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# Recent Developments in Food Products Liability

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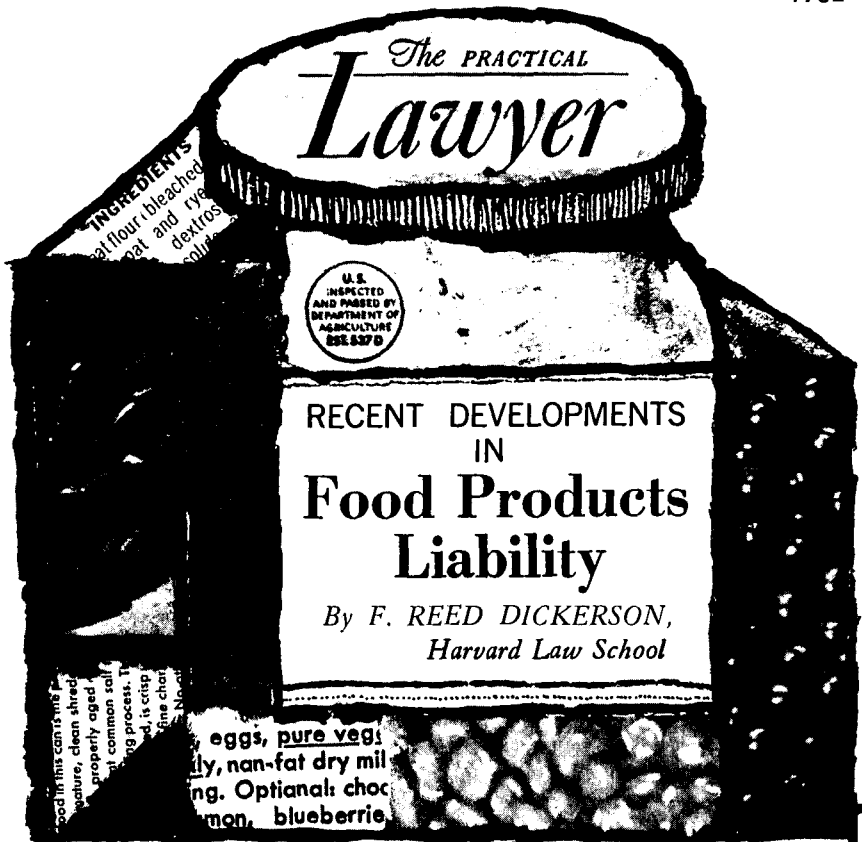
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SPECIAL legal treatment for food has had a long history. Products liability began with food and, for the most part, food has remained in the vanguard of legal developments ever since. Recent events have raised doubts, however, whether this preeminence will long continue.

It was recently noted that most of the interesting developments in products liability in 1960 occurred outside the field of food and even outside those of drugs and cosmetics. Condon, *Product Liability Cases—1960*, 16 FOOD DRUG COSM. L. J. 132 (1961). Moreover, it seems likely that the most significant future developments will continue to occur outside.

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EDITOR'S NOTE: This article is based on an address delivered at the Practising Law Institute, New York, on July 11, 1961.

### EROSION OF THE PRIVACY REQUIREMENT

This focus of immediate interest away from food is illustrated in the disappearing requirement of privacy. For food, all that remains is the mopping up. Few defense lawyers still entertain the hope that it may yet be possible to retain this defense. Of the committed states, a majority now appear to have dispensed with the requirement in food cases. Of the uncommitted states, it seems obvious that most will ultimately line up with this majority. The only real doubts lie with Sales Act states that have already committed themselves to the privacy requirement. Some of these may wait for legislation.

In this last group of states, which until recently included New York, the basis for doubt has been twofold. First is *stare decisis*. Second is the apparently uncongenial language of the Uniform Sales Act, which may have been intended to limit implied warranties to those between buyer and seller in the same transaction. (See especially the introductory clause and clause (1) of section 15.) Both factors present obstacles to any conscientious court that would otherwise like to do away with the necessity of privacy. As recently as May 1960, when I took a reading on the developments during the 1950's, I concluded that unless the slow trend toward abolishing the privacy requirement ac-

celerated sharply, the requirement would be around for a long time. No sooner was that conclusion expressed in print [Dickerson, *Recent Developments in Food Products Liability: Privacy*, 8 DEFENSE L. J. 105 (1960)], than such an acceleration made itself obvious!

It is true that Virginia had joined the ranks of the nonprivacy states, at least as against the manufacturer, in 1959 in *Swift & Co. v. Wells*, 201 Va. 213, 110 S.E. 2d 203, and that Arizona, undeterred by the Uniform Sales Act, had done so two years earlier in *Crystal Coca-Cola Bottling Co. v. Cathey*, 83 Ariz. 163, 317 P. 2d 1094 (1957). There had also been rumblings in Minnesota, North Carolina, Oklahoma, and Utah.

### *Express Warranty*

Also, there had been activity in the field of express warranty. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E. 2d 612 (1958), which found in the manufacturer's advertisements and labels an express warranty as to the quality of a home permanent preparation, created quite a stir in the law review notes and articles. It reminded us of its famous predecessor, *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. 2d 409 (1932), the Washington case in which liability for injuries from a shattered windshield was based on express representations that appeared in advertising pamphlets distributed by the

manufacturer. But little has come of the *Toni* case, at least so far as food is concerned. Only a small percentage of the food sold moves under a representation of fact solid enough to support an express warranty. Future inroads on the privity doctrine are likely to come from other directions. This may be true even for nonfood products.

There are several recent food cases that suggest this conclusion may be wrong, although they represent only the occasional exception. In *Lane v. C. A. Swanson & Sons*, 130 Cal. App. 2d 210, 278 P. 2d 723 (Dist. Ct. App., 2d Dist. 1955), the plaintiff had been injured by a bone in a canned product labeled "Boned Chicken" that had been widely advertised as containing "no bones." The California Court of Appeals held that these descriptions constituted an express warranty that there were no bones whatsoever in the product, despite the defendant's strong argument that the description "no bones" merely meant that the product was intended to be a boneless product, without any assurance of perfection.

This case appears to be unique in the food field, although it is possible to find in *Bryer v. Rath Packing Co.*, 221 Md. 105, 156 A. 2d 442 (1959), decided by the Maryland Supreme Court, aspects that are something like it. Here, the trouble had been caused by a chicken bone in a product likewise

marketed as "Boned Chicken." Although the court decided in favor of the plaintiff, its rationale is not entirely clear. On the one hand, it says that this written assurance required the manufacturer "to exercise as much care as would enable users to rely with reasonable safety on the assurance," leaving the impression that it is up to the manufacturer not to disappoint the consumer's increased expectations. On the other, it says, "This is not to say that the packer was an insurer. . . ." Apparently, the court is saying that an express representation of this kind increases the manufacturer's standard of care to an undefined degree, without holding him to strict liability. If so, the *Lane* case still stands alone.

A more solid basis for attacking the privity requirement is not so much that modern advertising appeals create express warranties as that they make clear that the sales by which the manufacturer disposes of his goods are aimed at the ultimate user, despite the intervention of a number of middlemen. This had been the supporting rationale in an Ohio home permanent case that preceded the *Toni* case. *Markovich v. McKesson & Robbins, Inc.*, 106 Ohio App. 265, 149 N.E. 2d 181 (1958), did away with the privity requirement on grounds of public policy, even though the advertising appeals had failed to create an express warranty.

However, even in the aggregate,

these developments were hardly enough to get excited about.

### *The Henningsen Case*

The big explosion occurred in May, 1960. The now-famous New Jersey case of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69 (1960), threw out the privity requirement lock, stock, and barrel. It held an automobile manufacturer liable in implied warranty for the injury to two persons caused by defective steering equipment, despite the lack of privity.

There are several reasons for considering this a highly important case. First, the decision was by the highest court of the State. Second, it did away with the privity requirement without benefit of express warranty. Third, it did away with the privity requirement in a field far removed from food, drugs, and cosmetics. Fourth, it did away with the privity requirement despite the troublesome language of the Uniform Sales Act. Finally, it did away with the privity requirement in the face of earlier judicial commitments by the same court. In these collective respects, the case stood almost alone. Its greatest significance lies in the encouragement that it will probably give to courts that would like to do away with the privity requirement but have until now been too cautious to change the *status quo*.

The *Henningsen* case rests most

convincingly on grounds of public policy, namely, that in the David-and-Goliath relationship between consumer and manufacturer any notion that the two are remote from each other is denied by the nature of modern advertising appeals, in the light of which the intervention of one or more distributors creates little more than a trivial technicality. Under such an approach, it can be argued either that the privity requirement ought to be abolished or, assuming that it must be retained, that a direct privity relationship actually exists.

The significance of the *Henningsen* case is not to be minimized by pointing out technical deficiencies in the court's reasoning: its citation of easily distinguishable, reversed, or overruled authorities (cited in 161 A. 2d at 83); its failure to explain how it found in the sale by the dealer a sale "by description" with its attendant warranty of merchantability; its failure to reconcile its conclusions with the rather formidable language of section 15 of the Uniform Sales Act; and its pretense that the earlier drug and cosmetic cases doing away with the privity requirement had represented a significant breakthrough from the narrow category of food. However vulnerable the opinion may be on these grounds, it is a fact of legal life that will undoubtedly have widespread and far-reaching influence, *a fortiori* in the food cases.

### Other Cases

Nor is its lustre dimmed by the fact that there were a few earlier cases outside the field of food, drugs, and cosmetics (only one of which was relied on in the *Henningesen* case) that seemed to throw out the privity requirement. A Michigan case, *Spence v. Three Rivers Builders and Masonry Supply, Inc.*, 353 Mich. 120, 90 N.W. 2d 873 (1958), while striking hard at the privity requirement, did so with respect to a warranty of due care, which made the cause of action in question little more than a euphemism for a negligence action, with respect to which the privity requirement has long been dead.

More significant is *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A. 2d 568 (1959). Here, despite the lack of privity, the manufacturer of a truck was held liable for property damage caused by a defective king pin. This case loses force by being the opinion of a lower court and being grounded only on an unexplained doctrine called the "principle of advertised-product-liability." This reference leaves the reader wondering whether the court is merely enforcing an express warranty based on an advertisement under the old *Baxter* principle or knocking down the privity requirement, with the general advertising appeal serving only as a supporting rationale. The case is

especially interesting because the damage incurred affected only property.

*B. F. Goodrich Co. v. Hammond*, 269 F. 2d 501 (10th Cir. 1959), struck down the privity requirement in an automobile tire case, but, being only a federal court's prediction of what the Missouri and Kansas Supreme Courts will ultimately do about privity in the area outside food, drugs, and cosmetics, it, too, fails to carry full conviction. The same is true of *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D. N.Y. 1959), in which a federal district court, charged with applying California law to a death case brought against an airplane manufacturer, held that the absence of privity was no bar even though the defective product was an airplane instead of food. Its implied prediction of future California thinking received partial support in *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (Dist. Ct. App., 1st Dist. 1960).

However, no downgrading of these cases can deny that they are additional straws in a wind that is blowing with increasing intensity against the privity requirement, even outside the special fields of food, drugs, and cosmetics. A similar straw is the fact that courts are finding additional reasons for holding that privity, even if required, actually exists. In *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339, 353 P.

2d 575 (1960), a California court held that the manufacturer of a grinding wheel was in privity with an injured employee of the purchaser, because his use of the wheel must have been contemplated by the manufacturer. The same principle was applied in *Vallis v. Canada Dry Ginger Ale, Inc.*, — Cal. App. 2d —, 11 Cal. Rptr. 823, 828 (Dist. Ct. App. 2d Dist. 1961), in which a restaurant employee had been injured by an exploding soft drink bottle.

Although the *Henningsen* case went unmentioned in a recent decision retaining Delaware's privity requirement, *Ciociola v. Delaware Coca-Cola Bottling Co.*, — Del. —, 172 A. 2d 252 (1961) (broken bottle), it appears to have played an important role in the overthrow of Connecticut's privity requirement in a detergent case, *Hamon v. Digliani*, 148 Conn. 710, 174 A. 2d 294, 296 (1961), and in the repudiation of the privity requirement in a Hawaiian case involving a flammable hula skirt, *Chapman v. Brown*, 198 F. Supp. 78, 101 (D. Hawaii, 1961). It was relied on in *Manzoni v. Detroit Coca-Cola Bottling Co.*, 263 Mich. 235, 109 N.W. 2d 918, 921 (1961), clarifying Michigan's position on negligence and privity in warranty suits, and the latter, in turn, was relied on in *Asher v. Coca-Cola Bottling Co.*, — Neb. —, 112 N.W. 2d 252, 256 (1961), repudiating the privity requirement in Nebraska, at least

with respect to food, if nothing else.

The prime example of the trend stimulated by the *Henningsen* case has been the recent about-face executed by New York's Court of Appeals in *Greenberg v. Lorenz*, 9 N.Y. 2d 195, 173 N.E. 2d 773 (1961), which involved a defective can of salmon. Here, privity was lacking between the buyer's teenage daughter and the defendant retailer. The lower court said that as a legal principle the privity doctrine lacked the "transcendent dimension" of reality, and threw it out. 12 Misc. 2d 883, 178 N.Y.S. 2d 407, 408 (Sup. Ct. 1958). The Appellate Division, on the other hand, found the privity requirement very much alive in New York, presumably on the ground adopted by the dissent in the lower court, that New York's Sales Act, which governed the transaction, had been construed to require privity. *Id.* at 414. That was four years ago.

On March 2, 1961, the Court of Appeals reversed New York's well established position and held that, "the infant's cause of action should not have been dismissed solely on the ground that the food was purchased not by the child but by the child's father." *Greenberg v. Lorenz*, 9 N.Y. 2d 195, 173 N.E. 2d 773, 776 (1961). The court was moved by the already voluminous literature proclaiming the unfairness of the privity rule and by the fact that upwards of 20 states had already done away with it. On this

it cited the *Wells* and *Henningsen* cases. As for the Uniform Sales Act, the court said that the Act says nothing about privity and that the rule requiring privity is only a judicial rule. "Alteration of the law in such matters has been the business of the New York courts for many years. . . ." *Id.* at 775.

We should probably give the Court of Appeals credit for mentioning the Uniform Sales Act, and recognizing it as a possible obstacle. This was more than the Arizona Court did in the *Cathey* case and the New Jersey Court in the *Henningsen* case. Beyond that, the court's handling of the problem posed by the Uniform Sales Act is not particularly impressive. Although the Uniform Sales Act may not use the word "privity," it uses language that strongly suggests that the Act contemplates only warranties arising between the buyer and the seller in the same transaction. By this I do not mean to imply that the Act necessarily requires privity. I only suggest that it takes a bit of legal doing to avoid that result. Dickerson, *Recent Developments in Food Products Liability: Privity*, 8 DEFENSE L. J. 105, 132-34 (1960).

The *Greenberg* case leaves the status of much of the privity rule in doubt in New York. On the ground that "we should be cautious and take one step at a time," the court limited its holding to suits against the retailer by a member

of the purchaser's household. It also limited it to food, plus the category of "household goods." It will be interesting to learn what this category comprehends and whether the court will confine itself to it. Why the court draws the line around household goods is not immediately apparent.

Whatever their merits as exercises in judicial craftsmanship, the joint effect of the *Henningsen* and *Greenberg* cases will undoubtedly be considerable, except possibly in Sales Act states in which the courts have been more fastidious in dealing with the language of statutes. Until the recent enactment of the Uniform Commercial Code, New Hampshire furnished such an example. *Smith v. Salem Coca-Cola Bottling Co.*, 92 N.H. 97, 98, 25 A. 2d 125, 127 (1942).

### *The Uniform Commercial Code*

At the same time, with the increasing adoption of the Uniform Commercial Code, which has been enacted in more than a dozen states, questions as to the meaning of the Uniform Sales Act are becoming academic. The Code is significant on two counts. First, section 2-318 expressly removes the privity requirement in suits against retailers brought by guests or members of the buyer's household. Second, although it attempts to remain scrupulously neutral so far as the manufacturer and other sellers are concerned, thus passing the



buck squarely to the courts, it is more liberal than the Uniform Sales Act, because it includes no restrictive language comparable to that of section 15.

In at least one state, the privity requirement has been abolished by statute, even as against the manufacturer. Several years ago, the Georgia legislature enacted a statute that in effect creates in each sale of new goods by a manufacturer a warranty of merchantability free of privity limitations but subject to being defeated by an express or implied disclaimer. GA. CODE ANN. §96-307 (1958). It is not confined to food.

### *The Restatement of Torts, Second*

The latest attack on the citadel of privity comes from still another source. This takes the form of the proposed section 402A, which Dean William L. Prosser and fellow authors of the RESTATEMENT (SECOND), TORTS (Tent. Draft No. 6, 1961), submitted in May, 1961 for consideration by The American Law Institute:

#### *"§402A. Special Liability of Sellers of Food*

"One engaged in the business of selling food for human consumption who sells such food in a defective condition unreasonably dangerous to the consumer is subject to liability for bodily harm thereby caused to one who consumes it, even though

"(a) The seller has exercised all possible care in the preparation and sale of the food, and

"(b) The consumer has not bought the food from or entered into any contractual relation with the seller."

It is plain that, within the area of its coverage, the proposed section would do away with the privity requirement at all levels of manufacturing and distribution. The section not only is interesting to food lawyers but has caused consternation among those concerned with the manufacture of so-called ethical drugs. Why? A comment to the proposed section explains that the term "food" includes all products intended for internal human consumption, including drugs that are to be taken internally.

If section 402A were limited to food in its more conventional sense, it would have much to support it. There is strong historical precedent for treating food differently. Also, strong support for the substance of it can be found in the existing cases. On the other hand, when the category is broadened to include ingested drugs, it becomes harder to support the proposed section as a "restatement" of the law and to find policy reasons to support a section that goes so far, and no farther.

The essential undesirability of the stopping place proposed by the

official comments was so apparent that The American Law Institute, at the same meeting at which the section was proposed, voted to extend the principle expressed by it to cover all products for intimate bodily use. While this makes more consistent sense from a policy standpoint, it makes it correspondingly harder to call the proposed section a "restatement" of current law.

Whatever difficulties there may be in rationalizing the proposed section 402A, even as amended, I am not going into extended mourning over the death of the privity requirement. It has been accomplishing very little good and may have been creating a good deal of harm. Although it is not the purpose here to debate the merits of the privity requirement, I want to make the point that the lawyers' preoccupation with its mysteries has distracted attention from the more important issues of products liability that confront us today. For a discussion of the merits of the privity requirements, see Dickerson, *The Basis of Strict Products Liability*, 16 FOOD DRUG COSM. L.J. 585 (1961), 17 BUS. LAW. 157 (Nov. 1961).

#### DIRECT RESPONSIBILITY

In the protracted debates over the privity requirement, it is easy to forget that to do away with the privity requirement is merely to get rid of a barrier. Suppose we

remove the barrier. What remains? It takes more than the elimination of a defense to win a law suit. The plaintiff has to show that he has a right against the defendant and that it has been infringed. What kind of right exists against the manufacturer, with whom the plaintiff has had no dealings? Did the manufacturer make a promise to the plaintiff that he has broken? Did he make a representation that was untrue?

The courts get into doctrinal difficulties if they try to construct direct consumer rights out of the scraps of actual promise and representation that may or may not have been expressed or implied by the manufacturer to his immediate purchaser; that is, if they try to apply the usual warranties of fitness and merchantability spelled out in sections 15(1) and (2) of the Uniform Sales Act. Comment, 25 WASH. U.L.Q. 293 (1940). Sooner or later they must realize that the law cannot build adequate legal doctrine to protect the consumer unless it erects an obligation directly to the consumer, bases it on public policy, and molds it around the armature of the plain facts of today's merchandising patterns. This is what the Georgia statute, in effect, does. It is essentially the approach of the proposed section 402-A of the RESTATEMENT.

If a direct responsibility to the consumer is the only kind that makes sense, the central problem

becomes one of determining what this direct responsibility should consist of. On the one hand, it seems to be widely assumed that, if the courts or legislatures do away with the privity requirement, a manufacturer will automatically have to indemnify every person who is injured by one of his products. This is what Burton Weitzenfeld has recently called "liability without warranty," a liability generally comparable to that under workmen's compensation, where all the claimant has to show is the causal relationship involved in an injury arising out of and in the course of his employment. I have called it "*strict* strict liability."

**Limitations—"Defective" and "Unreasonably Dangerous"**

Simple strict liability, on the other hand, need not consist of an obligation by the manufacturer to compensate the injured consumer under any and all circumstances. The point is clearer if we examine the language of proposed RESTATEMENT section 402A. This does not say that the seller must pay the consumer some money if his food product injured the consumer. The food must be, first, "defective" and, second, "unreasonably dangerous." Not everything that causes injury or illness is either "defective" or "unreasonably dangerous." In other words, strict liability need not be so strict that the only issue is one of causation, as it tends to be under

workmen's compensation. Some of those who seem to panic at the threat of strict liability may not fully appreciate this.

At the 1961 meeting of The American Law Institute an opinion was expressed that the provision just referred to was redundant and that the word "defective" could be stricken, since the most reliable test of defectiveness is whether the product is "unreasonably dangerous" to the consumer. The objection was overruled, and the word "defective" retained on the ground that it was needed to nail down the kind of case in which the product was improperly made and to excuse the manufacturer of a highly dangerous article that was properly made. Apparently, it was feared that without the word "defective" a highly dangerous product might be considered to be *ipso facto* "unreasonably dangerous." I would have thought otherwise, because all the ingredients of liability could probably be subsumed under the word "unreasonably." If this section stands, I wonder what kind of situation could exist in which the product was "unreasonably dangerous" without being legally "defective."

In any event, it is important to formulate appropriate concepts of what is "defective" and what is "unreasonably dangerous." How these concepts are developed will determine the ultimate impact of doing away with the privity re-

quirement and imposing strict liability. The appropriate development of these concepts may, indeed, take some of the sting out of strict liability. It can also furnish the key to such difficult legal problems as those involved in trichinosis, allergy, disclaimers, and warnings. While the most provocative questions appear to be arising outside the field of food, much needs yet to be done to clarify the law with respect to food.

In a suit for negligence, the plaintiff's main problem beyond that of showing causation is to stigmatize the actions or omissions of the defendant. Under strict liability, on the other hand, the problem of stigmatizing the defendant is removed. Even so, the plaintiff must stigmatize the product as "defective" and "unreasonably dangerous." In the usual food case, this is a simple matter. A mouse is enough to stigmatize a bottle of soft drink. Staphylococcus is enough to stigmatize a custard-filled éclair. Both are legally "defective." Both are "unreasonably dangerous." Unfortunately, the simple and typical instances do not give us a ready key to a concept of "defectiveness" on which products liability generally should be based. Let us consider several specific problems.

#### **"Natural" - "Foreign" Test of Defectiveness**

In the field of food, we find the courts still fighting the battle of the chicken pie. Does a chicken

bone in a chicken dish make the dish legally defective? Some courts, such as those in California, use the test of "naturalness." If the offending article is accessory to one of the purported ingredients, the object is "natural" to the product and, no matter how badly an unsuspecting consumer is hurt, he cannot recover.

For me, this test has little rational foundation. Its only justification seems to be the rough correlation existing between what is natural to the product and what consumers normally anticipate and guard against. Unfortunately, it reaches an absurd result in a case like *Maiss v. Hatch*, 8 Cal. Rptr. 351 (App. Dep't., Super Ct. 1960), in which the plaintiff broke his tooth on a bone in a hamburger served by the defendant caterer. As a consumer I can testify that, while an occasional piece of gristle in a restaurant hamburger does not surprise me, I would never be on my guard against a bone capable of breaking a tooth. I even wonder whether under the California approach *anything* could be "foreign" to a hamburger!

I wonder, too, how it would be if the concept of "natural to the product" were imported into other product areas. Suppose that in making an automobile or a lawnmower the manufacturer used a metal whose characteristics were inherently inadequate to do its job. Could this be brushed aside as

something "natural" to the product? Certainly not. In fact, the whole thrust of the concept goes counter to the concept of the "inherently dangerous," which has been so important in the nonfood negligence cases.

### **"Reasonable Expectations"** **Test of Defectiveness**

The more sensible test, adopted by many courts, including the Supreme Court of Ohio in *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E. 2d 167 (1960), and the Supreme Court of Wisconsin in *Betehia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W. 2d 64 (1960), is the "reasonable expectations" test: Is the offending condition one that consumers normally expect and guard against? It is clear that consumers anticipate and guard against bones in some kinds of fish. It seems equally clear that they do not anticipate and guard against bones in hamburger. At least one lower New York court has come to the same conclusion as to a piece of bone in salami. *Lore v. De Simone Bros.*, 12 Mis. 2d 174, 172 N.Y.S. 2d 829 (Sup. Ct. 1958). As for oyster shells in oysters, the Ohio court in the *Grafton* case agreed on the legal test to be applied, but divided on the factual question of what consumers normally expect of a serving of fried oysters. Despite these perplexities, a philosophy of consumer protection based on the reasonable expectations of the

parties usually helps to supply a sensible answer.

What about trichinae in pork chops? Trichinosis has often confused the courts, because the mere presense of trichinae in uncooked pork seems to constitute an obvious "defect." *DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER* 190-211 (Little, Brown & Co., Boston, Mass. 1951). The fact that the consumer cannot safely eat it in that condition has led some courts to hold that trichinous pork is legally defective *per se*, even though they have felt constrained to ban the plaintiff on the ground that in failing to cook it properly he was contributorily negligent. To me, it makes more direct sense to decide the matter on the basis of reasonable expectations. Because a sensible concept of legal defectiveness should take into account what buyer and seller normally expect the consumer to do with the product before he eats it, the real legal issue would seem to be this: Do normal cooking precautions include cooking pork to the thermal death point of trichinae? Under this approach trichinous pork is not necessarily legally defective.

If this analysis is correct, we cannot evaluate a product merely by looking at it or by measuring the harm that it can potentially do to a consumer. We must appraise it also in the context of what people usually expect in the kind of situation presented. For this purpose, let

us consider a situation in which, in the expectations of the parties, the identical product is legally defective under some circumstances but not legally defective under others. Suppose a processor of salami fails to cook it sufficiently to kill the trichinae in it. Suppose he sells it in that condition to a retailer, who resells it to a consumer, who becomes infected. Assuming no privity requirement, the processor is strictly accountable to the consumer. The product as sold by the processor was obviously defective, because salami is supposed to be edible without further processing by the consumer.

Let us suppose, again, the same manufacturer, the same retailer, the same consumer, the same salami, and the same case of trichinosis. Could additional circumstances exist by virtue of which the identical product as sold by the processor would *not* be legally defective?

The precise circumstances arose in *Schneider v. Suhrmann*, 8 Utah 2d 35, 327 P. 2d 822 (1958). Here the Utah Supreme Court absolved a packer of partly processed but trichinous salami because the retailer to whom he sold it had reassured him that it would be properly cooked by the retailer before sale to the public. This result seems defensible on the ground that the product that injured the consumer (legally defective salami) was not in legal contemplation the same product as that sold by the

defendant packer to the retailer (legally acceptable raw materials for salami), even though the physical object that injured the consumer was the identical object that the defendant processor had sold to the retailer. We can look at it another way: Although the defendant manufactured the partly processed raw materials, it was the retailer who for these purposes assumed the role of "manufacturer" of the fully processed salami, a responsibility that he failed to discharge.

It is possible, on the other hand, to disagree with the *Suhrmann* case on the ground that the court should have considered the unfinished salami as legally defective, even in the hands of the packer, because the agreement unreasonably jeopardized the consumer. However, unless the packer had reason to believe that the retailer was unreliable, the decision of the Utah court seems sound.

This sort of thing might occur also in other circumstances. Suppose the defendant processor sells a truckload of unwholesome butter to a buyer only because the buyer assures him that he plans to use it for an industrial, nonfood purpose. Would the processor be liable to an injured consumer if the buyer violated this understanding and turned the product back into regular food channels? It seems likely that he would not, because although the plaintiff has been injured by something clearly inad-

quate as "food," the product is not to be characterized as such in the hands of this producer, because the two parties were properly treating it as something else. On the other hand, it can be argued that the potential risk to the consumer requires that the processor be held responsible in such a case unless he takes the precaution of removing or marking the containers to prevent the contents from being diverted back into food channels. In either event, these cases show that the reasonable expectations of participants other than the consumer must also be considered.

The problem of defining a legal defect arises also for allergies, which in view of the absence of court cases is not likely to become the problem for food that it has been for cosmetics and wearing apparel. Here, again, the courts are beginning to find satisfactory answers in the reasonable expectations of the parties. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 211-30 (1951). With the increasing use of new additives, the problem may someday become significant even for food.

### *Use Qualification*

It should be apparent that the concept of defectiveness depends on the concept of what the offending product is. This, in turn, includes the concepts of contemplated use and contemplated performance. What may be legally

adequate for one purpose may be legally defective for another. Because most food has only one use, the point is less obvious there.

Consequently, even within the framework of strict liability, the manufacturer may have a legitimate escape hatch in the concept of contemplated or normal use. Clearly, the restaurant keeper is not liable if the customer stuffs mashed potatoes in his ear and gets an ear ache. If this seems implausible, let me mention examples from areas outside that of food.

In *Mannsz v. Macwhyte Co.*, 155 F. 2d 445 (3d Cir. 1946), the defendant manufacturer of wire rope got off the legal hook, even without the help of the privity requirement, because the plaintiff's use of the rope in question, which was to support a scaffold, was one abnormal to that kind of rope. Much the same result could be reached under notions of "proximate causation," which limits liability to classes of foreseeable harm. There is also the doctrine of "avoidable consequences." On the contemplated or normal uses of a hula skirt, see *Chapman v. Brown*, 198 F. Supp. 78, 89 (D. Hawaii, 1961).

### *State of Knowledge Qualification*

A big issue in the nonfood cases today is whether a product is to be considered as legally defective, even under strict liability, when it produces serious harm at a time when even scientists are inadequately

aware of its potentialities. For aircraft, the *Electras* provide a recent example. Some precedent exists for saying that a product is not legally defective until at least scientists know its dangers. Thus, in the allergy cases, courts that permit recovery make it a condition of liability that the product have an ingredient that is known to be capable of inflicting harm on a significant, generally determinable percentage of the public.

While this approach has had some judicial acceptance, fears have been expressed that a similar approach to new products not yet known by scientists to be unreasonably dangerous would, by giving manufacturers one free shot at the public, make them guinea pigs for products that should have been more adequately tested before being marketed. On the other hand, even Dean Prosser, Reporter for the RESTATEMENT, has expressed sympathy with the objective of protecting the still ignorant manufacturer of a new drug product. That such notions might be accommodated within the concepts of "defective" and "unreasonably dangerous" should comfort those who have been thinking that all will be lost if the current assault on the citadel of privacy is ultimately successful, as it most probably will be.

#### *Other Aspects of "Reasonable Expectations"*

Other problems that can be

clarified by an adequate philosophy of consumer protection based on the reasonable expectations of the parties include those of disclaimer and secondhand goods, neither of which is likely to become significant in the field of food.

The drug cases present problems that are hard to solve even with the help of a sophisticated philosophy of consumer protection. Part of the problem lies in the fact that for many new drugs no clear concept of "normal use" has yet emerged. Chemical X may be good for curing flea bites, fair for curing eczema, and poor for curing seborrhea. What expectations have sufficiently crystallized to serve as a criterion here? At any rate, strict liability does not necessarily require us to rely on hindsight. Nor, on the other hand, does it commit us to giving the drug manufacturers one free shot at the consumer.

Another complication arises for prescription drugs, where we must consider not only the reasonable expectations of the patient but those of the prescribing doctor. Should the patient be protected to the extent of the reasonable expectations of the doctor? That the contemplated use presupposed by any concept of defectiveness may depend, in the case of a particular drug product, on the issuance of an appropriate prescription is illustrated by *Kaspirowitz v. Schering Corp.*, — N.J. Super. —, 175 A.2d 658 (1961), in which the plain-



tiff, whose dermatitis was traceable to a shampoo that he had obtained without a prescription, had no legal basis for claiming that it was "defective."

Although such cases do not relate directly to food, they help to illumine the general concept of defectiveness and thus provide potential guidance in situations involving special-use problems, such as the disadvantageous consumption of salted peanuts by a person on a salt-free diet! See Judge Goodrich's concurring remarks in *Pritchard v. Liggett & Myers Tobacco Co.*, 295 Fed. 2d 292, 302 (3rd Cir. 1961) (allegedly carcinogenic cigarettes).

From this analysis, it should be clear that exposing the manufacturer to strict liability does not necessarily mean that he must under all circumstances underwrite the consumer's well-being in relation to the product. Strict liability is not so strict as might first appear.

### NEGLIGENCE

If space permitted, we might also consider several of the devices that courts have been using to avoid the injustices of the privity requirement. This might include a discussion of negligence, as bolstered by the doctrine of *res ipsa loquitur* or of negligence *per se* based on the breach of a pure food statute. It is interesting to find, for instance, that negligence *per se* was recently successfully based, apparently for the first time, on a breach of the

federal Food, Drug and Cosmetic Act, instead of a state pure food law. This was done in *Orthopedic Equipment Co. v. Eutsler*, 276 F. 2d 455 (4th Cir., 1960), involving a defective surgical nail. So far as I know, the case is unique. I have not dwelled on these things because the general erosion of the privity requirement is making them of little significance. On the other hand, the federal Food, Drug and Cosmetic Act will be significant in determining whether the particular product is legally defective.

My general impression from reading the reports is that the courts have rarely been able to try a bona fide negligence issue in a food products liability suit, because the specific facts surrounding the defect are rarely known to either party. In practice, if the plaintiff can persuade the jury that the defect was in the product when it left the defendant the inferences are usually drawn in his favor on the theoretical issue of negligence, with or without an assist from the doctrine of *res ipsa loquitur* or that of negligence *per se*. Because this is only paying lip service to culpability, what we have in effect been getting is strict liability. If so, the privity requirement has served only to drive underground the strict liability that is now emerging.

With the death of the privity requirement, the fictions and euphemisms of "negligence" will no

longer be needed, and they will probably soon disappear. (Even the concept of express warranty will become largely superfluous in the consumer cases.) Strangely enough, this will affect the trial of products liability suits very little, beyond eliminating some of the formal legal arguments that lawyers now make. The central factual issue in a products liability suit will continue to be what it has been all along: Assuming the food that injured the plaintiff was legally "defective" and "unreasonably dangerous," can the condition be traced to the defendant's factory?

#### CAUSATION; BURDEN OF PROOF

If I read the recent food cases correctly, the critical problem of causation is, and has been, how to assign the respective burdens of proof between the plaintiff and the defendant on matters on which specific facts are available to neither side. We cannot solve this complicated problem simply by uttering the legal platitudes that the burden of proof is on the plaintiff, and that he is entitled to rely on the normal inferences of fact. Not only is the whole question of the defendant's fault shrouded in a factual mystery, but even much of the causation issue is obscured from direct view. For this reason the plaintiff can rely only on general or fragile inferences and suppositions such as those supported by *res ipsa loquitur*.

First, he must prove that his hurt was caused by a condition in a particular food product. Next, he must prove that the particular product was manufactured by the defendant. Third, he must prove that the defect was in the product when it left the defendant's plant. We might think, off-hand, that in the food cases this last would be the easiest of all to prove. And so it is in many cases. But not always.

This third phase of proving causation is dramatized in the tampering cases, in which there are several points of view. The hardest on the plaintiff is that taken by the Kentucky Court of Appeals, which seems to have borrowed it from earlier cases in Tennessee. In *Ashland Coca-Cola Bottling Co. v Byrne*, 258 S.W. 2d 475, 476 (Ky. App. 1953), the court said that "Human experience has forced us to the conclusion that the presence of foreign objects in bottled drinks may in the ordinary course of things be the result of a prank or a deliberate wrongful act equally well as being the result of negligence on the part of the bottler." The court refused, therefore, to find any presumption in the plaintiff's behalf or to apply *res ipsa loquitur*. That case and several more recent ones have held that the plaintiff must prove actual negligence if he cannot affirmatively disprove tampering in a situation providing the *opportunity* to tamper. These were cases in which the

retailer allowed customers to wait on themselves or permitted them access to the place where the bottles were stored. Naturally, a plaintiff cannot sustain such a burden. Testimony by the retailer that he noticed no tampering, and would have done so if there had been any, was not enough. Several Illinois cases seem to have taken the same approach. *E.g.*, *Heimsoth v. Falstaff Brewing Co.*, 1 Ill. App. 2d 28, 116 N.E. 2d 193 (1953).

Recent cases in Mississippi and Texas indicate, on the other hand, that in those states the burden of proof on the tampering point is squarely on the defendant, for reasons that to me seem persuasive. This is the prevailing point of view elsewhere. In *Wichita Coca-Cola Bottling Co. v. Tyler*, 288 S.W. 2d 903 (Tex. Civ. App. 1956), the Court of Civil Appeals in Texas found the Kentucky court's discovery of a tendency to tamper in the *Byrne* case to be unrealistic. Its opinion echoes that of the dissent in the *Byrne* case, which stated, "I am not convinced that the placing of foreign objects in bottled soft drinks, by pranksters or evildoers, is a matter of such common occurrence as to justify the conclusion that the possibility of that must be disproved before the presumption of negligence of the bottler may be applied." 258 S.W. 2d 475, 476 (Ky. App. 1953).

The glaring weakness in the minority view, which puts the bur-

den on the plaintiff, is that it frames the plaintiff's burden in terms of negating the *opportunity* to tamper, and then assumes that from an opportunity to tamper it is reasonable to infer actual tampering. This weakness is pointed up forcefully in *Keller v. Coca-Cola Bottling Co.*, 214 Ore. 654, 330 P. 2d 346 (1958), where the Oregon Supreme Court said, ". . . in this case, as well as in every other one we have examined, there has been no evidence that tampering by competitors or busybodies was an actual probability. The only indication is the contention that the *opportunity* or possibility existed. This is not to establish a probability. . . ." In other words, the plaintiff should not lose merely because he fails to negate the improbable. Establishing the probability of tampering would, under elementary principles of proof, seem to fall more logically on the defendant. A more recent case to the same effect is *Asher v. Coca-Cola Bottling Co.*, \_\_\_ Neb. \_\_\_, 112 N.W. 2d 252, 255 (1961).

Tampering does not seem to be a live issue for food products not involving the removable crown cap, and outside a few states like Tennessee, Kentucky, and Illinois, it does not seem to pose a serious problem for the plaintiff even for products that do involve such a cap.

What about the nonfood cases? Frankly, I do not know, but my guess is that it would depend upon

the product, the nature of the defect, and the reasonable probability (not opportunity) of an intervening cause under the circumstances. An examination of GILLAM, PRODUCTS LIABILITY IN THE AUTOMOBILE INDUSTRY (University of Minnesota Press, Minneapolis, 1960), suggests that for products such as automobiles the possibility of an intervening cause may be strong for a mechanical failure occurring a significant time after the car was purchased.

Fears are now being expressed that the pendulum may be swinging too far in favor of the consumer with respect to the difficulties of proving causation. Condon suggests that the *Henningsen* case was far too lenient in this respect. Condon, *Restatement or Reformation?*, 16 FOOD DRUG COSM. L.J. 473 (1961). He points out that the plaintiff's "expert" witness, after admitting that the car was too badly damaged to tell specifically what went wrong, was able to say only that, based on the plaintiff's version of the accident, something went "wrong from the steering wheel down to the front wheel." The court said this was enough to raise a question of fact for the jury. Condon strongly disagrees. Furthermore, he feels that it reflects a growing attitude.

While Condon may be right about the *Henningsen* case, the opposite criticism could be made of *Milligan v. Coca Cola Bottling*

*Co.*, 11 Utah 2d 30, 354 P. 2d 580 (1960). Here the plaintiff was nonsuited because the offending bottle was allowed to stand for five weeks in an easily accessible, unlocked room. Because the plaintiff was unable to allege specific facts tending to negate the possibility that the bottle had been tampered with, he could not even get to the jury.

The dissent found it much more plausible to assume that the defect got in at the factory. This is precisely the kind of situation in which the court should not need expert testimony or special evidence to establish the normal probabilities. Juries are admirably fitted to determine issues such as these. The notion of some prankster sneaking into the plaintiff's storeroom, surreptitiously inserting a paper clip, and carefully resealing the bottle does not commend itself as a reasonable probability. Cases like this tend to be unique and should be allowed to go to the jury.

The issue of burden of proof was also squarely raised by *Reine v. Baton Rouge Coca Cola Bottling Co.*, 126 So. 2d 635 (La. App. 1961), in which the plaintiff recovered for illness caused by a roach egg and a toy jack in two respective bottles of Coca Cola. The court resolved it by approving the lower court's opinion holding that the plaintiff did not have to offer "negative proof that the foreign substance in the beverage did not result from the mishandling by

those other than the manufacturer.”

So far, of course, as the defendant controls the channels of distribution he assumes the risk of tampering by outsiders. This is illustrated by a recent California case, *Paul v. Rodgers Bottling Co.*, 183 Cal. App. 2d 680, 6 Cal. Rptr. 867 (3d Dist., 1960), involving a mouse in a soft drink bottle that the plaintiff had bought from a vending machine operated by the defendant bottler.

Other recent cases also support the notion that tracing a known defect to the defendant remains the central issue in most food products liability cases. In *Tiffin v. Great Atl. & Pac. Tea Co.*, 18 Ill. 2d 48, 162 N. E. 2d 406 (1959), the plaintiff lost because the circumstances suggested that it was more likely that the offending ham had become contaminated with hemolytic staphylococci by being allowed to stand unrefrigerated in his home than by being exposed to contamination in the defendant's establishment, where, the evidence showed, all normal precautions had been taken. In *Elledge v. Pepsi Cola Bottling Co. of Winston-Salem*, 252 N.C. 337, 113 S.E. 2d 435 (1960), the plaintiff lost because he failed to prove that the Pepsi Cola dealer from whom the retailer had bought the bottle of Suncrest was the defendant. Is it possible that the plaintiff's attorney overlooked the fact that it is sometimes possible to identify the bottler by the crown

cap (not the bottle) and that a bottler's franchise within an area is usually exclusive? See also *Baker v. Coca-Cola Bottling Works of Gary*, — Ind. App. —, 177 N.E. 2d 759, 764-770 (1961) (defective soft drink bottle), and *Crowell v. First Nat'l Stores, Inc.*, — Mass. —, 173 N.E. 2d 609, 610 (1961) (unwholesome frankfurts).

On the other hand, in *Gonzales v. Safeway Stores, Inc.*, — Colo. —, 363 P. 2d 667, 669 (1961) (bug in canned peas); *Jackson Coca-Cola Bottling Co. v. Nails*, — Miss. —, 130 So. 2d 258, 259 (1961) (wire and dirt in soft drink); and *Campbell Soup Co. v. Dusek*, — Miss. —, 135 So. 2d 414 (1961) (metal in canned soup), evidence that the offending foreign object came from a product prepared by the defendant entitled the plaintiff to take the case to the jury on the central question of causation.

### CONCLUSION

The factual problem in these cases is to balance the reasonable probabilities. The legal problem is to fix the burden of proof with respect to kinds of factual issues on which evidence is unavailable and in which the burden of proof is, therefore, decisive. It is here, and in the concept of legal “defectiveness,” that the most important battles of strict liability will probably be fought.

As for the privity requirement, *requiescat in pace*.