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Cigarette Manufacturers' Warranty: Application of Old Law or New

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COMMENTS

CIGARETTE MANUFACTURERS' WARRANTY: APPLICATION OF OLD LAW OR NEW

I.

INTRODUCTION

Products liability has been, and continues to be, the subject of considerable controversy, and developing guidelines in this area will require the combined efforts of judges, lawyers and scholars.[1] "With the liability of the seller of chattels to the ultimate consumer once established on the basis of negligence, it was to be expected that some attempt would be made to carry his responsibility even further, and to find some ground for strict liability which would make him in effect an insurer of the safety of the product, even though he had exercised all reasonable care."[2] At common law, this attempt to impose a greater liability upon the manufacturer was manifested in the creation of the action for breach of warranty. An action on a warranty was regarded for centuries as an action of deceit, and it was not until 1778 that the first reported decision of an action in assumpsit on a warranty appeared.[3] Although retaining its tort character, a warranty action is now generally characterized as contractual in nature.[4] The English Sale of Goods Act,[5] which codified the existing case law, was the first statutory characterization of warranty as contractual. Section (15) 2 of the Uniform Sales Act[6] was copied almost verbatim from the first part of Section 14 (2) of the English Statute.[7] The implied condition of merchantable quality found in Uniform Sales Act is now specifically described in the Uniform Commercial Code as "a warranty . . . implied in a contract. . . ."[8]

1. Noel, *Strict Liability of Manufacturers,* 50 A.B.A.J. 446 (1964).

2. PROSSER, TORTS § 97 (3d ed. 1964).

3. Stuart v. Wilkins, 1 Doug. 18 (1778); 4 WILLISTON, CONTRACTS § 2689 (Rev. ed. 1936).

4. Gardiner v. Gray, 4 Camp. 144, 171 Eng. Rep. 46 (1815).

5. 56 & 57 Vict., ch. 71, § 14(2):
Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantible quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

6. 1 UNIFORM LAWS ANN. § 15(2) (1965 Supp.).

7. Prosser, *The Implied Warranty of Merchantible Quality,* 27 MINN. L. REV. 117 (1943).

8. UNIFORM COMMERCIAL CODE § 2-314 (1962).

While liability in warranty is termed strict, this does not mean that goods are warranted to be foolproof, or incapable of producing injury. By and large, the standard of safety for goods is the same under the warranty theory as under the negligence theory. In either action, the plaintiff must show: (1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some special use which was brought to the attention of the defendant, and (2) that the unreasonably dangerous condition existed when the goods left the defendant's hands.[9] However, considerable authority rejects these standards when the product is for human consumption. A more severe standard is then imposed: "The purveyor of victuals for human consumption always has been held to a *special responsibility* under the common law, although its precise nature and extent in the older cases has been a matter of some disagreement" (Emphasis added.).[10] The reasons for imposing this special responsibility are numerous. The primary contention is that

> when a manufacturer or a processor places food products in the channels of commerce for human consumption he assumes a special responsibility to the public. The consumer, helpless to protect himself, has the right to expect, in the case of products so vitally important to human existence and the health of the community, as food and other products for intimate bodily use, that the products are reasonably fit for the purposes for which they were sold. . . . Public policy demands that the burden of any accidental injuries caused by such products be placed upon those who produce the risks. The injuries from knowable risks are a cost of production for the industry to bear; they are passed on to the consumers. The consumer of such products is entitled to a maximum of protection at the hands of someone, and

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9. 2 HARPER & JAMES, TORTS § 28.22 (1956); *but see,* Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919, 922 (D.C. Mun. App. 1962) which held that the concepts of negligence and fault, as defined by negligence standards, have no place in warranty recovery cases.

10. PROSSER, TORTS § 97 (3d ed. 1964). This special responsibility borders on absolute liability.

> Liability in such cases is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principles of the public policy to protect human health and life. . . . It seems to be the rule that where food products sold for human consumption are unfit for that purpose, there is such an utter failure of the purpose for which the food is sold and the consequences of eating unsound food are so disastrous to human health and life that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.
>
> Since very early times the common law has applied more stringent rules to sales of food than to sales of other merchandise. . . . A majority of American courts that have followed this holding have not based such warranty upon an implied term in the contract between buyer and seller, nor upon any reliance by the buyer on the representation of the seller, but have imposed it as a matter of public policy in order to discourage the sale of unwholesome food.

Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); *accord,* Wiedeman v. Keller, 171 Ill. 93, 49 N.E. 210 (1897); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Hoover v. Peters, 18 Mich. 51 (1869); Race v. Krum, 222 N.Y. 410, 118 N.E. 854 (1918); Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915).

> the proper persons to afford it are those who receive the benefits from manufacturing and marketing the products.[11]

To ascertain the "knowable risks" one must use such foresight as is appropriate to his enterprise.[12] It is submitted that, although strict liability as applied to products for human consumption appears to be limited by the concept of foreseeability, the standard of foreseeability in this area is unlimited, with the manufacturer becoming, in turn, an insurer.

II.

NATURE OF THE PRODUCT

In order to determine the elements of products liability law applicable to cigarettes, it is necessary to determine the nature of that product. A survey of the case law dealing with cigarettes reveals that they have been classified with "food and drink and other articles intended for human consumption as products intended for intimate bodily use."[13] However, these cases present a slight anomaly since they were based in part upon a tentative draft of the Restatement of Torts, Second and, in the final draft of this section, the language concerning cigarettes was deleted.[14] Though the reasons for the deletion of cigarettes from this section are uncertain, its effect is rather clear. A plaintiff is subjected to the burden of showing that the standard of special responsibility extends to cigarettes, thereby bringing them within the above category. Although the Restatement has raised a question as to this classification, most courts will be quick to hold that cigarettes are within the category of products intended for human consumption.[15]

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11. Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19, 36 (5th Cir. 1963).

12. See, Mr. Justice Jackson's dissenting opinion in Dalehite v. United States, 346 U.S. 15, 51-52 (1953):

> This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. There no longer are natural or simple products but complex ones whose compositions and qualities are often secret. Such a dependent society must exact a greater care than in more simple days and must require from manufacturers or products increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent dangers. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his enterprise.

13. Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19, 35 (5th Cir. 1963) [citing RESTATEMENT, TORTS (SECOND) § 402A comment, Tent. Draft No. 7 (1962)]; Ross v. Philip Morris & Co., 328 F.2d 3, 13 (8th Cir. 1964); accord, Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).

14. RESTATEMENT, TORTS (SECOND) § 402A comment (1965).

15. See, 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03[4] (1965).

III.

IMPLIED WARRANTY OF CIGARETTES

A. *Generally*

The application of warranty law to food, when employed in cigarette-cancer cases, has raised a myriad array of perplexing problems. An examination of these decisions and the problems encountered therein will demonstrate the uniqueness of the cigarette in the products liability area. The courts are in a quandary in determining whether to categorize this problem within an existing legal pigeonhole or to devise an entirely new approach.

Cigarette-cancer cases are unlike the usual product liability cases in that the product involved generally meets all commercial standards,[16] and causation is generally accepted by juries.[17] Moreover, since they are closely akin to food cases, the requirement of privity is no longer a problem.[18] The controversy in these cases centers rather around the nature and the scope of the manufacturer's implied warranty. The precise question posed is whether the manufacturer's liability should be limited by his inability to gain knowledge of the possible harmful effects which no developed human skill or foresight could afford him.

B. Green *Interpretation*

The first significant opinion dealing with this question is *Green v. American Tobacco Co.*[19] The plaintiff proposing a theory of implied warranty of fitness for human consumption in the Court of Appeals, contended that the knowledge of the manufacturer is irrelevant and immaterial to his liability on an implied warranty under Florida law, and that the warranty is not limited to harmful substances of which the manufacturer either had knowledge or should have had knowledge or could have had knowledge according to developed human skill and

16. Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 297 (3d Cir. 1961).
> [T]he district court could charge the jury that they are to consider the practices of other cigarette manufacturers and the quality of cigarettes they manufacture as bearing on the question of merchantibility. Such practices, however, are not conclusive, for 'what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.'

17. Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962); Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961).

18. 'The assault upon the citadel of privity is proceeding in these days apace.' So said Cardozo in 1931, and has been much quoted since. With the passage of nearly thirty years, a goodly part of the citadel still holds out; but the assault goes on with unabated vigor.
Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960). It is submitted that, as to the liability of food producers and processors, the citadel has been conquered. 10 VILL. L. REV. 607, 609 (1965).

19. 304 F.2d 70 (5th Cir. 1962), question certified to Supreme Court of Florida, 154 So. 2d 169 (Fla. 1963), 325 F.2d 673 (5th Cir. 1963); *cert. denied*, 377 U.S. 943 (1963).

foresight.[20] The court interpreted the plaintiff's approach as being a doctrine of *absolute* liability.[21] Reasoning that the doctrine of absolute liability was founded on the manufacturer's superior opportuntity to gain knowledge of the fitness of his product and the consumer's justifiable reliance on the judgment or skill of the manufacturer, the court concluded that the manufacturer could not be held as an *absolute* insurer against consequences about which no developed human skill and foresight could afford knowledge and, therefore, under Florida law, no warranty would be imposed.[22]

Judge Cameron's dissenting opinion expressed grave doubts about the majority's interpretation of the status of Florida warranty law, and reached a conclusion directly opposed to the majority. After a thorough survey of the Florida case law,[23] he stated unequivocally that the majority's reasoning was in error. He interpreted these cases as establishing the principle that, as to items of food or other products in the original package, which are offered for sale for human consumption or use generally, the buyer may hold the manufacturer liabile for injuries sustained by him on the theory of an implied warranty of wholesomeness or fitness of such article or product for the purposes for which it was offered to the public. He equates this with the imposition of absolute liability unaffected by any limitation of foreseeability. ". . . [O]ne who warrants wholesomeness can [not] escape liability by showing that it exercised reasonable care in its efforts to achieve it. Such an idea is, in my opinion, a refutation of the whole concept of warranty".[24] The question considered by the court was restricted to the imposition of liability and did not deal with the scope of the warranty. The dissent, however, in order to arrive at its conclusion of absolute liability necessarily decided, by implication, that foreseeability is inapplicable to both the imposition and the scope of the warranty. Although this may have been done unconsciously, the dissent brought to the fore the distinction to be made between the imposition and the scope of implied warranties in cigarette-cancer cases. On petition for rehearing, this court, evidently not totally convinced by their own reasoning and disturbed by the strong dissent of their fellow judges,[25] granted the petition to the extent necessary to certify to the Florida

20. *Id.* at 73.

21. Absolute liability must be distinguished from strict liability. Absolute liability has been imposed when the plaintiff alleges an implied warranty of fitness for human consumption and a jury finds the product unfit. Inability to foresee the harm is irrelevant. In the case of strict liability, however, the product is not warranted to be foolproof; the warranty is limited by the inability to gain knowledge of the harm through the utilization of all human skill and foresight.

22. *Supra* note 19, at 73.

23. From these cases it is obvious that Florida is the vanguard of those states, as yet numerically in the minority, which are holding purveyors of food and other products for human consumption to an absolute liability under the doctrine of implied warranty. Green v. American Tobacco Co., 304 F.2d 70, 81 (1962) (dissenting opinion, n.6); *see also,* Parkinson and Sanders, *Implied Warranty in Florida,* 12 U. FLA. L. REV. 241, 253 (1959).

24. *Supra* note 19, at 78.

25. *Supra* note 19, at 77.

Supreme Court the question as to whether the law of Florida *imposed* absolute liability under these circumstances.[26]

This distinction between imposition and scope of the warranty was recognized by the Florida Supreme Court in its answer to the certified question.[27] The court prefaced its answer by stating that the question as framed did not present for their consideration a statement of the scope of the warranty implied in the circumstances of the case.[28] The inquiry was limited to the status of Florida law upon imposition of liability for breach of implied warranty, when the manufacturer could not, by reasonable application of human skill or foresight, have known of the danger. The court stated that the Florida decisions[29] conclusively establish the principle that a manufacturer's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on an implied warranty, thus answering the certified question in the affirmative.[30] It further stated, "To the extent that our cases take note of the defendant's opportunity for knowledge, it is merely in recognition of a supplier's superior position relative to the purchasing public, as a factor affecting policy considerations, rather than determining the limits of implied warranty liability in a particular situation."[31] The court, going beyond the certified question, appeared to consider the scope of the warranty in its discussion of the wholesomeness of the product. In refuting the defendant's contention, the court stated, "wholesomeness of a product should not be determined on any standard other than its *actual safety for human consumption,* when supplied for that purpose . . . "[32] and rejected the argument that prevailing industry standards supplant the ordinary standard of objective truth and proof, and should be conclusive on the issue of the product's reasonable fitness for human consumption. This position arises from the policy of protecting public health from exploitation by those who, for a profit motive, undertake to supply the ever increasing variety of products which the people through high pressure

26. *Supra* note 19, at 86.
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?
27. Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).
28. *Id.* at 170. The court also noted that it would not deal with the questions of causation, privity, or whether the cigarettes, in this instance, were as a matter of law unmerchantable in Florida.
29. Carter v. Hector Supply Co., 128 So. 2d 390 (Fla. 1961); Sencer v. Carl's Markets, 45 So. 2d 671 (Fla. 1950). The latter case illustrates that whatever may be the scope of an implied warranty in a given case, the basis of such liability is the undertaking or agreement, imposed by law upon the manufacturer, to be responsible in the event the thing sold is not in fact merchantable or fit for its ordinary use or purposes.
30. *Supra* note 24.
31. *Supra* note 27, at 171.
32. *Supra* note 27, at 173.

advertising are daily urged to use and consume. Under this interpretation of Florida law, this court would apply the same standards of products liability to cigarette manufacturers as they have applied to food manufacturers and processors — absolute liability.

The Court of Appeal, after a most sincere expression of their appreciation to the Supreme Court of Florida for their answer to the certified question, performed a masterpiece of judicial surgery in circumventing that court's interpretation of Florida law. It accepted the interpretation given as a proper statement of the status of Florida law on the question, yet, by narrowly limiting that court's opinion to imposition of liability, it effectively frustrated the application of Florida law.[33] Had this court applied the Florida Supreme Court's statement of Florida law to the case in light of the interrogatories[34] answered by the jury in the District Court, and followed standard prescribed by the Supreme Court for determining "wholesomeness",[35] the inevitable result would have been the imposition of absolute liability on the defendant-manufacturer, and a judgment for the plaintiff. This is a necessary implication since the Florida court had indicated that "actual safety for human consumption" should be the criteria and the jury expressly found actual causation.

This court, although recognizing that the answered interrogatories had made the finding, felt compelled to submit to the jury the question as to whether the cigarettes were reasonably fit and wholesome before they could render a decision in favor of the plaintiff. Reasoning that the interrogatories did not exhaust the available defenses, since the district court required a general verdict[36] and not a special verdict in the form of a special written finding upon each issue of fact,[37] the court felt that

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33. See note 60 *infra.*

34. (1) Did the decedent Green have primary cancer in his left lung?
Yes (x) No (___)
If your answer is 'yes,' then
(2) Was the cancer in his left lung the cause or one of the causes of his death?
Yes (x) No (___)
If your answer to the above question is 'yes,' then
(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?
Yes (x) No (___)
If your answer to the above question is 'yes,' then
(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?
Yes (___) No (x)

35. The contention that the wholesomeness of a product should be determined on any standard other than its actual safety for human consumption, . . . is a novel proposition in our law, and one which we are persuaded has no foundation in the decided cases.
Green v. American Tobacco Co., 154 So. 2d 169, 173 (Fla. 1963).

36. FED. R. CIV. P. 49(b).

37. FED. R. CIV. P. 49(a).

the jury never considered the issue of wholesomeness.[38] The court stated that in these cases there is an undertaking or agreement on the part of the seller to be responsible in the event the cigarettes are not in fact reasonably wholesome or fit for human consumption. In light of the answered interrogatories and the acknowledgment of the certified Florida law, it seems this court was saying foreseeability did play a role in determining the *scope* of the warranty, that is, in defining "reasonably wholesome."

The apparent conflict between the answer to the certified question and its application to the case at bar by the circuit court may center about the deference to be accorded the Florida court's answer. The certification procedure,[39] although a fine example of judicial cooperation, is subject to objections that it induces abstract answers by severing legal questions from the facts which spawned them, and that it elicits advisory opinions from the answering courts.[40] The answer to such a certified question is necessarily an advisory opinion since, under existing standards, a Federal court, although it must apply state law, need only apply court decisions directly on point. Although such answer is to be given deference, it is by no means binding. Other factors to be considered by the court in determining state law are analogous or related state court decisions, the federal court's own reasoning as to the intended public policy, and any other reliable data tending to show the status of the state law.[41] The conclusion to be drawn is essentially, that the circuit court accepted the reasoning of the Florida Supreme Court solely as to the imposition of *absolute* liability and proceeded to apply a theory of *strict* liability as defined by the law of Louisiana[42] and California.[43] As the dissenting opinion

38. It appears from the district court's charge to the jury that the written interrogatories were not intended to cover each and every issue of fact, but, 'they are interrogatories which counsel described in their arguments, seeking to find from you your opinion on certain factual matters that have occurred in this trial.' Green v. American Tobacco Co., 325 F.2d 673, 677 (5th Cir. 1963).

39. FLA. STAT. ANN. tit. 5, § 25.031 (1957):
The supreme court of this state may, by rule of court, provide that, when it shall appear to the supreme court of the United States, to any circuit court of appeals of the United States, or to the court of appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the supreme court of this state, such federal appellate court may certify such questions or propositions of the laws of this state to the supreme court of this state for instructions concerning such questions or propositions of state law, which certificate the supreme court of this state, by written opinion, may answer.

40. 111 U. PA. L. REV. 344, 350 (1963).

41. 1A MOORE, FEDERAL PRACTICE, 0.309[2] (2d ed. 1965).

42. Lartigue v. R. J. Reynolds Tobacco Co., 317 F. 2d 19 (5th Cir. 1963).

43. 2 HARPER & JAMES, TORTS § 28.22, p. 1584 (1961):
In a recent California case the court said, 'the essential inquiry, thus, is the same in respect to the breach of warranty theory as to the negligence claim; whether the defendant complied with the standard of reasonable care in ascertaining the fitness of the chattel for the use for which he knew it was hired. Tierstein v. Licht, 174 Cal. App. 2d 835, 345 P.2d 341 (1959). It is submitted that this case deals with the bailment of a chattel, and this area is not relevant to a consideration of absolute liability in the food or cigarette cases.

of Judge Cameron[44] so aptly stated, it would be a complete rejection of the law of warranty to hold that it could be abrogated by requiring the plaintiff to show that cigarettes were not *reasonably fit and wholesome for use by the general public,* even though he had already proven himself injured by the smoking of cigarettes. The words "reasonably fit and wholesome" as used in this warranty are intended to demonstrate the universality of its application. The warranty extends to every member of the public, covering the liability of the tobacco company to each separate individual to whom a sale is made. "The finding of the jury has settled the fact that the cigarettes sold to Green were not reasonably fit and wholesome for use by him. No other question is, in my opinion, involved under the law of Florida, with which, alone we are dealing."[45] From this statement it would appear that Judge Cameron would apply a theory of absolute liability, requiring the showing of (1) the sale of an item warranted to be fit and wholesome, (2) an injury to the plaintiff and (3) proof that the product caused the plaintiff's injury. Thus, the causal relationship between the use of the warranted product and the injury would be sufficient to render the product unfit and unwholesome according to the Florida Supreme Court's standard of its *actual safety* for consumption.[46] A product cannot be actually safe if its basic nature and content has caused injury.

In the adjudication of a suit based solely upon the diversity of citizenship of the parties, the federal court is in effect only another court of the state. ". . . It cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."[47] "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result."[48] Though the advisory opinion issued by the Florida Supreme Court is not binding upon the federal courts of Florida, in rejecting at least a portion of this decision the appellate court has created the situation so vehemently condemned by the *Erie-Guaranty Trust* Doctrine.

C. Lartigue *Interpretation*

The appellate court in *Green*[49] used, as substantial authority for their decision, the case of *Lartigue v. R. J. Reynolds Tobacco Co.*[50] As aforementioned, the court applied the *strict* liability test of *Lartigue,* a decision rendered in accordance with an interpretation of the Civil Code of

44. Green v. American Tobacco Co., 325 F.2d 673, 681 (5th Cir. 1963).
45. *Ibid.*
46. Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).
47. Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945).
48. *Id.* at 109.
49. 325 F.2d 673 (5th Cir. 1963).
50. 317 F.2d 19 (5th Cir. 1963).

Louisiana.[51] The facts of *Lartigue* are essentially the same as those of *Green*. This action to compensate for the death of the plaintiff's husband from cancer of the larynx, allegedly caused by his smoking of the defendant-manufacturer's cigarettes asserted claims in both negligence and breach of implied warranty. The district court rendered judgment on the jury's general verdict for the defendant. The appellant contended that the trial judge's instructions[52] to the jury on the nature of the implied warranty were contrary to Louisiana law. The court acknowledged that such terms as "knowledge", "reasonable diligence", "reasonably foreseeable", "reasonably fit" and "reasonable care" are ordinarily associated with negligence, but determined that they are properly used when recovery is sought against a manufacturer on the ground of breach of warranty. These terms define the nature and scope of a manufacturer's so-called "warranty" (law-imposed duty) to consumers.[53] The foreseeability relevant to warranty was differentiated from that applied in negligence. "It is not the foreseeability of unreasonable risks, but rather the foreseeability of the kinds of risks which the enterprise is likely to create."[54] Warranty under Louisiana law was characterized as ". . . not contractual but as strict liability in tort, independent of negligence."[55] The court interpreted Louisiana law to mean that the manufacturer's warranty is almost tantamount to making him an insurer but only as against foreseeable risks. Thus, the standard of safety of the goods is the same under the warranty theory as under the negligence theory.[56] It was observed that, thus far, public policy has not decreed absolute liability for the harmful effects which no developed skill or foresight can avoid.

The progression of events in the *Green-Lartigue* relationship, when fully appreciated, points up the confusion which pervades the cigarette cases. It must be observed that: (1) the initial *Green* decision affirmed the district court's application of a foreseeability limitation on implied warranty liability; (2) *Lartigue* accepted the limitation imposed by the district court, using *Green*[57] as authority; (3) The Supreme Court of Florida, in answer to the certified question, held the district court's interpretation of Florida law erroneous in its application of the foresee-

51. LA. CIV. CODE arts. 2315, 2316, 2475, 2476, 2520, 2531, 2545, 2547 (Supp. 1965).

52. ". . . The warranty of general quality which is implied by Louisiana law is only as to those qualities of which a manufacturer can have knowledge in the exercise of reasonable diligence, the absence of which causes damages that is reasonably foreseeable." Lartigue v. R. J. Reynolds Co., *supra* note 50, at 23.

53. *Id.* at 24.

54. James, *Strict Liability of Manufacturers,* 24 TENN. L. REV. 923, 925 (1957). Since the basic philosophy of warranty law is to provide a plaintiff with a cause of action when in a negligence action he could not show the requisite elements, it appears that this application of foreseeability as a limitation on the scope of the warranty, imposes on the plaintiff a more difficult burden than he would have faced in a negligence action.

55. *Supra* note 50, at 26.

56. *Supra* note 50, at 37. Under this theory the goods are not warranted to be foolproof or incapable of producing injury.

57. 304 F.2d 70 (5th Cir. 1962).

ability limitation to the imposition of warranty liability in *Green*[58]; The *Green* Circuit Court then accepted the answer to the certified question to the extent that under Florida Law, foreseeability would not be applied when imposing absolute liability. However, it remanded the case to the district court for jury consideration of the issue of whether the product was "reasonably wholesome", citing *Lartigue* as authority for this proposition. To emphasize the obvious, upon its initial consideration of *Green,* the appellate court affirmed the district court; *Lartigue* then cited the *Green* court of appeals decision; subsequently, the *Green* district court's interpretation of Florida law was found erroneous by the Supreme Court of Florida; the second consideration of *Green* by the appellate court then cited *Lartigue,* which, in effect, amounted to citing their own prior erroneous affirmation of the district court.

D. Ross *Interpretation*

The next significant decision in the area was *Ross v. Phillip Morris and Co.*[59] The facts, being essentially the same as those already discussed in *Green* and *Lartigue,* need not be reiterated.[60] The plaintiff's main contention on appeal concerned the district court's charge to the jury on the nature and scope of defendant's warranties. The plaintiff proposed a jury instruction that Missouri ". . . law implies a warranty of fitness for human consumption to the smoker of such products irrespective of whether the manufacturer did not know, or even could not have known, in the exercise of the ultimate in care, skill and foresight, that the product may have contained any harmful, dangerous and deleterious substances or ingredients."[61] The district court, in rejecting the suggested charge, applied a foreseeability limitation to the scope of the manufacturer's implied warranty. The circuit court found the instruction to be the correct interpretation of Missouri law,[62] reasoning that ". . . under the proper factual situation, the Missouri courts would impose the same strict liability upon a manufacturer of

58. 154 So. 2d 169 (Fla. 1963). The Florida Supreme Court did not intend to limit their answer to the imposition of liability, for they unequivocally stated that the test of wholesomeness to be that of "actual safety," which intimates that foreseeability is irrelevant when considering an implied warranty as to food in Florida.

59. 328 F.2d 3 (8th Cir. 1964).

60. The plaintiff's complaint alleged three counts: (1) breach of an implied warranty, (2) negligence, (3) fraud and deceit by false advertising. On this appeal, the only remaining count was that of breach of implied warranty.

61. *Supra* note 59, at 6. This instruction would require a verdict for the plaintiff if the jury found that there were harmful carcinogenic substances in the defendant's product and that the smoking of the defendant's product caused the plaintiff's injury.

62. It is interesting to note that the court focused its attention on cigarette-cancer cases from other jurisdictions in attempting to determine the nature and scope of this warranty. Having all of the *Green* decisions before it, this court interpreted the Florida Supreme Court's answer to the certified question as stating that under Florida law, implied warranty liability is not limited by the foreseeability doctrine, the "reasonable application of human skill and foresight" test of tort liability. However, merely because the district below, referred to Green with approval before the Florida Supreme Court responded contrarily in the certification proceeding, they did not feel compelled to hold that the Missouri Supreme Court would arrive at the same conclusion as the Florida Court. *Supra* note 59, at 12. Query, is this the interpretation that the Fifth Circuit should have given to the Florida Supreme Court's opinion as to the status of that state's law?

cigarettes as has been applied in the food and beverage cases."[63] Considerations of public policy and the protection of the health of the consuming public require ". . . that his liability should be made absolute."[64] Public policy desirious of protecting the health of the consumer has given rise to the presumption of foreseeability on the part of the manufacturer. This presumption is not difficult to impose, since the deleterious effects of any adulteration or putrefication of a pure food product are readily foreseeable.

Once again, the court reasoned that the imposition of absolute liability upon the manufacturer was dependent upon his possessing a superior position to gain knowledge of the contents of the product which he places on the market. In the court's considered view, under the facts in this case, they ". . . failed to comprehend how the ends of justice could be served by adopting the fiction that the manufacturer of cigarettes was — as early as 1934 (when plaintiff began smoking defendants cigarettes exclusively) — in a better position, except in theory, than the consumer to ascertain the now highly-publicized causative relationship between smoking and cancer. . . ."[65] Citing *Lartigue*,[66] the court held that, thus far, public policy has not decreed absolute liability for those harmful effects which no developed skill or foresight could avoid. Though the manufacturer may be an insurer against the unknown, that is not his status in regard to the unknowable.[67]

IV.

FOOD LAW OR NEW LAW

Admittedly, the law of products liability is in a state of flux; guidelines are not sharp and clear, and the warranties (such as they are now) overlap.[68] As aforementioned, the crux of this problem is whether or not there is a breach, if the defect or hazard is one which, at the time of the product's manufacture and distribution, was scientifically unknowable.[69] When the courts impose a foreseeability limitation on the implied warranty, in essence, they are asking, "It there a breach?" *Lartigue*[70] and *Ross*[71] hold that, since such a defect or hazard is not foreseeable,

63. *Supra* note 59, at 8.
64. Williams v. Coca Cola Bottling Co., 285 S.W. 53, 55 (Mo. App. 1955). Thus, this strict liability as applied to food and beverage cases is tantamount to *absolute* liability; however, these cases involve products containing readily identifiable foreign matter, inherently nauseous, deleterious, or putrid. In every case the risk of harm could reasonably have been foreseen as a consequence of the defect. Ross v. Philip Morris & Co., 328 F.2d 3, 9 (8th Cir. 1964).
65. *Supra* note 59, at 8.
It is perhaps tempting in the light of knowledge of today to create the thought that defendant should have been aware of the cancer-smoking relationship. . . . However, it should be carefully noted that this case must be decided on the facts as they existed in the light of the knowledge of the early 1930's to 1952.
66. Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19, 39, 40 (5th Cir. 1963).
67. *Supra* note 59, at 11.
68. Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19, 39 (1963).
69. 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.03[4] (1965).
70. *Supra* note 68.
71. *Supra* note 59.

no warranty on the manufacturer's part can arise as to it. Hence, even though a jury could find the cigarettes "unwholesome" or "not reasonably fit", liability will not be imposed on the cigarette manufacturer.[72] Therefore, since no warranty arises, no breach can be found.

In *Green*,[73] however, the court found that foreseeability does not limit the imposition of implied warranty liability in Florida. The warranty does arise. Whether it has been breached will be determined by the jury. Their finding that the cigarettes were not reasonably wholesome will impose warranty liability. Under this interpretation, the foreseeability limitation defines the scope of the warranty though it does not affect imposition.

The courts categorize cigarettes as food and state that they are applying food law.[74] However, whether, in fact, this is food law and further, whether such should be applied remain questionable propositions. The liability of the food manufacturer, whether labeled strict[75] or absolute is a tantamount to holding him as an insurer, since all risks incident to adulterated or defective food are foreseeable; once causation is determined, the issue of foreseeability is irrelevant. It is submitted that the courts, in effect, are not applying food law to the cigarette-cancer cases, since foreseeability has been considered. In doing so, the courts have reverted to more general concepts of strict liability.

This reluctance on the part of the courts to hold the manufacturer to the special responsibility of a food manufacturer is due to the unique nature of cigarettes. They differ from food products in that the attendant risks could not, and still may not, be foreseen.[76] The policy considerations that gave birth to absolute liability in the area of food products are primarily: (1) the manufacturer's superior position for detecting any defects in his product, and the presumed reliance of the public on that position;[77] (2) the coercive effect that flows from the imposition of absolute liability;[78] and (3) the distribution of loss effect.[79] When the cigarette

72. In these two cases, the issue of unwholesomeness was never submitted to the jury, since the courts first considered whether or not a warranty had arisen and disposed of the cases at that point.

73. *Supra* note 44.

As suggested by Judge Cameron, the finding by the jury of proximate causation settles the issue in favor of holding that the cigarettes were not reasonably fit and wholesome for use by the plaintiff. *Supra* note 44, at 681. This is an application of the "actual safety" test as enunciated by the Florida Supreme Court. *Supra* note 58, at 173.

74. *Supra* note 13.

75. Strict liability as applied to food has been defined as imposing a special responsibility upon the manufacturer over and above the general concept of strict liability. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

76. James, *Strict Liability of Manufacturers*, 24 TENN. L. REV. 923, 925 (1957). "It is not the foreseeability of unreasonable risks, but rather the foreseeability of the kinds of risks the enterprise is likely to create." *Ibid.*

77. Dalehite v. United States, 346 U.S. 15 (1953).

78. Holding the manufacturer to such a high standard forces him to maintain a high standard of quality in his product. This is also termed a "deterrent effect." 63 COLUM. L. REV. 515, 530 (1963).

79. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Morris, *Enterprise Liability and the Actuarial Process — the Insignificance of Foresight*, 70 YALE L.J. 555 (1961).

manufacturer's position is considered in light of these policy considerations, some distinctions become obvious. The manufacturer has no superior position to detect the unwholesome characteristics of its products, since there is conclusive evidence to the effect that such agents could not have been discovered by the reasonable application of human skill and foresight. Therefore, this policy should not demand the application of absolute liability.[80] Imposition of a coercive element is, likewise, of questionable significance when considered in this context. In the case of cigarettes, because of the high standards of reasonable care required by negligence laws with regard to both manufacture and research, it is somewhat suspect that any greater deterent effect would flow from the imposition of absolute liability. In any case, it is highly doubtful that greater care could lead to a safer product. The distribution of loss effect presents the best argument for the imposition of absolute liability, where the manufacturer could not have known the risk. In such a situation, the manufacturer is in a much better position to secure insurance for such a risk, and to finance such protection through an increase in the sales price. In this way, the smokers who indulge in this costly luxury would insure each other through policies administered by the manufacturers.

In light of the foregoing discussion, it is submitted that the only reason for the imposition of absolute liability in a cigarette case is to distribute the risk. In food cases, this is the least important of the policy considerations, and it should be of no greater importance in cigarette cases. It is submitted that the courts in *Green, Lartigue* and *Ross,* although at times suffering from conceptual confusion, were correct in refusing to apply the doctrine of absolute liability, as such a doctrine would cure no ills. Rather, it could destroy an industry which only legislation, if anything, should be permitted to seriously affect. The case most compatible with the foregoing discussion is *Ross v. Philip Morris & Co.*[81] This court found no controlling public policy which compelled absolute liability, or even made it desirable, for harmful effects which no developed skill or foresight could avoid. However, in the proper circumstances, that is, where the harm could be foreseen by the manufacturer, this court would impose liability. Therefore, a plaintiff's action will not be foreclosed, but only forestalled until the day he can show that it was unreasonable for the manufacturer to place the cigarettes on the market. At the same time, this will give the manufacturer additional time, in light of present scientific developments, either to take added precautions in the manufacture of his product, or to secure the necessary liability protection. He will not, therefore, be held liable for the harmful consequences of putting on the market a socially desirable product, the wholesomeness of which no human foresight or scientific skills can determine.

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80. 63 COLUM. L. REV. 515, 530 (1963).

81. *Supra* note 59.

V.

EXPRESS WARRANTY

A more favorable approach for a plaintiff in the cigarette-cancer area is an action based on express warranty. An express warranty arises where a seller, supplier, or manufacturer makes a *positive representation* of fact concerning the goods he sells,[82] while an implied warranty, either that a product is merchantable or fit for a particular purpose, is imposed by operation of law.

In *Pritchard v. Liggett & Myers Tobacco Co.*,[83] the plaintiff claimed damages for personal injury, alleging that he contracted lung cancer as a result of having smoked Chesterfield cigarettes for many years. Discussion of this case is valuable only to the extent of its consideration of the express warranty issue, all other causes of action having been abandoned.[84] The plaintiff based his express warranty claim on newspaper advertisements,[85] assurances of wholesomeness in national magazines[86] and a systematic and nationwide advertising campaign culminating in statements on a national television program featuring Arthur Godfrey. In essence, these statements assured the smoker that "Nose, throat, and accessory organs [are] not adversely affected by smoking Chesterfields."[87] On initial appeal, the court found, "the evidence compellingly points to an express warranty, by the defendant, by means of various advertising media, not only repeatedly assuring plaintiff that smoking Chesterfields was absolutely harmless, but in addition the jury could very well have concluded that there were express assurances of no harmful effect on the lungs.[88] On remand,

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82. UNIFORM SALES ACT § 12.

> Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon.

See also, UNIFORM COMMERCIAL CODE § 2-313, 1962 official text, which provides in the pertinent part:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

83. 134 F. Supp. 829 (W.D. Pa. 1955), 295 F.2d 292 (3d Cir. 1961), 350 F.2d 479 (3d Cir. 1965).

84. Plaintiff brought suit on counts of negligence and breach of warranty, both express and implied. Since the plaintiff's purchases and smoking of the manufacturers cigarettes, plus the removal of the plaintiff's lung occurred before the effective date of the Uniform Commercial Code (July 1, 1954) this action was controlled by the Uniform Sales Act. It is submitted that the application of the Uniform Commercial Code would not affect the outcome of this case.

85. The Pittsburgh Press, July 16, 1934; "A good cigarette can cause no ills and cure no ailments . . . but it gives you a lot of pleasure, peace of mind and comfort." Later that month (The Pittsburgh Press, July 26, 1934) it was said: "There is no purer cigarette made than Chesterfields."

86. Time, February 20, 1950; Life, February 23, March 23, April 20, June 1, August 3, and August 10, 1953; Saturday Evening Post, December 19, 1931.

87. Life, January 26, 1953; Program of September 17 and 24, 1952.

88. 295 F.2d at 296; see statements by defendant, *supra* notes 85, 86, 87.

the district court submitted the issues to the jury on a series of special interrogatories, of which all except one were answered adversely to the plaintiff. The jury found: (1) the plaintiff's smoking of Chesterfield Cigarettes was the cause or one of the causes of the cancer; (2) the defendant was not charageable with negligence; (3) the defendant made no express warranties upon which the plaintiff relied and by which he was induced to purchase the cigarettes; and (4) the plaintiff assumed the risk of injury by smoking the cigarettes. A judgment for the defendant in accord with the special findings was entered.[89]

The breach of warranty issue was tried on the assumption that reliance by the purchaser was an essential element of an express warranty as defined by statute, and therefore requisite for a cause of action for its breach. The plaintiff endeavored to show that the advertisements were an inducement to the public and, in reliance thereon, he regularly purchased and smoked Chesterfields. His testimony apparently failed to impress the jury.[90] The appellate court, upon its consideration of the second district court proceedings, held that, although their instructions were a correct statement of majority rule concerning reliance, that rule is not applicable where the factual affirmations run to the public and their natural tendency is to induce a purchase.[91] Therefore, these instructions were erroneous and the only issue was whether the factual affirmations contained in the many advertisements were such as would naturally tend to induce the buyer to purchase the goods.[92]

The other interrogatory of concern to the appellate court was that which related to assumption of the risk. This court held that when defining assumption of the risk, a distinction must be made between its primary and secondary applications. Assumption of the risk in its secondary sense is somewhat analogous to contributory negligence and involves a failure to exercise *reasonable care* for one's own safety.[93] Since contributory negligence is not available as a defense in an action for personal injury based on breach of warranty (since this action is in contract) assumption of the risk in that, the secondary sense, is likewise not available. Assumption of the risk in its primary and strict sense, however, involves voluntary exposure to an obvious or known danger which negates liability. Under this concept, recovery, even in warranty, is foreclosed because the plaintiff is assumed to have relieved the defendant of any duty to protect him.[94] Under Pennsylvania law, persons who voluntarily expose themselves to a danger of which they have knowledge, or have had notice,

89. 350 F.2d at 482.

90. *Id.* at 483.

91. *Ibid.*

92. *Id.* at 484. Although the court stated that in this situation reliance is irrelevant, a showing that the "factual affirmations run to the public and their natural tendency is to induce a purchase" is the equivalent of proving reliance.

93. 350 F.2d at 484, Citing Potter v. Brittan, 286 F.2d 521 (3d Cir. 1961); HARPER & JAMES, TORTS § 22.2, p. 1201; PROSSER, TORTS § 55 (2d ed. 1955).

94. *Ibid.*

assume the attendant risk,[95] and in this sense assumption of the risk is available as a defense to an action on breach of warranty. Finding that the issue raised by the defense was submitted to the jury on instructions which were inadequate and confusing in that they failed to differentiate between the primary and secondary concepts, and that the jury had no evidence upon which to predicate a determination that the plaintiff either knew or had notice of the harmful effects of Chesterfields, the court held the instruction to be erroneous.

It is highly doubtful that the *Pritchard* circumstances will again arise. But, if so, or if someone brings himself within the already existing facts, the most recent *Pritchard* decision makes it obvious that express warranty is the more favorable approach for the plaintiff.[96] He will not be faced with a foreseeability limitation on the manufacturer's warranty. The manufacturer will be held to his word. Once the plaintiff establishes: (1) that the language used by the manufacturer created a warranty, (2) that the warranty was intended to induce purchases, and (3) that cigarettes were the proximate cause of the injury, the burden then shifts to the defendant, whose only defense will be assumption of the risk. At this time, the defense is of no avail, since the plaintiff had no knowledge of the risk and could not have voluntarily exposed himself to it. It is submitted, however, that this will be a valuable defense in the future and determinative of a cigarette-cancer case, since manufacturers have now put the plaintiff on notice by publishing the following statement on each pack of cigarettes: "Caution: Cigarette Smoking May be Hazardous To Your Health". Although this warning may not negate a warranty, it may preclude a smoker's action based on that warranty.

VI.

CONCLUSION

It is suggested that strict food law cannot be applied to cigarette warranties, since the cigarette (and its harmful consequences) is something completely unique to the area of products liability. Although these concepts may be used to draw guidelines, a court should not blindly categorize cigarettes with food, since this product necessitates a completely new range of ideas concerning manufacturers liability. Although, at present, these ideas are very ill-defined, the increasing number of cigarette-cancer cases, coupled with the insatiable quest of legal scholarship, will bring about the day when these ideas may be resolved into another legal pigeonhole.

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95. 350 F.2d at 485, Citing Kopp v. R. S. Noonan, Inc., 385 Pa. 460, 123 A.2d 429 (1956); Cutler v. Peck Lumber Mfg. Co., 350 Pa. 8, 37 A.2d 739 (1944).

96. Cooper v. R. J. Reynolds Tobacco Co., 234 F.2d 170 (1st Cir. 1956), 256 F.2d 464 (1st Cir. 1958), *cert. denied*, 358 U.S. 875 (1959).