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Cigarettes, Cancer and the Implied Warranty of Wholesomeness – Lartigue v. R. J. Reynolds Tobacco Company – Green v. American Tobacco Company

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Comment / Cigarettes, Cancer and the Implied Warranty of Wholesomeness—

Lartigue v. R. J. Reynolds Tobacco Company— Green v. American Tobacco Company

> *"... [A] custome lothsome to the eye, hatefull to the Nose, harmful to the braine, daungerous to the lungs, and the black stinking fume thereof, neerest resembling the horrible Stigian smoke of the pit that is bottomelesse."* *
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> *KING JAMES I, COUNTERBLASTE TO TOBACCO, (1604).

DESPITE THE FACT that our legal headlines are dominated by a number of controversies over public law, one area of private litigation has consistently managed to capture its share of publicity. Attempts by smokers who develop lung cancer to fasten liability for their hurt upon the great tobacco companies are often in the news, and will continue to be for years to come.[1]

These cases are complex, and present a host of legal problems. The complaint may be based on negligence, on express or implied warranty, or on violation of a statute.[2] The added problems of statutes of limitations, possible defenses, privity, scope of warranty, causation and a number of others make cigarette-cancer litigation a tort battlefield of epic proportions.

Two recent cases, *Lartigue v. R. J. Reynolds Tobacco Co.*[3] and *Green v. American Tobacco Company,*[4] bring into sharp focus the issue to which this comment is devoted. Both *Green* and *Lartigue* are suits to recover for wrongful death caused by cancer suffered as a result of cigarette smoking; neither case brings privity into issue,[5] and both opinions involve at least a presump-

[1] There have been four appellate court opinions in such cases; at least twenty cases are pending in trial courts at the time of writing. There are 40,000 deaths per year in the United States from lung cancer, and the great majority of these victims are cigarette smokers. It is apparent that there are many potential plaintiffs in such suits. See, generally, THE CONSUMER'S UNION REPORT ON SMOKING AND THE PUBLIC INTEREST (1963).

[2] See Rossi, *The Cigarette-Cancer Problem: Plaintiff's Choice of Theories Explored,* 34 So. CAL. L. REV. 399 (1961).

[3] 317 F. 2d 19 (5th Cir., 1963).

[4] 154 So. 2d 169 (Fla., 1963).

[5] Both cases consider tobacco as a product intended for intimate bodily use, and therefore analogous to food and drink. By applicable state law, no requirement of privity exists to bring a warranty suit under these circumstances. See RESTATEMENT (SECOND), TORTS §402A, Tentative Draft No. 7 (1962).

tion of causality.[6] The point of departure of the two opinions is their disagreement over the scope of a manufacturer's implied warranty of wholesomeness. The *Green* case takes the position that the warranty extends even to those injuries which are not foreseeable as a result of scientific knowledge and human experience at the time of the sale; the *Lartigue* case holds that the warranty extends only to the type of injury which is foreseeable as a possible result of the sale at the time it is made. The purpose of this comment is to contrast these cases, and to attempt an evaluation of their conflicting viewpoints.

Before discussing the facts of the cases, some preliminary distinctions should be drawn. The cigarette-cancer case is not the usual product liability case, in which the plantiff claims that the product was defective in some way; these cigarettes were admittedly up to commercial standards. As cigarettes, they were not defective. Nor are these cases similar to cases in which the plaintiff claims that the manufacturer knowingly sold a product containing recognized allergen without a warning to the consumer, who suffered injury because of his abnormal sensitivity to it. Rather, these cases involved a claim upon a different level—the plaintiff contends that the cigarettes, although up to the usual standards of quality, contained a substance harmful to the normal human body. Cigarette-cancer cases seem to be the only cases which have ever advanced such a claim.

I

Frank J. Lartigue, the husband of the plaintiff in the *Lartigue* case, was a heavy smoker for fifty-five years. He died of lung cancer, which the plaintiff alleged was caused by his use of the defendant's products. She based her claim on breach of warranty and negligence, and after a long trial with voluminous medical testimony,[7] lost on a general verdict for the defendant. The judgment of the trial court[8] was appealed to the United States Court of Appeals for the Fifth Circuit, mainly upon the ground of asserted error in the charge to the jury. The trial judge charged the jury that the law of Louisiana[9] implies a warranty of wholesomeness "only as to those qualities of which a manufac-

[6] The jury specifically found causality in the *Green* case. In *Lartigue,* the verdict for the defendant was general, but the Fifth Circuit's opinion proceeded upon the presumption that the jury might have found causality.

[7] The decedent's medical record itself is of some interest. Testimony indicated that during his life he suffered from constant sore throat and coughing, measles, pertussia, diphtheria, malaria, influenza, tonsilitis, pyorrhea, muscular pain, gonorrhea, syphilis, tuberculosis and rheumatism. It is quite possible that the jury found for the defendant because of lack of proof of definite causal connection between decedent's lung cancer and his death. The general verdict gives no hint of the reasoning behind it.

[8] The United States District Court for the Eastern District of Louisiana, Herbert W. Christenberry, J.

[9] Jurisdiction was based upon diversity of citizenship; under the *Erie* doctrine state law controls.

turer can have knowledge in the exercise of reasonable diligence, the absence of which causes damage that is reasonably foreseeable."[10]

The Court of Appeals affirmed, stating that although the language of this charge may savor of negligence, the words are also appropriate to convey to the jury the scope of an implied warranty of wholesomeness. This warranty is an absolute undertaking, but the law extends it only to a certain limit, continued the court, and this limit is the area of possible damage foreseeable at the time of the sale. The court based this holding upon the proposition that the implied warranty is grounded in the superior position of the manufacturer, relative to the consumer, to know of dangerous defects in the products, and to guard against them.[11] When this basis for the liability is found to be non-existent, the court reasoned that the law must cease to imply the warranty. The Court was of the opinion that the liability of a manufacturer must end somewhere, and "Louisiana draws the line at unknowable risks. For strict liability to apply, there must be foreseeability of harm."[12]

Green v. American Tobacco Company,[13] a long and complicated lawsuit, began in 1957 when Edwin Green filed suit against the defendant, alleging that his use of its product had resulted in lung cancer.[14] He died several months later, and his administrator, who was substituted as plaintiff, added a claim for wrongful death to the complaint. The suit was based upon a number of grounds, including breach of implied warranty. After a long trial, the jury found, in answer to specific interrogatories that Green had cancer, that he died from the cancer, and that the defendant's product had caused the disease. The trial judge also propounded another interrogatory, asking whether the defendant could have known, by reasonable application of human skill and foresight, when the sales were made, that the use of cigarettes could cause cancer. The jury answered this interrogatory in the negative, and the court entered judgment for the defendant.

An appeal was taken, again to the Fifth Circuit, and the decision below was affirmed, largely upon the grounds of the decision in the *Lartigue* case.[15] On rehearing the court became uncertain as to its previous interpretation of the Florida law, so it certified the question to the Supreme Court of Florida[16] for an authoritative pronouncement on the state law.

The Florida court answered that the liability of a manufacturer of products

[10] Lartigue v. R. J. Reynolds Tobacco Company, *supra,* note 3, at 23.
[11] *Id.* at 39.
[12] *Id.* at 36.
[13] *Supra,* note 4.
[14] The trial court was the United States District Court for the Southern District of Florida, Emmet C. Choate, J. Jurisdicton was again based on diversity of citizenship, so Florida law ruled.
[15] 304 F. 2d 70 (5th Cir., 1962).
[16] This procedure is authorized by Sec. 25.031, F.S.A.

for human consumption upon breach of an implied warranty was absolute, and extended even to the type of damage which was scientifically unforeseeable at the time of the sale.[17] The superior position of the manufacturer, relative to the consumer, to know of defects and to guard against them is only one of a number of policy considerations involved in such a warranty. The extent of this superior position, taken alone, does not define the limits of the warranty. The basis of the liability is a policy decision that risks of unwholesomeness are to be borne by the manufacturer, and not the public, since the manufacturer has undertaken to supply, at a profit to himself, products to be used for human consumption.[18]

The Florida court's decision in *Green* and the Fifth Circuit's view in *Lartigue* represent opposing viewpoints on the scope of a manufacturer's liability for unwholesome products. The importance of this issue will undoubtedly grow as science finds new and previously unsuspected causative links between the use of various products and diseases. In order to weigh the relative merits of the two positions, an inquiry into the history of the liability and the policy reasons for its imposition is necessary.

II

The history of the liability which these plaintiffs sought to impose upon the tobacco companies is by no means free of doubts and ambiguities. Starting with the assumption that tobacco is to be treated for present purposes as food or drink,[19] which is a conclusion reached by both principal cases, we must venture back into feudal days in England to find the source of liability of vendors of unwholesome food.[20] This liability far antedated the warranties of merchantability and fitness for the purpose, which are contained in our modern law of sales.[21] The purveyor of unwholesome foods was liable civilly upon either of two bases, violation of ancient criminal statutes (a sort of medieval negligence *per se* doctrine), or for a failure to show the degree of skill prevailing in his trade, the remedy for which was an action on the case.[22] Significantly, both of these bases of liability sounded in tort, rather than in contract.

The next step in the development of the liability of a seller of food was the appearance of the action for breach of warranty. Originally, this action lay for breach of an express undertaking only, and the action was upon the case.[23] It

[17] *Supra*, note 4, at 171.
[18] *Ibid.*
[19] *Supra*, note 5.
[20] See Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).
[21] UNIFORM SALES ACT §15. UNIFORM COMMERCIAL CODE §2-314, 315.
[22] Prosser, *Strict Liability to the Consumer*, 69 YALE L.J. 1099, 1103 (1960).
[23] Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8-10 (1888).

was looked upon as analogous to deceit, and the line dividing a breach of warranty from a deceit was far from clear.

About the middle of the eighteenth century, the action to enforce a breach of warranty came to be enforced in most cases by a count for an assumpsit, due to the almost invariable coincidence of a contract of sale.[24] However, it was recognized, and still is, that an action for tort was also a proper remedy.[25] The only warranties enforceable were still express ones; the law had not yet begun to imply warranties not expressly agreed to by the parties.

In the early nineteenth century, the familiar warranties of our sales law first made their appearance.[26] The most significant of these for our purpose is the implied warranty of merchantability, by which the seller undertakes as a matter of law to provide goods up to the usual commercial standard of that particular product.[27] In the case of food or drink, merchantability certainly included wholesomeness, and so the old remedies gradually fell into disuse, or were merged into the new concept of merchantability. The law of liability of a vendor of food or drink remained fairly static until our own century, when drastic changes began to take place.

Thus far, it should be noted that liability was attached only to the "vendor," and the only proper plaintiff was the "vendee." In other words, privity of contract was a requisite to entertainment of an action for breach of warranty. The salient point in the development of the law in our times is the abandonment of this requirement, thereby allowing the injured consumer to sue directly the manufacturer or processor of the unwholesome product.

The first step in the crumbling of the "citadel of privity" came in products liability cases based on negligence, when Justice Cardozo buried the rule of privity under the exception of "dangerous instrumentality."[28] Certainly there could be no more dangerous instrumentality than negligently prepared food, and the minority view, that no privity need be shown to establish liability for negligence by a food manufacturer, rapidly became the almost universal rule.[29]

The extension of the abandonment of privity to strict liability, regardless of negligence, came somewhat more slowly. This was due to the identification of strict liability with warranty, and the connection of warranty to contract. But the tide was not to be turned, and gradually state after state entered the "strict

[24] Stuart v. Wilkins, 1 Douglas 18 (1778) was the first case to hold such a count good.

[25] In 1797, Lord Kenyon spoke of a breach of warranty as a form of fraud in Jendwine v. Slade, 2 Esp. 572 (1797). In modern days, the tort rule of damages has been used, Greco v. S. S. Kresge Co., 277 N.Y. 26, 12 N.E. 2d 557 (1938), and the tort statute of limitations applied, Schlick v. New York Dugan Bros., 175 Misc. 182, 22 N.Y. S. 2d 238 (1940).

[26] The leading case is Gardiner v. Gray, 4 Camp. 144, 171 Eng. Rep. 46 (1815).

[27] See generally, Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

[28] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[29] Prosser, *op. cit. supra*, note 22 at 1100.

liability without privity" camp,[30] until now this is clearly the majority rule in the United States in food and drink cases.[31]

The difficulties over establishing this "no privity" rule are the result of the generations-long habit of lawyers and judges of thinking of warranty liability as a matter of contract, despite the fact that the historical origin of the liability is in tort. There is at present a trend in the law, supported by the Restatement of Torts (2nd), and advocated by the eminent Dean Prosser, to recognize strict liability on a warranty without privity as what it actually is, a species of tort liability, and to abandon the talk of contract which has confused the real issues for so long.[32] However, the tendency of the courts today is still to talk in terms of "warranty without privity," as is illustrated in the 1963 cases under discussion here.

III

In announcing the rule of strict liability for a manufacturer of unwholesome products for human consumption, regardless of negligence and privity of contract, the courts have all too often failed to explain the reasons for adopting it, and relied merely upon the naked assertion that "public policy demands this rule."[33] Some courts and a number of writers have analyzed the problem more deeply, and have announced specific reasons for the strict liability rule. These reasons must now be examined to see whether they continue to apply to a situation in which the manufacturer could not know of the risk created at the time of the sale, because of lack of scientific knowledge connecting the product and the injury caused.

The reasons for strict liability without privity rule are by no means free of controversy, but it is not the purpose of this comment to discuss their merits or defects.[34] Rather, assuming that strict liability does exist for these reasons, the purpose here is to inquire into whether or not there is justification for extending the liability to the facts found by the jury in the *Green* case.

It is unfortunate for several reasons that this problem has first arisen in connection with the relationship between cancer and cigarette smoking. The situation has been so highly publicized, and has so much economic significance, that objective judgment and perspective on this precise legal issue are rather difficult. Further, it appears that there is little, if any, factual basis for the de-

[30] One writer has collected no less than twenty-nine different legal theories on which this result was justified. Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1957).

[31] Prosser, *op. cit. supra*, note 22 at 1109-10.

[32] *Id.* at 1133-34, and note 5, *supra*.

[33] E.g. Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).

[34] See generally, *Symposium on Strict Liability of Manufacturers*, 24 TENN. L. REV. 923 (1957) for opinions pro and con; also Prosser, *op. cit. supra* note 22 at 1114-1124.

fense in question in these cigarette cases.[35] However, the jury in the *Green* case specifically found that the type of injury was unforeseeable, and the court's opinion in *Lartigue* assumes that the jury may have so found. For present purposes, therefore, the defense must be considered as factually established.

One of the strongest arguments for strict liability is the belief that fear of such liability will spur research and precautions by the manufacturer to improve the safety of his product.[36] Here, it is submitted, the Florida court can find some support for its refusal to except unforeseeable types of injuries from strict liability. Fear of such liability would provide a powerful incentive for manufacturers to conduct constant scientific research into the qualities of their products. The benefits of such activity to medical science and humanity are obvious. However, these benefits must be considered in conjunction with the economic burden which will be thrust upon industry.

This leads to the second powerful argument for strict liability, which is the concept of spreading the loss caused by the injury by making the manufacturer liable to the consumer. The entrepreneur can then adjust the price of the product to provide a fund for insurance or damage payments, and thereby prevent the imposition of the loss upon the injured person alone.[37] Here, the argument for liability regardless of the foreseeability of the type of injury can find little comfort. It is impossible to spread a risk one does not know exists. Once the risk of the type of injury becomes known, it is, of course, possible to spread it, but the situation has then moved from the shadow of our hypothetical into the bright sunlight of unquestioned liability. Since a manufacturer cannot spread an unknown risk, this argument in our case boils down to "let the rich defendant bear the loss," which is neither wise in terms of economics, nor in accord with our notions of justice.

Perhaps the most often encountered view of the basis of strict liability is the argument that the manufacturer is in a superior position, relative to the consumer, to know of defects and guard against them.[38] As the Florida court in *Green* pointed out, this is only one of a number of policy considerations.[39] It is not the whole story, as is shown by the numerous cases holding a retail vendor liable for selling unwholesome canned goods,[40] a case where this argument is

[35] The medical evidence collected in the CONSUMER'S UNION REPORT ON SMOKING AND THE PUBLIC INTEREST (1963), pp. 1-57, makes it quite clear that the risk of cancer from smoking cigarettes was foreseeable a full generation ago. The fact that the industry chose, and still chooses, to ignore or try to discredit the medical evidence does not change the fact that this risk has been foreseeable for many years.

[36] Prosser, *op. cit. supra,* note 22 at 1119. See also *Symposium,* 24 TENN. L. REV. 923, *supra* note 34, for a variety of views on the weight of this argument.

[37] See concurring opinion of Traynor, J., in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P. 2d 436, 441 (1944).

[38] The Fifth Circuit cites a number of cases advancing this argument in its *Lartigue* and *Green* decisions. E.g., Cliett v. Lauderdale Biltmore Corp., 39 So. 2d 476 (Fla., 1949).

[39] Green v. American Tobacco Co., *supra* note 4, at 171.

[40] E.g., Sencer v. Carl's Markets, 45 So. 2d 671 (Fla., 1950).

clearly inapplicable. Similarly, it cannot be applied to the situation where the risk is scientifically unknowable, for this state of facts negatives the basic premise of the whole argument. The manufacturer cannot know any more of the danger than can the consumer. This argument provides no basis for the holding of the Florida court.

A number of courts have merely announced the rule that public policy demands that manufacturers who put products on the market, acting from a profit motive, must be liable if the consumer is injured as a result.[41] It has been pointed out that this argument "in the last analysis rests upon public sentiment,"[42] and it is therefore rather difficult to pin down for analysis. Does public sentiment demand an absolutely safe product, or a product as safe as the utmost utilization of scientific knowledge can produce? The reasonable person can rightfully expect the latter only, and the exception to strict liability argued for by the Fifth Circuit appears to be justified upon this basis for strict liability.

Finally, the strict liability of the manufacturer has been founded upon the view that the manufacturer, by offering his product for sale, represents it to be suitable and safe for use.[43] This is undoubtedly true, but the next questions are what the consumer reasonably understands by this representation, and how far he is entitled to rely upon it. Again, it is submitted that a reasonable man expects only a product perfected to the degree of scientific knowledge available. Since the consumer knows that no manufacturer can give more than this, he cannot reasonably expect more.

In summary, the only policy support for the absolute view expressed by the Florida court can be found in the incentive such liability would provide for scientific research by manufacturers to improve the safety of their products. The majority of the policy reasons advanced for strict liability fail when applied to a fact situation where, at the time of the sale, scientific knowledge and human experience give no warning of the risk of injury eventually suffered.

IV

However desirable the result reached in the *Green* case by the Florida court may be when applied to cigarette-cancer cases, it is submitted that the rule announced there is too broad, and lacking in sound policy basis.

While the Circuit Court perhaps lent too much emphasis to the factor of the superior position of the manufacturer *vis à vis* the consumer to know of defects, it was on firm ground when it stated that the risk of unforeseeable

[41] E.g., Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W. 2d 828 (1942).
[42] Prosser, *op. cit. supra* note 22 at 1122-1123.
[43] E.g., Jacob E. Decker & Sons v. Capps, *supra* note 41 at 832-33.

kinds of injury is not properly considered a risk created by the business, and that therefore there should be no liability.[44]

The Florida court's rebuttal of this point was superficial, stating that the liability of a retailer who sells unwholesome canned goods was analogous to the facts under consideration. There is a basic distinction between the two situations. The risk of making people sick by selling unwholesome canned food is known to every retailer; it is the type of risk he knowingly creates when he enters the retail food business. There is a considerable difference in holding a manufacturer liable for risks he had no idea he was creating at the time he sold the goods.

The Fifth Circuit, it is believed, has laid down the better reasoned rule of law on the scope of an implied warranty of wholesomeness, however unfortunate the jury's application of that rule to the facts of the case may have been. The Florida court, perhaps influenced by the disparity between the finding of fact that the defendant could not foresee the risk he created and the almost undeniable historic facts to the contrary,[45] has laid down a rule which is difficult to justify in terms of policy. It is hoped that a reconsideration of this rule in light of the reasons for imposing such a warranty will be forthcoming if and when the attempt is made to attach warranty liability to a manufacturer for a truly unforeseeable type of damage.

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[44] Lartigue v. Reynolds, *supra*, note 3, at 36, discusses the problem in terms of what Professor Ehrenzweig has called the "typicality" of the damage. "Put in more ordinary language, this means the foreseeability of the harm."

[45] Note 35, *supra*.