Strict Liability for the Manufacturer of General Products--Recent Developments

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them. It is nearly impossible to determine how much, if anything, has been done in this field and to measure its effectiveness. They also have the more drastic remedy of local option.

In the final analysis, the chief hope of the cities may rest upon a change in philosophy by the Ohio Supreme Court. That such a change is taking place is clear from the Phillips case. How far it will go is in the realm of supposition. If the decision in the Compola case that the state has preempted the field is approved by the court, such a change in philosophy will be effectively repudiated in one area. The outlook for the cities would then be dark indeed.

In answer then to the question raised at the outset of this article, i.e., do Ohio municipalities have the power to control the traffic in and the consumption of intoxicating liquor within their limits; one can safely say, theoretically yes. However, this power has been so limited that the practical answer must be no.

REES TAYLOR

**Strict Liability for the Manufacturer of General Products—Recent Developments**

In the Wall Street Journal of August 31, 1960, there appeared a front-page article announcing the new reaches of products-liability law. The developments chronicled in that article are not of an ordinary nature; they suggest a broad and elemental shifting in the legal relationship between the manufacturer and the consumer. By convention, the legal responsibility of the manufacturer to the consumer has rested in negligence; there are now significant indications that that responsibility is to be supplanted by one founded upon a doctrine of strict liability.

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68. 168 Ohio St. 191, 151 N.E.2d 722 (1958).
70. The 1960 United States Census has added yet another facet to the problem facing municipalities. The Department of Liquor Control has reported that under the population quota system, an additional 604 liquor licenses will become available in Ohio during 1961. Under the quota system, more liquor licenses are made available when population increases but they are not taken away, if previously issued, when population decreases.

The most unfortunate feature of this development is that the majority of openings are in the fast-growing and predominantly residential suburbs rather than in the more commercial central cities. In Cuyahoga County, for example, there are 64 new license openings and none of them are in Cleveland. This situation has led State Liquor Director Richard C. Crouch to recommend that the cities be given more control over liquor quotas. (Past attempts by cities to do this have failed. State ex rel. Cozart v. Carran, 133 Ohio St. 50, 11 N.E.2d 245 (1937)). Mr. Crouch will ask the legislature to allow cities to set their own limits on licenses as long as the total is less than that set by the state. He will also ask the legislature to give the municipalities specific power to pass liquor zoning laws. Cleveland Plain Dealer, Dec. 8, 1960, p. 1, col. 4.
The doctrine of strict liability for the manufacturer has been the subject of exhaustive discussion and analysis. It is not necessary to restate here the many arguments which have been advanced in support of the doctrine. The social and economic philosophy which underlies those arguments is well presented in the following lines:

... public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.

This philosophy has been upheld as humanitarian by many writers and denounced as authoritarian by others. Whatever may be its merits, it is a philosophy which has found vigorous new expression in the law.

The movement towards strict liability of the manufacturer has not been an even and sweeping one. It has progressed irregularly along two distinct legal courses. One of these has been express warranty, the other implied warranty.

EXPRESS WARRANTY

Since the Nineteen-Thirties a growing number of courts have taken notice of the fact that the world of merchandising is a world of advertising. They have observed that manufacturers discharge a steady and inescapable stream of words which direct the consuming public to buy their products. Claims of every description are made for these products,

2. The history of the negligence-based action against the manufacturer is treated briefly in Prosser, Torts 497-500 (2d ed. 1955). For greater detail, see Feezer, Tort Liability of Manufacturers, 19 Minn. L. Rev. 752 (1935); Jeanblanc, Manufacturers' Liability to Persons Other Than Their Immediate Vendees, 24 Va. L. Rev. 134 (1937); Russell, Manufacturers' Liability to the Ultimate Consumer, 21 Ky. L.J. 388 (1933).
3. For a summary of the arguments for and against strict liability of the manufacturer, see Dickerson, Products Liability and the Food Consumer 134-42 (1951); see also 2 Harper & James, Torts ch. 28 (1956); Strict Liability of Manufacturers: A Symposium, 24 Tenn. L. Rev. 787 (1955). For a comprehensive bibliography of products-liability literature, see Gillman, Products Liability in the Automobile Industry 30-32 (1960).
5. See generally 1 Frumer & Friedman, Products Liability ch. 3 (1960).
all touched with a seeming glow of verity, and all intended for the ultimate consumer. Why, when these claims prove false and the consumer is injured, should the manufacturer be permitted to deny direct liability on the ground that no contractual ties exist between him and the consumer? The courts have reasoned that he should not be so permitted, and, accordingly, they have held that positive statements made in advertisements, labels and sales brochures must be regarded as express warranties to the ultimate consumer. If the consumer can show that he has relied to his injury on such a positive statement, he may recover in express warranty, even though the misrepresentation was innocently made and the product's defect not attributable to negligence in its manufacture. Liability for the misrepresentation is absolute.

This doctrine of express warranty-through-advertising is now firmly established in the law. Since the leading case of Baxter v. Ford Motor Company was decided in 1932, few courts have refused to adopt it.

Inasmuch as the gravamen of the express warranty action is the misrepresentation, judicial acceptance of the express warranty-through-advertising theory cannot be regarded as tantamount to judicial acceptance of an all-encompassing policy of liability without fault for the manufacturer. But this in no way alters the effect of the express warranty action. Since the liability for the manufacturer's representation is "strict" (in the sense that no negligence or scienter need be proved), the courts' unexpressed convictions toward the risk-spreading philosophy of such liability are not directly material.

**IMPLIED WARRANTY**

Simply stated, an implied warranty provides that the particular goods are reasonably suited to the general purposes for which they were manu-

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6. *Id.* at § 16.04 (4) (a). The following passage from the opinion in Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 248-49, 147 N.E.2d 612, 615 (1958), is illuminating:

Today, many manufacturers of merchandise . . . make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer . . . The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisement. What sensible reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss.


8. 168 Wash. 456, 12 P.2d 409 (1932). For a discussion of this case and others of more recent vintage see 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.04(4) (a) (1960).

factured and sold. Although an implied warranty arises when a contract of sale is formed, it is independent of the contract terms. It is a warranty imposed by law. It may be nullified only by the mutual consent of the parties to the sale. Although its genesis was in tort, implied warranty has come to be governed, under most circumstances, by the law of contracts. This hybrid nature of the warranty action has been both beneficial and detrimental in the defective products cases. Because it is a creature of the law and of public policy, implied warranty has immediate allure for those liberal courts which endorse and seek to implement the philosophy of strict liability for the manufacturer. On the other hand, the contractual elements of warranty give conservative courts a convenient means of avoiding difficult policy decisions by barring consumer actions for technical reasons.

The Privity Requirement

The technicality which dominates the implied warranty action is privity of contract. Most courts, loath to inflict the broad liability which implied warranty may bring, have purposely ignored the tort antecedents of warranty and have continued to call for a showing of privity. This obdurate stand in the implied warranty actions has come in the face of privity's virtual extinction in the negligence and express warranty actions. The reasons for this inconstancy are not altogether clear. Perhaps there has been a realization that express warranty-through-advertising, based as it is on an express misrepresentation, is an essentially limited means of imposing strict liability upon the manufacturer. Perhaps there has been an a priori feeling that the express misrepresentation imports a greater "moral" culpability. But, whatever judicial thought has been, there is no question that it has been directed by considerations of policy rather than by the technicalities of the law, for it is clear that the "technical" force of privity must be the same in both express and implied warranty actions.

The first use of implied warranty in actions by the consumer against the remote manufacturer came in cases involving adulterated foods and

12. 1A Uniform Laws Ann. § 71. See also James, Products Liability, 34 Texas L. Rev. 192, 210-12 (1955).
14. See authorities cited in notes 2 and 3 supra.
15. The history of the privity requirement is given in the authorities cited in note 3, supra. See also Spruill, Privity of Contract as a Requisite for Recovery on Warranty, 19 N.C.L. Rev. 551 (1941).
beverages.\textsuperscript{16} Despite the peregrinations of the early decisions, a majority of those states having any definite law on the subject now permit the consumer who has been injured by adulterated foods or beverages to recover directly against the manufacturer in an implied warranty action.\textsuperscript{17} Privity of contract in these cases has been defeated (and strict liability supported) by the strong emotional reaction to noxious foods. This language of a Texas court is typical:

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 or life, that the law imposes a warranty of purity in favor of the ultimate consumer as a matter of public policy.\textsuperscript{18}

In the express warranty actions the policy preoccupations have been with the character of the misrepresentation rather than with the product; in the implied warranty actions the policy considerations (and thus the decisions) have been directly related to the defective product involved. For many years the strict liability of the manufacturer to the remote consumer of unwholesome foods was regarded as an exception to the general rule that no liability existed in implied warranty where privity of contract was absent. Then, in the Nineteen-Fifties, came several decisions which lifted the privity bar in implied warranty actions involving products intended for intimate bodily use.\textsuperscript{19} These decisions were clearly taken by analogy to the food and beverage cases. With respect to other products of a general nature, the reluctance to impose strict liability through implied warranty persisted.

This brief survey has led to the recent developments of which the Wall Street Journal has spoken.

\textit{The Recent Cases}

Claus Henningsen purchased for his wife a new Plymouth. Ten days after it was delivered by Bloomfield Motors, Inc., Chrysler Corporation's authorized dealer, Mrs. Henningsen set out on a short driving trip. The car performed in a normal fashion until, on her return home, it suddenly veered off the road, crashing into a brick wall. Mrs. Henningsen was seriously injured.

\begin{itemize}
\item \textsuperscript{16} The so-called "food cases" are discussed in detail in Dickerson, \textit{Products Liability and the Food Consumer} 134-42 (1951).
\item \textsuperscript{17} Prosser, \textit{The Assault upon the Citadel (Strict Liability to the Consumer)}, 69 \textit{Yale L.J.} 1099, 1103-10 (1960).
\item \textsuperscript{18} Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 612, 164 S.W.2d 828, 829 (1942).
\end{itemize}
Suit was brought against the manufacturer and the dealer by Mr. and Mrs. Henningsen. The complaint was based upon negligence and upon breach of express and implied warranties. At the trial, the negligence and express warranty counts were dismissed by the court and the cause was submitted to the jury for determination solely on the issue of breach of implied warranty. Verdicts were returned against both defendants.

On direct appeal to the Supreme Court of New Jersey it was held that Mrs. Henningsen was entitled to recover from the manufacturer for breach of implied warranty despite the fact that neither she nor her purchaser-husband stood in privity with the Chrysler Corporation.  

*Henningsen v. Bloomfield Motors* 20 is a landmark decision. Already it has been proclaimed the most important decision in products-liability law since *MacPherson v. Buick Motor Company*. 22 The opinion is an unusually trenchant and thorough one: the delineation of the issues is sharp, the reasoning incisive, the language unequivocal. It may be expected to have a great influence upon the movement toward strict liability for the manufacturer.

The lengthy quotation which follows indicates the New Jersey court's broad endorsement of the risk-spreading policy which lies at the core of strict liability:

> With the advent of mass-marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media. In such an economy it became obvious that the consumer was the person being cultivated. Manifestly, the connotation of "consumer" was broader than that of "buyer." He signified such a person who, in the reasonable contemplation of the parties to the sale, might be expected to use the product. Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur. 23

A very recent case which closely parallels *Henningsen* on its facts and in its result, but which fails to come directly to grips with the policy of strict liability, is *General Motors Corporation v. Dodson*. 24 In that case the purchaser of a new Oldsmobile was seriously injured in an accident

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21. Ibid.
caused by the automobile's defective brakes. Suit was brought against the manufacturer for breach of express and implied warranties. After a jury verdict and judgment for the plaintiffs, General Motors appealed on the ground, inter alia, that the trial court had erred in submitting the issue of implied warranty to the jury because no privity existed between General Motors and the plaintiffs. In affirming, the court of appeals said:

The jury could have found that General Motors was the actual person or entity with whom the plaintiffs were dealing, and [that the dealer] was a conduit or subterfuge by which General Motors tried to exempt itself from liability to the consumers...25

Certiorari was denied by the Supreme Court of Tennessee.

There are, in addition to Henningsen and Dodson, a number of other significant decisions in which manufacturers of general products have been subjected to strict liability. While none of these can compare with Henningsen in circumspect treatment of the strict liability-through-implied warranty issue, several of the decisions do merit special consideration. In discussing these cases particular emphasis will be given to the language used by the courts in arriving at their decisions.

A "non-food" case which has already provoked considerable judicial comment is Spence v. Three Rivers Builders & Masonry Company,26 decided by the Michigan Supreme Court in 1958. The defective product involved in Spence was that enemy of American architecture, the cinder block. The blocks purchased by the plaintiff cracked, chipped and "bled" unsightly red stains. Suit was brought against the remote manufacturer for negligence and for breach of implied warranty. The court squarely met the defense of lack of privity. After observing that

...awesome have been some of the semantic bogs negotiated by ours and other appellate courts when in particularly harsh cases they have attempted...to get around the barrier imposed by [privity]...27

the court concluded that it could find

...no reason in logic or sound law why recovery in these situations

25. Id. at 661. The opinion gives a less than satisfactory analysis of the important legal questions presented in the case. The short passage quoted in the text contains the only remarks which may be regarded as directed to the privity requirement. It is not clear whether the statement that the dealer could be found to have been a mere conduit for the manufacturer was intended to express a universal marketing truth, or rather, that such a deduction would be permissible only because of the particular circumstances of the present case, or at most, because of the particular relationship existing between automobile manufacturers and their dealers. From the language used, it is likely that the court meant only to take the latter stand. Since, however, one of the most compelling arguments for the abolition of privity rests on the fact that nearly all dealers are simply "conduits" for manufacturers, the court's identification with that argument in the present automobile manufacturer-dealer situation would, in logic, force it to reach similar conclusions in cases involving other general products.


27. Id. at 127, 90 N.W.2d at 877.
[implied warranty] should be confined to injuries to persons and not to property, or allowed in food and related cases and denied in all others.\textsuperscript{28}

Accordingly, the plaintiff was permitted to hold the manufacturer strictly liable for breach of implied warranty.

The \textit{Spence} case has particular significance because of the innocuous nature of the product involved and because of the court’s insistence that implied warranty actions for property damages be given the same consideration as those brought for personal injuries.

Florida aligned itself with the strict liability movement by its decision in \textit{Continental Copper & Steel Industries, Inc. v. Cornelius},\textsuperscript{29} a case involving defective electric cable. Suit against the remote manufacturer was predicated on breach of implied warranty. Judgment for the consumer-plaintiff was upheld by the court of appeals on the basis of clear-cut dictum of the Florida Supreme Court in two earlier defective products cases.\textsuperscript{30}

The activity of the California courts in extending strict liability to the manufacturer has been of a spectacular but uneven nature. A judgment for the plaintiff in one of the celebrated Cutter Laboratories cases was recently affirmed, the appellate court holding that a child who had contracted polio as a result of an injection of the defendant’s polio vaccine was entitled to recover in an action for breach of implied warranty, despite the absence of privity.\textsuperscript{31}

Because of the experimental nature of the product involved, and the complete lack of legal fault on the part of the defendant, the result is a bold one. The court’s opinion, however, shows considerable restraint. Emphasis was given to the fact that the ruling was taken by analogy to the food and beverage cases; as to products in general, the court conceded

\textsuperscript{28} \textit{Id. at 130, 90 N.W.2d at 878. The exact holding of the court is obscured by the negligence issues involved, but, nonetheless, several federal courts have taken it at face value and have used it as a basis for permitting actions by consumers against remote manufacturers. Bowles v. Zimmer Mfg. Co., 277 F.2d 868 (7th Cir. 1960) (defective surgical pin); Conlon v. Republic Aviation Corp., 6 Av. Cas. 17,982 (S.D.N.Y. 1960) (defective airplane).}

\textsuperscript{29} The case is commented upon, with only partial enthusiasm, in \textit{1958 Annual Survey of Michigan Law, 5 WAYNE L. REV. 100 (1959)}, and in \textit{1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY} § 16.04(2), at 413, 414 (1960).

\textsuperscript{30} Matthews v. Lawnlite Co., 88 So.2d 299, 300 (Fla. 1956); Hoskins v. Jackson Grain Co., 63 So.2d 514, 515 (Fla. 1953).

\textsuperscript{31} Gottsdanker v. Cutter Laboratories, 6 Cal. Rptr. 320 (Ct. App. 1960). The case presents a number of extremely difficult questions, not the least of which is whether or not the imposition of strict liability without fault upon organizations producing highly experimental medical products will have the effect of seriously hindering the development of medical science. To this contention, raised by the defendant in \textit{Gottsdanker, Keatley}, in his article, \textit{Products on Trial, op. cit. supra note 1}, quotes an attorney for the plaintiff as retorting: “They talk as though they’re entitled to one free catastrophe.”

The questions presented in the Cutter Laboratories cases are discussed in Note, \textit{65 YALE L.J. 262 (1955)}.
that privity of contract remained a prerequisite for the bringing of an implied warranty action in California.\(^{32}\)

Another recent case, decided by the California Supreme Court, permitted a workman to recover against the manufacturer who had sold a defective grinding wheel to the man’s employer.\(^{33}\) The decision turned upon the rather illusory theory that the workman was a member of the industrial “family” of the employer and as such was clothed with sufficient “privity” to maintain an action for breach of implied warranty against the manufacturer. What effect this ruling will have upon the course of strict liability in California is difficult to foretell.

If the California courts have been diffident in their approach to strict liability for the manufacturer, the case of Beck \textit{v.} Spindler\(^{34}\) shows the Minnesota Supreme Court’s apparent willingness to adopt the strict liability doctrine \textit{in toto}. The case involved a house trailer whose defective insulation caused inordinate condensation upon the trailer’s inner walls and ceiling. Although the purchase of the trailer had been from an intermediary, suit for breach of implied warranty was brought against the manufacturer. In discussing the defense of lack of privity, the court had this to say:

It may well be that the time has come when we should discard the whole troublesome idea that privity of contract is essential to recovery on an implied warranty and extend liability to the one who has caused the harm. If that were done, clearly the manufacturer of a chattel would become liable because in many, if not most, of the cases it is the manufacturer rather than the dealer who ought to know whether the chattel is fit for the use for which it was sold. . . . it is difficult to see why an injured party should be permitted to recover against the manufacturer on the theory that he negligently used improper material in the construction of the trailer and not to be permitted to recover on the theory that the manufacturer had breached an implied warranty that the trailer was fit for use in the locality in which it was sold.\(^{35}\)

The court, notwithstanding this progressive analysis of the manufacturer’s responsibility to the ultimate consumer, chose to decide the case upon a different theory,\(^{38}\) thereby reducing the foregoing language to dictum. Nevertheless, it appears quite evident that the court would

\(^{32}\) The court referred to \textit{Burr v. Sherwin Williams Co.}, 42 Cal. 2d 682, 268 P.2d 1041 (1954), in which the Supreme Court held that privity was essential in all implied warranty actions except those involving foods and beverages. In that case, however, the court did discard the privity rule in actions based upon express warranty-through-labeling.

\(^{33}\) \textit{Peterson v. Lamb Rubber Co.}, 5 Cal. Rptr. 863 (Sup. Ct. 1960). The case is discussed at length in \textit{Frumer & Friedman, Products Liability § 16.03 (7)} (1960).

\(^{34}\) \textit{256 Minn. 543, 99 N.W.2d} 670 (1959).

\(^{35}\) \textit{Id.} at 561, 99 N.W.2d at 682.

\(^{36}\) Because of an express warranty given by the manufacturer to the plaintiff, the court reasoned, rathersingularly, that the manufacturer was a “seller” within the meaning of the Minnesota Sales Act. \textit{Id.} at 562, 92 N.W.2d at 683.
sympathetically receive arguments for strict liability if a proper implied warranty case were brought before it.

The decisions which have just been discussed are representative of state court activity in expanding the strict accountability of the manufacturer to his consumer. Federal courts, too, have shown a disposition to break down the privity barrier in defective products cases. To date the Southern District Court of New York has denied motions to dismiss in four implied warranty actions brought against airplane manufacturers for personal injuries or wrongful deaths. Three of these cases were decided upon state law; the fourth, *Middleton v. United Aircraft Corporation*, was brought pursuant to a federal statute, the Death on the High Seas Act. The wrongful death action followed the crash of a helicopter which had been manufactured by the defendant. The defendant filed a motion to dismiss on the ground that privity of contract had not been present between it and the deceased pilot of the helicopter. The court surveyed the history of the privity rule and concluded that it was an anachronism which no longer deserved judicial sanction. The following excerpts from the court's opinion show an unqualified acceptance of the "philosophy" of strict liability which is reminiscent of that given by the New Jersey Supreme Court in *Henningsen*:

> With liability of the manufacturer to one not in privity with him on a negligence theory established, it is but one logical step forward to allow recovery against a manufacturer on a breach of warranty theory by one not in privity with him.

The progressive decline of the older rule [privity], based as it was on an infirm and fallacious foundation is clearly evident. The fact that a manufacturer of an aircraft located in Connecticut may become involved in a disaster happening in the Gulf of Mexico may have unfor-

37. Other noteworthy implied warranty cases involving products other than food are:

- *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959). Defective king-pin in tractor-trailer's steering assembly resulted in extensive property damage. Recovery upon implied warranty, without a showing of privity, upheld by the appellate court which relied upon several Pennsylvania cases involving *express* warranties.

- *Brown v. Globe Laboratories*, 165 Neb. 138, 84 N.W.2d 151 (1957). The purchaser of livestock vaccine was permitted to recover against the remote manufacturer in an implied warranty action. The opinion, though very lengthy, is strangely silent on the privity issue and therefore appears somewhat suspect.

38. See, e.g., *B. F. Goodrich Co. v. Hammond*, 269 F.2d 501 (10th Cir. 1959). The court, in apparent dedication to the strict liability movement, went somewhat beyond the Kansas law in allowing a non-purchasing "consumer" to hold the remote manufacturer for breach of implied warranty covering a sale of automobile tires. The court relied on *Graham v. Bortenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413 (1954), a case involving hair dye in which the ruling was taken by analogy to the food cases.


40. 6 Av. Cas. 17,975 (S.D.N.Y. 1960).

runate aspects, but that is not determinative of the question at issue.

The fact that modern life and developments, such as transportation, have taken on complex relationships is no anomaly. Complex relationships result in complex responsibilities. If life is complex, so are the laws of human relationship, which are the results thereof.42

In the past year there has been nearly one decision a month in which strict liability has been carried, through implied warranty, to the manufacturer of general products. In several of these cases there has been more than a grudging recognition of the illogic of the privity rule; in several there has been a broad and affirmative acceptance of the socio-economic philosophy which supports the doctrine of strict liability. This shift of judicial attitude in the implied warranty cases, coupled with the expanding vitality of the express warranty-through-advertising doctrine, suggests that a trend towards strict accountability for the manufacturer has begun. In view of this movement, these are perhaps propitious times for examining the adequacy of the legal vehicles through which strict liability has been imposed.

THE INADEQUACIES OF THE WARRANTY SCHEME

Express Warranty

To prevail in an express warranty action against the manufacturer, the consumer must be able to prove that the manufacturer has made a positive assertion of fact upon which the plaintiff has relied to his injury.43

What may be considered a positive assertion of fact?44 In one case a label on a loaf of bread read:

This bread is 100 per cent pure, made under the most modern, scientific process; has very special merit as a healthful and nutritious food...45

It was held that this statement did not cover a nail found in the loaf purchased by the plaintiff. On the other hand, in Worley v. Procter & Gamble Manufacturing Company,46 the statement that "of course, Tide is kind to hands" was said to be a sufficiently positive statement to permit suit by a woman whose hands had become inflamed after use of the detergent. These two cases, and the pettifogging distinctions found in other express warranty cases, amply illustrate the fact that recovery in

43. See Prosser, Torts § 88, at 546-49, § 89 (2d ed. 1955); James, Products Liability, 34 Texas L. Rev. 44, 192 (1955).
44. The problem of distinguishing "warranty" from mere "sales-puffing" is a difficult one. See 1 Frumer & Friedman, Products Liability § 16.04(4) (c) (1960).
46. 241 Mo. App. 1114, 253 S.W.2d 532 (1952).
express warranty rests upon the unknowable influences of the English language.

Equally elusive is the element of reliance. In many defective product cases there has been no reliance in a conventional sense. Many purchases are made perfunctorily, and though the buyer may realize that he has a preference for a particular "brand," that preference does not always turn upon any express statement made by the manufacturer. Even in those situations in which the preference has been exercised because of a particular claim made in the advertisement of the product or upon its label, it does not often follow that that statement is the false one.

It is almost always difficult and sometimes impossible for the plaintiff to meet successfully the requisites for recovery in express warranty.\textsuperscript{47} A recognition of this hardship may be seen in the tendency of the courts to liberalize the technical burdens which weigh upon the plaintiff-consumer.\textsuperscript{48} But even with this tendency toward liberalization express warranty remains an essentially circumscribed method of imposing a policy of strict liability, for there are many situations in which there is simply no express statement upon which suit can be grounded.

\textit{Implied Warranty}

As a warranty which is imposed by the law as a matter of policy,\textsuperscript{49} and which is independent of the contract terms (except disclaimers\textsuperscript{50}), implied warranty would appear to be an ideal, and what is more, an available means of implementing a broad judicial policy of strict liability for the manufacturer. Unfortunately, such is not the case; the theoretical capabilities of implied warranty have not been matched by the tangible results which it has produced. There are a number of reasons for this.

One inadequacy of implied warranty has its roots in the very nature of the warranty action. The following statement may be considered:

\begin{quote}
It has been said of warranty, 'A more notable example of legal miscegenation could hardly be cited.' It originated in tort as a species of relief for misrepresentation. Later there was added to this concept of warranty another which was consensual in nature. In time, special assumpsit rather than trespass on the case for deceit became the normal remedy for breach of warranty and men came to think of warranty as contract. But the old remained along with the new. Consequently warranty is neither tort nor contract, it is both.\textsuperscript{51}
\end{quote}

\textsuperscript{47} In one case, for example, the plaintiff was denied recovery because he had not given any attention at the time of purchase to an express warranty on the label of a bottle of liniment. Randall v. Goodrich-Gamble Co., 238 Minn. 10, 54 N.W.2d 769 (1952).

\textsuperscript{48} See Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

\textsuperscript{49} Bekkevold v. Potts, 173 Minn. 87, 89, 216 N.W. 790, 791 (1927).

\textsuperscript{50} 1A UNIFORM LAWS ANN. § 71; James, Products Liability, 34 TEXAS L. REV. 192, 210-12 (1955).

Progressive courts have resurrected or perpetuated the tort elements of warranty in actions brought by the consumer against the remote manufacturer. Other courts, however, have continued to be harnessed by the contractual side of warranty's derivation, and thus have applied contract rather than tort rules in determining such matters as the applicable measure of damages and the standing to sue of the injured party.\(^5\)

A second and very real shortcoming of implied warranty lies in the fact that all warranties are in thirty-five states governed by the Uniform Sales Act.\(^6\) There are a number of provisions in this act which seriously restrict the usefulness of implied warranty as a means of effecting a policy of liability without fault.

The Sales Act was promulgated at a time when warranties running to persons other than purchasers were unthought of. The definitions of "buyer" and "seller" within the act were drawn with the immediate parties to the sale in mind.\(^6\) Thus the act has often been interpreted as excluding suits brought by members of the purchaser's family or other unrelated third parties who have been injured by the defective product.\(^6\)

Another provision of the Sales Act which does not lend itself to the scheme of strict liability is that which requires the buyer to give notice to the seller within a reasonable time after the breach.\(^6\) Although this rule has sound commercial application, it can lead to hardship in personal injury actions brought by the consumer. The injured consumer is seldom "steeped in the business practice which justifies the rule," and, as Prosser has said, until the consumer "has had legal advice it will not occur to him to give notice to one with whom he has had no dealings."\(^6\)

Another commercial rule sanctioned by the Sales Act is that of disclaimer. The "seller" is empowered to disclaim any express or implied warranty which might otherwise have attached to the sale.\(^9\) When reasonably pursued, and in a commercial context, disclaimer may be a

\(^{52}\) See Prosser, Assualt upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1126-27 (1960); Amram & Goodman, Some Problems in the Law of Implied Warranty, 3 SYRACUSE L. REV. 259 (1952).

\(^{53}\) 1A UNIFORM LAWS ANN. §§ 12-16. Section 15 of the Sales Act provides that no implied warranties except those described by the act arise when a sale is made. Taken in conjunction with other provisions of the act, this section could seriously limit the use of implied warranty actions against remote manufacturers. See Prosser, Assualt upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1128-29 (1960), and cases cited therein.

\(^{54}\) 1A UNIFORM LAWS ANN. § 76.

\(^{55}\) See PROSSER, TORTS § 84, at 506-07 (2d ed. 1955), and cases cited therein. See also, Prosser, Assualt upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1117-18 (1960).

\(^{56}\) 1A UNIFORM LAWS ANN. § 49.

\(^{57}\) James, Products Liability, 34 TEXAS L. REV. 192, 197 (1955).

\(^{58}\) Prosser, Assualt upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1130 (1960).

\(^{59}\) 1A UNIFORM LAWS ANN. § 71. James, Products Liability, 34 TEXAS L. REV. 192, 210-12 (1955); Wilson, Products Liability, 43 CALIF. L. REV. 809, 835-40 (1955).
justifiable means of protection for the seller. But with regard to the manufacturer's relationship to the ultimate consumer, the power of disclaimer may be a dangerous and unreasonable one. If public policy demands the absolute liability of the manufacturer to the ultimate consumer, then he should not be permitted to skirt this responsibility by simply attaching a disclaimer of liability to his product.

It is not necessary to continue with this list of implied warranty's shortcomings. They have been presented in full spectrum in the "food" cases and have already undergone close scrutiny. More rewarding would be a search for some other means of implementing the "public policy" of strict liability for the manufacturer. Happily, this search need not be a protracted one. Prosser has already suggested a solution which has immediate appeal.

THE NEW TORT

After observing that even those courts which have said that "the remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales," have proceeded to entangle themselves in precisely those intricacies like Laocoon and his sons," Prosser states that the whole warranty snarl is completely unnecessary. No one doubts, he says, that

... unless there is privity, liability to the consumer must be in tort and not in contract. There is no need to borrow a concept from the contract law of sales; and it is "only by some violent pounding and twisting" that "warranty" can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask.

This position, with respect to the manufacturer, appears to be in-

60. See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER (1951); James, Products Liability, 34 TEXAS L. REV. 44, 192 (1955); Prosser, Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960).

61. In 1957 Georgia enacted the following statute:

   The manufacturer of any personal property sold as new property, either directly or through wholesale or retail dealers, or any other person, shall warrant the following to the ultimate consumer, who, however, must exercise caution when purchasing to detect defects, and, provided there is no express covenant of warranty and no agreement to the contrary:

   1. The article sold is merchantable and reasonably suited to the use intended.
   2. The manufacturer knows of no latent defect undisclosed.


62. Prosser, Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099, 1134 (1960).

63. Ibid.

64. Prosser intimates, though he does not specifically state, that the "new tort" should apply with equal force to all commercial sellers, and not to the manufacturer alone. While there is considerable practical justification for this view, it does not, as a matter of policy, appear that other sellers owe the same degree of responsibility to the public as the manufacturer. Retailers
disputably sound. Strict liability is not a new and hideous visage in the
law of torts. If, as the cases previously discussed indicate, the courts are
showing a disposition to impose strict liability upon the manufacturer,
there is no reason for their philosophy to be obscured by a bridge of legal
fictions on the one hand, or by a sales law vocabulary on the other.

Liability under the proposed "new tort" would, in its bare thesis,
closely approximate that imposed by implied warranty. The manu-
facturer would be liable to the ultimate consumer if the product was not
reasonably suited to the general purposes for which it was manufactured
and sold. The plaintiff would retain his burden of proving that the
defect existed at the time the product left the manufacturer's hands, and
that his injuries proximately resulted from that defect. The manu-
facturer's liability with regard to the status of the injured party (i.e.,
whether purchaser, member of purchaser's family, unrelated third party)
would be determined by a pragmatic test of foreseeability rather than by
the technical rules of the law of sales. Many important issues, such
as those raised by the "age" and condition of the product, and the use
to which it has been put by the plaintiff, would be resolved by the
application of principles carried over from the negligence cases. Dis-
claimers of liability, except perhaps in certain rare situations, would not
be tolerated. Strict liability would attach without regard to the express
representations of the manufacturer.

Although the response to this "new tort" has been sympathetic, there

and wholesalers are increasingly becoming mere "conduits" (albeit very powerful ones in cer-
tain instances) by which manufacturers transmit their goods to the consuming public. The
testing and inspection resources of these intermediaries are almost non-existent and, indeed,
they are rarely expected to test or inspect for defects.

With respect to the retailer this may appear to be an idle argument since he has tradition-
ally been subjected to strict liability through the implied warranty of the law of sales. The
distinction, however, lies in the fact that the seller is provided with certain safeguards under
the warranty scheme (disclaimer, notice, reliance, etc.) which would not be available under
the "new tort."

Taking a broad view of the "public policies" in which the doctrine of strict liability is
suspended, there seems to be justification for seeing in the new tort a second benefit, this being
the relief which it would bring to retailers who are often beset by damage claims which do not
in justice belong at their feet.

A new criterion of liability called "typicality of risk" has been introduced into the pro-
ducts liability field. It is discussed in Wilson, Products Liability, 43 CALIF. L. REV. 809
(1955).

65. See James, Products Liability, 34 TEXAS L. REV. 192 (1955).

66. See Prosser, Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J.
1099, 1138-48 (1960).

67. The Henningsen case reached this point under the implied warranty theory: "Manifestly,
the connotation of 'consumer' was broader than that of 'buyer.' He signified such a person
who, in the reasonable contemplation of the parties to the sale, might be expected to use the

68. It may be beneficial to allow freedom of contract to override the policy of strict liability
in situations where the manufacturer has no possible way of effectively testing the product or
of ascertaining its worth. Experimental drugs might be included in this category.