss on the ground that the complaint failed to state a claim for relief. It contended that the characterization of deceased as an independent contractor was an admission that defedant had no control over the means by which the deceased accomplished his work and therefore it owed him no duty. However, the United States District Court for the Eastern District

[40] See note 33 *supra*.

[41] See cases cited note 24 *supra*. See also 36 So. CAL. L. REV. 490 (1963) (reaching essentially the same conclusion).

[1] Swartz v. Eberly, 212 F. Supp. 32 (E.D. Pa. 1962).

[2] *Id.* at 33.