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PRODUCTS LIABILITY: IMPLIED WARRANTIES*

WALLACE SEDGWICK, SCOTT CONLEY AND ROGER SLEIGHT**

I. INTRODUCTION

Within roughly the past fifty years, products liability has grown from the occasional negligence case to a fulltime practice for thousands of lawyers, and the end of this geometric growth is not in sight.

Warranties, and particularly implied warranties, have been playing an increasingly important role in the products liability case. With privity breaking down and becoming less of a bar, recovery on a warranty basis has become available to more and more persons.

The rapid growth of the products liability field has been, to some extent, the result of a change in social philosophy and technical industrial advances. Also an accelerating factor has been the activities of the plaintiffs bar, liberal courts, and legal theorists. The rate of the continued growth may somewhat depend on the efforts and activities of defense attorneys.

This monograph is intended only to present a brief summary of the law of implied warranties and is not intended to be exhaustive or definitive. Neither does it discuss other areas of liability, with the exception of a brief mention of strict liability in tort. There is no discussion of negligence. There is no discussion of absolute liability, defining that as the area in which ultrahazardous products are involved and in which even assumption of risk is not a defense. There is no discussion of express warranties, defining that as the area in which explicit statements or representations are made, either orally or in writing, with respect to the goods in question.

Implied warranties may arise in a number of different types of situations. They are most important, however, in the area of sales. Every sale, in the absence of a disclaimer, carries with it certain implied warranties with respect to the item sold. This is not to say that there is an absolute guarantee as to the quality of the item. But there is a guarantee that the item meets certain standards.

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Whenever a warranty is at issue, it is incumbent upon the plaintiff to show that a warranty existed, that the warranty was breached, and that the breach caused the injury or damage complained of. It is often said that if these three things are shown, the defendant will be strictly liable. Be that as it may, it is true that warranty liability is liability that does not require a showing of fault. Whether this means that the defendant is strictly liable is left as a question of semantics. It is safe to say that warranty liability is not absolute, for even though warranty, breach, and cause are shown, the defendant is often held not liable.

The material discussed in the section on defenses is intended to cover those factors which negate liability where liability would otherwise exist. It roughly corresponds to those matters on which the defendant has the burden of proof. But whether a given fact goes to negating liability or merely to showing that the plaintiff has not established his case is not always that clear. Thus it should be remembered that some of the matters discussed as defenses may also go to the issue of whether the plaintiff has established his case. In fact, the easiest and best defense is in preventing that very thing.

II. HISTORY

The earliest cases of warranty were in the nature of a tort action for deceit.[1] Breach of warranty differed from fraud only in that it did not require scienter or an awareness by the seller of the falsity of his representations. To establish a warranty it was necessary that the seller use the word "warrant" or at least words importing that they were purposely made for the buyer to rely upon.[2] "The most emphatic affirmation or representation of fact was not construed as a warranty, although the parties might have intended it to operate as such. Much less was there any recognition of such a thing as the implied warranty."[3]

The law of assumpsit began to develop in the fifteenth century and seems to have been at least partially based on the earlier warranty actions. It was originally conceived as a tort action, but soon became classified with covenant rather than trespass on the case.[4] Following the same pattern, express warranties eventually were recognized as a term of the sales contract and were also treated as a matter of covenant until finally, in 1778, *Stuart v. Wilkins*[5] granted relief for breach of warranty in assumpsit. There were certain pleading advantages to assumpsit, and case fell into comparative disuse as a remedy. Thus, war-

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[1] For references to medieval statutes governing implied warranties from the seventh century and early case law concerning express warranties from the late thirteenth century, see Murray, *Implied Warranty Against Latent Defects: An Historical Comparative Law Study*, 1961 INS. L. J. 547, 548-50.
[2] Chandelor v. Lopus, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. 1603).
[3] 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 379-80 (1906).
[4] 1 WILLISTON, SALES 501-02 (rev. ed. 1948).
[5] 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778).

ranty went from an action in tort to an action primarily in contract, although destined to retain many of its tort characteristics.

Early sales law, in the absence of an express warranty, was governed by the old maxim of caveat emptor.[6] Broader rules appeared in the early nineteenth century as greater protection for the buyer was desired. Along with an implied warranty of title, two distinct implied warranties of quality developed in those cases in which the buyer relied on the skill and judgment of the seller—an implied warranty of merchantability and an implied warranty of fitness.

The leading case is *Gardiner v. Gray.*[7] It was the case of the sale of "waste silk" by sample, and neither the buyer nor the seller had an opportunity to inspect the goods before delivery. The goods delivered did not meet the purposes of waste silk, and Lord Ellenborough set out the fundamental principle of the implied warranty of merchantability in terms of saleability:

> I am of the opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill.

As the warranty of merchantable quality developed, it came to mean that goods must be of a quality to pass under the same kind or description specified in the agreement and must be reasonably fit for the ordinary uses to which such goods are put.[8]

The warranty of fitness for a particular purpose logically followed, with the first cases generally in the field of shipping. In *Gray v. Cox,*[9] Abbott C. J. said: "If a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose."

The early implied warranty decisions were couched in terms of giving effect to the unexpressed intentions of the parties and were treated primarily as contract matters. But the idea grew that warranties

[6] 1 WILLISTON, *op. cit. supra* note 4, at 584.

[7] 4 Camp. 144, 171 Eng. Rep. 46 (K.B. 1815). An earlier case concerning merchantable quality is Holcombe v. Hewson, 2 Camp. 391, 170 Eng. Rep. 1194 (Ex. 1810). Sale by sample later became a separate implied warranty contained in UNIFORM SALES ACT §16 and an express warranty under UNIFORM COMMERCIAL CODE §2-313(1)(c).

[8] Prosser, *The Implied Warranty of Merchantable Quality,* 27 MINN. L. REV. 117, 121 (1943). The matter of implied warranties was summed up in Jones v. Just, L.R. 3 Q.B. 197 (1868).

[9] 107 Eng. Rep. 999 (K.B. 1825).

were implied by law, independent of any intention of the parties. To speak of a warranty as a term of the contract was "to speak the language of pure fiction."[10]

Today an implied warranty may be treated as a matter of tort (innocent misrepresentation of fact), contract (implied-in-fact term of the agreement), or public policy (implied-in-law). It seldom makes any difference which theory is followed, but occasionally it is important, and courts are prone to adopt that which best suits their needs. Where privity is a problem, the tort theory can be followed. If reliance is absent, the contract theory is available. And if there are problems with disclaimers or evidence rules, warranty will be imposed by law.[11] Whether a tort or contract theory is followed may also cause a different rule to govern such matters as the survival of actions, statute of limitations, the measure of damages, or recovery for wrongful death.[12]

With the intention of codifying the then existing common law of sales, England adopted the Sale of Goods Act in 1893.[13] The Uniform Sales Act (also referred to herein as the Sales Act or the USA), based on the Sale of Goods Act, was recommended for adoption by the Commissioners on Uniform State Laws in 1906. Section 15 of the Uniform Sales Act, governing implied warranties, was taken almost verbatim from section 14 of the English statute. The Sales Act was eventually adopted by thirty-four states, Alaska, Hawaii, and the District of Columbia. The last states to put the Sales Act into effect were Arkansas and Colorado which did so in 1942.[14]

Eventually a more comprehensive and modern code, which would govern all facets of commercial transactions, was thought desirable. Work on such a project began in 1942, and the Uniform Commercial Code (also referred to herein as the Code or the UCC) was first promulgated in 1952. A complete revised text and comments edition was published in 1958. To date, twenty-nine states and the District of Columbia have adopted the UCC, including seven states which had not adopted the USA.[15] It is likely that many more states will follow suit. In those

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[10] Williston, *Liability for Honest Misrepresentation,* 24 HARV. L. REV. 415, 420 (1911).

[11] Prosser, *supra* note 8, at 122-25.

[12] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L. J. 1099, 1126-27 (1960).

[13] Sale of Goods Act, 1893, 56 & 57 Vict., c. 71.

[14] Left as common law states were Florida, Georgia, Kansas, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Virginia, and West Virginia, with Louisiana as a civil law state.

[15] In the following states the UCC has been enacted but will not become effective until the date indicated: California (January 1, 1965); Maine (December 31, 1964); Missouri (July 1, 1965); Montana (January 1, 1965); Nebraska (September 1, 1965); New York (September 27, 1964); Virginia (January 1, 1966); Wisconsin (July 1, 1965).

Sales Act states which have not adopted the UCC are Alabama, Arizona, Colorado, Delaware, Hawaii, Idaho, Utah, Minnesota, Nevada, North Dakota, South Dakota, Utah, Vermont, Washington.

states which have not yet adopted the Code, the provisions of the Code will be persuasive authority, just as the Sales Act has been persuasive in many common law states.

III. Warranty of Merchantability

Under the Sales Act, the requirement that goods be of merchantable quality applies only when (1) the goods are purchased by description, (2) from a dealer in goods of that description: "Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality."[16] The description may be general or specific, even to the point of identifying the goods by their brand or trade name.

One of the most quoted definitions of a sale by description is contained in *Kohn v. Ball*:[17] "The term sale by description strictly means an executory sale where the article is not present, but the term has been broadened to include all sales, whether or not the goods are present, where there is no adequate opportunity for inspection."

Not all jurisdictions follow this definition, and a small number have refused to find a warranty where specific goods are purchased, confining the warranty to cases in which the description is essential to identification of the goods sold. Thus there is some authority that it is not a sale by description when the purchaser selects the articles desired, as in a supermarket.[18] Prosser[19] and the modern view argue that the description may be an essential part of the contract, even when specific goods are involved, and that holdings that the warranty of merchantability does not arise in the sale of specific goods are probably the result of an additional factor such as an implied disclaimer, the obviousness of the defect, or a desire to limit liability.[20]

The definition is also a little narrow in that inspection is generally not considered in deciding whether a sale is by description, but rather whether a warranty which might otherwise exist is negated by actual inspection or an opportunity to inspect. Most jurisdictions do not permit a mere opportunity to inspect to negate a warranty. Further, actual inspection will ordinarily not eliminate a warranty as to undiscovered or latent defects.

Only persons who generally or ordinarily handle goods of the kind in question impliedly warrant merchantability. At common law, this

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Common law states which have not adopted the UCC are Florida, Kansas, Mississippi, North Carolina, South Carolina, and Texas. Louisiana remains a civil law state.

[16] Uniform Sales Act §15(2).

[17] 36 Tenn. App. 281, 286, 254 S.W. 2d 755, 758 (1952).

[18] Torpey v. Red Owl Stores, 228 F. 2d 117 (8th Cir. 1955). *Contra,* Sams v. Ezy-Way Foodliner Co., 157 Me. 10, 170 A. 2d 160 (1961).

[19] Prosser, *supra* note 8, at 143.

[20] *Id.* at 145.

dealer was not liable if he was not also the manufacturer, primarily because there was no element of reliance. The USA made the dealer a warrantor, even if not the manufacturer, and this was followed by several common law states. However, Georgia, West Virginia, and Mississippi apparently still hold that a dealer who is not also the manufacturer does not warrant that his goods are merchantable.[21]

Where second-hand goods are sold, there may be an implied warranty that they are merchantable—at least as second-hand goods. In most cases denying existence of the warranty, the seller was not a dealer.[22] However, Texas has failed to find the warranty even where the seller was a dealer.[23]

Definitions of merchantability are legion, but it is possible to draw some general conclusions as to the minimum obligations of the seller.[24]

1. *The goods must conform to their name, kind, and description.*

For example, if *A* agrees to sell red apples to *B*, he must deliver red apples. Green or yellow apples will not do. Neither will red plums or peaches. The description might be more specific such as "#2 Common & Btr. rough green Alder with Maple developing."[25] That is what must be delivered. The description is taken to call for goods usually sold by that name as understood by the trade.[26] Whether the goods conform to the description is a question for the jury. It is at least arguable that evidence of the price paid is admissible to show what the agreement contemplated as merchantable goods.

2. *The goods must be marketable under the contract designation.*

If a buyer purchases for his own use, he must receive what dealers customarily sell as the same product.[27] If the buyer purchases to resell the goods must be generally marketable, with their true character known, under the same name or description.

Saleability means that the merchandise has been properly packed,[28] that it complies with applicable statutes,[29] and even that the buyer will not be liable for a license tax not necessary for the goods as they were described.[30] The warranty generally arises when title passes and the goods need only be saleable at that time in the same market.[31]

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[21] See Bel v. Adler, 63 Ga. App. 473, 11 S.E. 2d 495 (1940); Pennington v. Cranberry Fuel Co., 117 W.Va. 680, 186 S.E. 610 (1936); Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933).
[22] Prosser, *supra* note 8, at 146.
[23] Norvell-Wilder Supply Co. v. Richardson, 300 S.W. 2d 733 (Tex. Civ. App. 1957).
[24] Based on Prosser, *supra* note 8.
[25] Lindsey v. Stalder, 120 Colo. 58, 208 P. 2d 83 (1949).
[26] Frith v. Mitchell, 176 Eng. Rep. 647 (Q.B. 1865).
[27] Frantz Equip. Co. v. Leo Butler Co., 370 Pa. 459, 88 A. 2d 702 (1952).
[28] Ritter v. Erlich, 152 F. 2d 181 (2d Cir. 1945) (dictum).
[29] Manning Mfg. Co. v. Hartol Prod. Corp., 99 F. 2d 813 (2d Cir. 1938).
[30] Haynor Mfg. Co. v. Davis, 147 N.C. 267, 61 S.E. 54 (1908).
[31] Sumner Permain & Co. v. Webb & Co., [1922] 1 K.B. 55.

3. *The goods must be fit for the general purposes for which they are sold.*

A coffeepot which will not make coffee,[32] or flour that will not make bread,[33] is not merchantable because it is not fit for its ordinary or predominant use.

The warranty of merchantability was rewritten by the Uniform Commercial Code:

> (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.[34]

The major change under the Code is the abolition of the requirement that the sale be by description. Under UCC section 2-313 (b), a purchase by description creates an express warranty.

The minimum standards of merchantability which developed under the Sales Act are set out in UCC section 2-314 (2). It should be noted that failure of the goods to conform to promises of fact made on the label will normally also create an express warranty in the same manner as express warranties are created by advertisements or directions sheets. Comment 2 to section 314 states that the "meaning of the terms of the agreement as recognized in the trade" will determine when the warranty is imposed.

IV. Warranty of Fitness

The warranty of fitness for a particular purpose has two basic elements: The buyer must (1) make his particular purpose known to the seller, and (2) rely on the skill and judgment of the seller.

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[32] McCabe v. L. K. Liggett Drug Co., 330 Mass. 177, 112 N.E. 2d 254 (1953).
[33] Kaull v. Blacker, 107 Kan. 578, 193 Pac. 182 (1920).
[34] Uniform Commercial Code §2-314.

> Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or the manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.[35]

Originally the *particular* purpose was a *special* as distinct from a general purpose, but as greater consumer protection was desired the particular purpose came to be that purpose for which a given buyer intended to use the goods. Thus the particular purpose may be no more than the ordinary purpose for which the goods are manufactured.

The seller may be informed either impliedly or expressly of the buyer's purpose. When this purpose is no more than an ordinary purpose, the courts have had little trouble in finding that the seller was at least impliedly aware of that purpose.[36]

If someone purchases an ordinary bicycle, he may tell the seller that he is going to use it for riding in the park. This is his particular purpose in buying the bicycle. Even if the buyer says nothing to the seller, the latter is held to impliedly know of the buyer's particular purpose, for it is the same as the ordinary purpose for which bicycles are made, assuming there is nothing unusual about the park. But if the buyer intends to use the bicycle for racing, he must bring that fact home to the seller in order to hold him to a warranty of fitness for a particular purpose.

The goods furnished need not be perfect or even the best of their kind, but only reasonably fit for the purpose of the buyer.[37]

The buyer must also rely on the skill and judgment of the seller. It is probable that this reliance must be justifiable, although this is not a specific requirement of the Sales Act,[38] and liability has been denied where the court thought that reliance was not justified.[39]

Where the buyer designates specific goods or specifically describes the goods to be purchased, it is less likely that he has relied on the seller's judgment.[40] Thus, goods purchased by their brand or trade name are expressly not covered by the warranty of fitness under the Sales Act,[41] although courts have side-stepped this provision where it

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[35] UNIFORM SALES ACT §15(1).
[36] See Twombley v. Fuller Brush Co., 221 Md. 476, 491, 158 A. 2d 110, 117 (1960).
[37] Crotty v. Shartenberg's-New Haven, Inc. 147 Conn. 460, 466, 162 A. 2d 513, 516 (1960).
[38] See *In re* Belle-Moc, Inc., 182 F. Supp. 429, 435 (S.D. Me. 1960); 1 WILLISTON, SALES 607 (rev. ed. 1948).
[39] See Wallower v. Elder, 126 Colo. 109, 247 P. 2d 682 (1952).
[40] See Turkish State Rys. Administration v. Vulcan Iron Works, 153 F. Supp. 616, 620-22 (M.D. Pa. 1957); Royal Pioneer Paper Box Mfg. Co. v. Louis De Jonge & Co., 179 Pa. Super. 155, 161, 115 A. 2d 837, 839 (1955).
[41] UNIFORM SALES ACT §15(4).

appeared that a buyer purchased a particular item at the suggestion of the seller.[42]

Merely selecting an item from the stock of the seller has precluded a finding of reliance on occasion,[43] but the majority holds that it is enough that the purchaser relies on the skill and judgment of the retailer in his selection of the products which he offers for sale.[44]

The occupation of the seller is relevant to the question of reliance, and it should be noted that this warranty is not limited to those who deal in goods of the kind in question, as is the warranty of merchantability. In fact, it may still be arguable that the purchaser cannot rely on the retailer, at least where the goods are in a sealed container.[45]

The Uniform Commercial Code has made several minor changes in the fitness warranty:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.[46]

The most important change is probably the elimination of the trade name exception. The fact that goods are purchased under their brand or trade name is to be just one of the considerations in determining whether there was reliance.[47]

Under the Code, the seller need not have actual knowledge of either the particular purpose or the reliance of the buyer; it is enough that the seller has reason to know.[48] Information as to the purpose of the buyer may come from any source, while the Sales Act required that the purpose be made known by the buyer.

The Code has also eliminated the Sales Act requirement that the

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[42] Halterman v. Louisville Bridge & Iron Co., 254 S.W. 2d 493 (Ky. Ct. App. 1953). The mere fact that an article has a trade name will not preclude the warranty. Torrance v. Durisol, Inc., 20 Conn. Supp. 62, 112 A. 2d 589 (Super. Ct. 1956).

[43] Torpey v. Red Owl Stores, 228 F. 2d 117 (8th Cir. 1955); Williams v. S. H. Kress & Co., 48 Wash. 2d 88, 291 P. 2d 662 (1955).

[44] Ringstad v. I. Magnin & Co., 39 Wash. 2d 923, 239 P. 2d 848 (1952).

[45] See Bradford v. Moore Bros. Feed & Grocery, 268 Ala. 217, 105 So. 2d 825 (1958); Bel v. Adler, 63 Ga. App. 473, 11 S.E. 2d 495 (1940). The fact that the goods come in a sealed container is probably not the sole reason for denying liability, however. *The Implied Warranty of Merchantability—Smith v. Hensley*, 48 VA. L. REV. 152, 160 n. 55 (1962).

[46] UNIFORM COMMERCIAL CODE §2-315. Rhode Island has added the following sentence to this section: "As to foodstuffs or drinks sold for human consumption in sealed containers, there is an implied warranty that the goods shall be reasonably fit for such purpose, and such warranty shall extend from the seller and the manufacturer or packer of such goods to the person or persons described in section 6A-2-318 of this chapter." R.I. GEN. LAWS ANN. §6A-2-315 (Supp. 1961).

[47] UNIFORM COMMERCIAL CODE §2-315, comment 5.

[48] UNIFORM COMMERCIAL CODE §2-315, comment 1.

goods be "reasonably" fit, but it is unlikely that the deletion of this word will have much practical effect.[49]

V. Limitations on Finding of Warranty

On several occasions courts have refused to find an implied warranty where there has technically not been a sale, although it is not certain why they felt compelled to so hold. The Sales Act does not provide for the implication of warranties in nonsales cases,[50] and some courts have apparently been reluctant to analogize. Conscious of this, the draftsmen of the Code have pointed out that the warranty sections were not intended to restrict the recognition of warranties in non-sale areas.[51] Those jurisdictions which require a sale before implying warranties are generally those which consider warranty in the nature of contract rather than tort.

A. *Service*

Perhaps the leading case in which the court did not find a sale is *Perlmutter v. Beth David Hosp.*[52] The plaintiff was a patient in defendant hospital and became seriously ill due to a transfusion of contaminated blood, which she alleged was "sold" to her by the defendant for sixty dollars. The court held that plaintiff's contract with defendant was primarily one for the rendition of services and, as such, was not governed by the provisions of the Sales Act. California codified this result, but only with respect to blood products,[53] and the California Supreme Court has held the administration of polio vaccine to be a sale rather than a service.[54] That case might have had a different result had the defendants been the physicians, as in *Perlmutter,* rather than the manufacturer.[55]

Construction contracts, in which the furnishing of materials is incidental to the labor, have been held not to be sales contracts, and no implied warranty has been found.[56]

Some jurisdictions have classified the supplying of food by a restaurateur as a service,[57] but the modern and majority view is that the furnishing of food is a sale and raises an implied warranty that the

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[49] *A Comparison of California Sales Law and Article Two of the Uniform Commercial Code,* 10 U.C.L.A. L. Rev. 1087, 1156 (1963).
[50] See Uniform Sales Act §15.
[51] Uniform Commercial Code §2-313, comment 2.
[52] 308 N.Y. 100, 123 N.E. 2d 792 (1954); *accord,* Gile v. Kennewick Pub. Hosp. Dist., 48 Wash. 2d 774, 296 P. 2d 662 (1956), 59 A.L.R. 2d 761 (1958); Dibblee v. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P. 2d 1085 (1961).
[53] Cal. Health & Safety Code §1623.
[54] Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).
[55] Liability was denied on the ground that the charitable immunity of a hospital extended to an implied warranty of fitness for human consumption because the action sounded in tort in Forrest v. Red Cross Hosp., 265 S.W. 2d 80 (Ky. Ct. App. 1954).
[56] Foley Corp. v. Dove., 101 A. 2d 841 (Munic. Ct. App. D.C. 1954).
[57] McCarley v. Wood Drugs, Inc., 228 Ala. 226, 153 So. 446 (1934).

food is wholesome and fit for human consumption.[58] A few courts have implied the warranty without finding a sale.[59] The Uniform Code specifically includes the "serving for value of food or drink" in the section on merchantability.[60]

B. *Bailments*

Many jurisdictions will imply a warranty in a variety of bailment situations, although not where the bailment is gratuitous,[61] or where the plaintiff is not in privity,[62] or where a specific piece of equipment is hired.[63] The bailor impliedly warrants that the article he supplies is reasonably fit for the purpose for which it is hired.[64] However, the plaintiff-bailee must generally show more than a simple breach of warranty, and he is usually required to show that the bailor was negligent in failing to discover the defect.[65] A showing of negligence is more likely to be required where there is a personal injury loss rather than a property or commercial loss.[66]

There is still a great deal of room for arguing that a transaction is of the nature of a service or bailment rather than a sale. The finding of a service or bailment may preclude the finding of implied warranties or at least subject the plaintiff to more stringent requirements as to proof and privity.

C. *Incomplete Sale*

Liability has sometimes been denied where a sale has not been consummated, as where the buyer has made a selection but has not yet paid for it. These cases are primarily self-service supermarket cases, and the leading case is *Day v. Grand Union Co.*,[67] in which the plaintiff picked up a bottle of beer from the counter and it exploded in her hand. However, the *Day* case is of questionable authority, even in New York.[68]

It is arguable in the exploding bottle cases that there has been no sale of the bottle by the immediate seller of the contents, particularly where the bottle is returnable. The courts, however, have never separated the bottle from the sale of its contents and have refused to deny liability on this ground, whether the bottle was technically sold or

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[58] See DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER (1951).
[59] Amdal v. F. W. Woodworth Co., 84 F. Supp. 657 (N.D. Iowa 1949).
[60] UNIFORM COMMERCIAL CODE §2-314(1).
[61] See Ruth v. Hutchinson Gas Co., 209 Minn. 248, 296 N.W. 136 (1941).
[62] *Cf.* Nelson v. Fruehauf Trailer Co., 11 N.J. 413, 94 A. 2d 655 (1953).
[63] Pennsylvania R.R. v. J. Jacob Shannon & Co., 363 Pa. 438, 70 A. 2d 321 (1950).
[64] Price Boiler & Welding Co. v. Gordon, 138 F. Supp. 43 (E.D. Mich. 1956).
[65] McNeal v. Greenberg, 40 Cal. 2d 740, 255 P. 2d 810 (1953). *But see* Covello v. New York, 17 Misc. 2d 637, 187 N.Y.S. 2d 396 (1959).
[66] See Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 57 COLUM. L. REV. 653, 658 (1957).
[67] 280 App. Div. 253, 113 N.Y.S. 2d 436, *aff'd without opinion*, 304 N.Y. 821, 109 N.E. 2d 609 (1952); *accord*, Loch v. Confair, 361 Pa. 158, 63 A. 2d 24 (1949).
[68] See Sanchez-Lopez v. Fedco Food Corp., 211 N.Y.S. 2d 953 (N.Y.C. City Ct. 1961).

not.[69] Oklahoma may still hold that there is no warranty with respect to the bottle in either case.[70]

D. *Inspection*

Under the common law, there was some authority for the proposition that no implied warranty existed if there was an actual inspection or an opportunity to inspect, even if the defect was not discoverable.[71] The Sales Act, however, precludes the finding of an implied warranty only where the defect is known or obvious and not if it is latent: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."[72]

It should be noted that this section only applies when there has been an actual examination and imposes no duty to inspect.[73] However, there is authority under the Sales Act which excludes implied warranties where inspection would have revealed a defect and the buyer failed to do so.[74] If the buyer makes an inadequate inspection and misses an obvious defect, no warranty will arise.[75]

The Uniform Commercial Code provides that

> when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has *refused to examine* the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.[76] (Emphasis added.)

Comment 8 to section 2-316 states that to bring the transaction within the scope of "refused to examine," there must be a demand by the seller that the buyer fully examine the goods, followed by a refusal of the buyer to inspect. If the demand is accompanied by words of merchantability or fitness, it may give rise to an express warranty which will be considered to have been expressly incorporated into the agreement. The buyer's skill and the normal method of examining goods will determine what defects are excluded by an examination, but obvious defects will be excluded in every case.

E. *Disclaimer*

A seller may limit his liability by means of an express disclaimer, but such a disclaimer will be strictly construed against him.[77] Some courts require that the disclaimer be brought to the attention of the

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[69] Hadley v. Hillcrest Dairy, Inc., 341 Mass. 624, 171 N.E. 2d 293 (1961). Compare UNIFORM COMMERCIAL CODE §2-313, comment 2.
[70] See Soter v. Griesedieck W. Brewery Co., 200 Okla. 302, 193 P. 2d 575 (1948), 4 A.L.R. 2d 458 (1949).
[71] See 1 WILLISTON, SALES §234 n. 12 (rev. ed. 1948).
[72] UNIFORM SALES ACT §15(3).
[73] See Hughes v. Diehl, 178 F. 2d 329 (4th Cir. 1949).
[74] McCormick v. Hoyt, 53 Wash. 2d 338, 333 P. 2d 639 (1959).
[75] See Richardson v. Waterite Co., 169 Neb. 263, 99 N.W. 2d 265 (1959).
[76] UNIFORM COMMERCIAL CODE §2-316(3)(b), comment.
[77] *E.g.*, Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927).

buyer,[78] and no court will permit a disclaimer to justify the delivery of goods which do not meet the description in the agreement.

An express warranty may be treated as a disclaimer, but only where it conflicts with an implied warranty. USA section 15(6) provides that "an express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith."[79]

Disclaimers were first denied effect as a matter of public policy in cases in which food was involved.[80] Recently, courts have refused to enforce a disclaimer in situations in which the buyer was in an unequal bargaining position.[81] Where privity is not otherwise a problem, disclaimers may be binding on third parties.[82] On the other hand, disclaimers made by the manufacturer are probably not effective when the action is against an intermediate seller.[83]

Occasionally even an implied disclaimer may be found. The seller may indicate that the goods are defective, or he may offer an opportunity to inspect, which is sufficient notice to the buyer that he must rely on his own judgment. The past dealings of the parties,[84] the custom of the trade,[85] and even the nature of the goods (waste products, secondhand goods, a new invention)[86] may also raise an implied disclaimer.

The Uniform Commercial Code has explicit provisions relating to disclaimers.[87] To exclude the implied warranty of merchantability, the language must mention merchantability and must be conspicuous if in writing. To exclude the implied warranty of fitness, the exclusion must be in conspicuous writing, but the language may be general. Implied warranties may also be excluded by common expressions such as "with all faults" or "as is," if that is the usage of the trade.

The Code permits the court to refuse to enforce all or part of a contract if it finds that it is unconscionable as a matter of law.[88] Courts may now discard the fictions previously used to reach the same result.

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[78] Sensabaugh v. Morgan Bros. Farm Supply, Inc., 223 Md. 593, 165 A. 2d 914 (1960).

[79] There is a minority view that the existence of written express warranties excludes all implied warranties. See, *e.g.*, Interstate Motor Freight Sys. v. Gasoline Equip. Co., 107 Ind. App. 494, 24 N.E. 2d 418 (1948).

[80] Linn v. Radio Center Delicatessen, 169 Misc. 879, 9 N.Y.S. 2d 110 (N.Y.C. Munic. Ct. 1939).

[81] State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W. 2d 449 (1961); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A. 2d 69 (1960), 75 A.L.R. 2d 1 (1961).

[82] See McVey v. Phillips Petroleum Co., 288 F. 2d 53 (5th Cir. 1961).

[83] Sokolski v. Splann, 311 Mass. 203, 40 N.E. 2d 874 (1942).

[84] UNIFORM SALES ACT §71; Crofoot Lumber, Inc. v. Ford, 191 Cal. App. 2d 238, 12 Cal. Rptr. 639 (1961).

[85] See Miller v. Germain Seed & Plant Co., 193 Cal. 62, 222 Pac. 817 (1924); Hoover v. Utah Nursery Co., 79 Utah 12, 7 P. 2d 270 (1932).

[86] Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 165-66 (1943).

[87] UNIFORM COMMERCIAL CODE §2-316.

[88] UNIFORM COMMERCIAL CODE §2-302.

VI. Extent of Liability

As warranty came to be considered more and more contractual in nature, it was subjected to many of the rules governing contract actions. The foremost of these was that a contractual relationship, or privity, had to exist between the parties before a warranty action could be sustained. However, until the development of modern marketing techniques, privity did not present much of a problem, as there was seldom a middleman involved and the manufacturer generally dealt directly with the consumer.

The privity requirement is now the subject of much abuse by the writers and the cases. With the possible exception of a few minor areas, lack of privity is no longer of any consequence in a negligence action, and those jurisdictions which consider warranty as essentially in the nature of tort have less difficulty in dispensing with the privity requirement. The same is true where implied warranties are considered as matters of public policy.

The first exceptions to the privity requirement came in the early twentieth century in the area of food and beverages.[89] It was well settled by then that the seller of food could be liable in warranty to an injured consumer to whom he had made a direct sale.[90] At least partially in response to widespread clamoring for action on the problem of defective and misbranded foods and drugs, the courts extended this liability to third persons. Well over half of the states which have considered the issue have now abolished the privity requirement in food cases.[91] Even New York, one of the staunchest defenders of privity, recently extended the food retailer's warranty to all members of the purchaser's household.[92]

The privity requirement is gradually being abandoned in other areas as well. The leading case is *Henningsen v. Bloomfield Motors,*[93] in which plaintiff's wife was injured while driving a new car purchased by plaintiff-husband. Both the dealer and the manufacturer were made defendants. In permitting the wife to recover, the court said that the implied warranty of merchantability extends not only to the purchaser of a car, but to "members of his family and others occupying or using it with his consent."[94]

Henningsen, by finding that the warranty runs with the goods to all who are likely to be hurt by use of an unfit commodity for an ordi-

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[89] Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913).
[90] Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 Yale L. J. 1099, 1104 (1960).
[91] *Id.* at 1107-10.
[92] Greenberg v. Lorenz, 9 N.Y. 2d 195, 173 N.E. 2d 773, 213 N.Y.S. 2d 39 (1961).
[93] 32 N.J. 358, 161 A. 2d 69 (1960), 75 A.L.R. 2d 1 (1961).
[94] *Id.* at 414, 161 A. 2d at 100.

nary purpose, essentially abolished the privity requirement. It is possible that even an innocent bystander might now be able to recover.[95]

Another non-food case which did not find it necessary to go quite so far is *Peterson v. Lamb Rubber Co.*[96] The court in that case, apparently assuming that warranties extended to members of the family in every case, simply found that the plaintiff-employee was a member of the industrial "family" of the employer.

The Uniform Commercial Code section 2-318 has codified a few of the exceptions to the original privity rule:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

It should be noted that this section is limited to the family and guests and covers only personal injuries.

The discussion up to this point has been primarily concerned with recovery by someone other than the immediate buyer. But there is the further question of whether recovery may be had against someone other than the immediate seller or retailer. Here again privity has traditionally been a bar, and here again it is breaking down.

Henningsen is again the leading case, for not only was a non-purchaser allowed to recover, but both the husband and wife were permitted to recover against the manufacturer. In allowing recovery against the manufacturer, the court held that an implied warranty that an automobile is reasonably suitable for use as such accompanies it from the manufacturer into the hands of the ultimate purchaser. The court reasoned that society's interests can only be served by eliminating the privity requirement and placing the burden of losses on those who are able to either control the defect or distribute the losses when they do occur.

One factor which may indicate that privity may still be of some moment, even in New Jersey, is that the court placed a great deal of emphasis on the advertising. Where there is little or no advertising, lack of privity may still bar recovery, perhaps on the basis that the plaintiff is unforeseeable.[97]

Henningsen presages further elimination of the privity requirement although it is still very important in most jurisdictions, particularly in

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[95] See Connolly v. Hagi, 24 Conn. Supp. 198, 188 A. 2d 884 (Super. Ct. 1963).
[96] 54 Cal. 2d 339, 353 P. 2d 575 (1960). *Contra,* Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A. 2d 575 (1963).
[97] See Kaspirowitz v. Schering Corp., 70 N.J. Super. 397, 175 A. 2d 658 (Super. Ct. 1961).

non-food cases.[98] Two states have already adopted statutes abolishing privity to some degree.[99]

Lacking a statute, a number of devices have been employed by the courts as a means of circumventing the privity requirement.[100] For example, the retailer has been found to be merely the agent of the consumer,[101] the consumer has been held to be a third-party beneficiary of the retailer's contract with the manufacturer,[102] or the retailer's warranty from the manufacturer has been said to be assigned to the consumer.[103]

Even if the wholesaler is not the actual manufacturer, he may be held to the manufacturer's warranties, particularly if he represents himself as the manufacturer. The argument for holding the wholesaler-middleman is that he is likely to know much more about the product and its manufacturer than the retailer. The arguments against circuity of action and for finding a solvent defendant also apply. However, lack of privity may still protect the middleman, and he may even be immune where there is no privity requirement as to the manufacturer.[104] But he should be wary of Kansas, for he will be liable there even in a non-food case.[105]

VII. DEFENSES

Warranty liability is strict but not necessarily absolute. Even though a warranty and a breach thereof are established, some defenses remain to the defendant.

A. *Contributory Negligence*

Logically, contributory negligence should not be a defense to a warranty action, because negligence is no part of the plaintiff's case.

[98] See Prosser, *supra* note 90, at 1107-08, for a breakdown of the food cases by states. See also FRUMER & FRIEDMAN §16.04(2)(b).

[99] GA. CODE ANN. §96-307 (1958), which was repealed when Georgia adopted the UCC. Privity in Georgia is now governed by GA. CODE ANN. §109A-2-318 (Supp. 1962), which is UNIFORM COMMERCIAL CODE §2-318.

VA. CODE ANN. ch. 29, §8-654.3 (Supp. 1962), which states: "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied . . . although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods. . . ."

California did not adopt UNIFORM COMMERCIAL CODE §2-318 because it was thought that case law in that state had already extended greater coverage than that envisioned by this section.

[100] Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1957), discloses twenty-nine different theories by which privity has been avoided.

[101] Freeman v. Navarre, 47 Wash. 2d 760, 289 P. 2d 1015 (1955).

[102] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928) (food).

[103] Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W. 2d 445 (1936) (food).

[104] Bowman Biscuit Co. v. Hines, 151 Tex. 370, 251 S.W. 2d 153 (1952) (food) (sealed package).

[105] Patterson v. George H. Weyer, Inc., 189 Kan .501, 370 P. 2d 116 (1962); Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P. 2d 413 (1954). RESTATEMENT (SECOND), TORTS §402A (Tent. Draft No. 7, 1962), would make any seller of food strictly liable in tort.

Some courts so hold.[106] But as testimony to the tort nature of warranty, many cases have denied liability in the language of contributory negligence.[107] In each case it would have been better to talk in terms of the non-existence of a warranty, assumption of risk by the plaintiff (or avoidable consequences), or an intervening cause.

> Close inspection of warranty cases in which contributory negligence superficially appears to function as an affirmative defense usually reveals that the court is in fact refusing to find a breach of warranty or is applying some form of the rule of avoidable consequences. In other opinions the language is so enigmatic that no definite explanation can be given.[108]

In fact, there are no cases in which the court has found a breach of warranty and then sustained a defense based on ordinary contributory negligence of the plaintiff. However, there is language in a few cases which indicates that contributory negligence might be a defense.

In *DiVello v. Gardner Mach. Co.*,[109] the primary issue before the court was the absence of privity between the plaintiff's deceased and the defendant supplier. But the court stated that "in the absence of contributory negligence such workman could recover on the basis of a breach of warranty against the party who sold the wheel to his employer."[110] The language would indicate that contributory negligence could bar recovery even if a breach of warranty is found.

In *Arnaud's Restaurant, Inc. v. Cotter*,[111] the court, applying Louisiana law, refused to find that contributory negligence existed as a matter of law. But in indicating that the question was a proper one for the jury, the court impliedly acknowledged the availability of contributory negligence as a warranty defense. Although there is dictum in *Parish v. Great Atlantic & Pacific Tea Co.*[112] that "contributory negligence may be asserted as a defense to the breach of warranty action," the authorities cited for this proposition are generally weak, and only two are warranty cases. One of the authorities cited, however, is *Fredendall v. Abraham & Straus*[113] in which the plaintiff, contrary to the instructions, used some cleaning fluid in a small unventilated room. The court said: "We think the evidence conclusively shows that the plaintiff failed to use reasonable care in the use of the fluid and that this default was an essential cause of her illness. We do not pass upon any other question."[114]

[106] Kassouf v. Lee Bros., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962) (food); Vassallo v. Sabatte Land Co., 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (1963).
[107] Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A. 2d 568 (1959).
[108] Note, *Contributory Negligence in Warranty Law*, 15 U. FLA. L. REV. 85, 94 (1962).
[109] 65 Ohio L. Abs. 58, 102 N.E. 2d 289 (C.P. 1951).
[110] *Id.* at 64, 102 N.E. 2d at 293.
[111] 212 F. 2d 883 (5th Cir. 1954), *cert. denied*, 348 U.S. 915 (1955).
[112] 13 Misc. 2d 33, 46, 177 N.Y.S. 2d 7, 21 (N.Y.C. Munic. Ct. 1958).
[113] 279 N.Y. 146, 18 N.E. 2d 11 (1938).
[114] *Id.* at 148, 18 N.E. 2d at 11.

It is a moot point whether this language means that contributory negligence is a defense or that there was no breach or no warranty.

As contrasted with these four cases, many cases have clearly denied the defense of contributory negligence.[115] One court has accepted it as a defense to a negligence action, but denied it as a defense to a warranty action in the same case.[116]

It should be again pointed out that the above discussion is primarily concerned with contributory negligence as a defense when a breach of warranty has been clearly established. The majority of the cases which discuss contributory negligence either do not establish a breach or are not concerned with ordinary negligence as a defense, and it should be remembered that those courts are using the language of contributory negligence when the facts indicate one of the defenses discussed below.

B. *Assumption of Risk*

This is the defense on which denial of liability is most often predicated, although it is commonly discussed in terms of contributory negligence. It has been noted that every case in which contributory negligence has been upheld as a defense has been one in which the plaintiff discovered the defect but continued to make use of the product:

> When the cases are examined, however, they fall into a very consistent pattern, and it is only their language which is confusing. Those which refuse to allow the defense have been cases in which the plaintiff negligently failed to discover the defect in the product, or to guard against the possibility of its existence. . . . Those which have permitted the defense all have been cases in which the plaintiff has discovered the defect and the danger, and has proceeded nevertheless to make use of the product.[117]

The net effect is that contributory negligence which amounts to assumption of risk will be a defense. Although it has not been discussed by the cases, a possible reason for talking in terms of contributory negligence, rather than assumption of risk, might be a desire to have the defendant prevail even though the plaintiff does not have the awareness or realization of the danger involved which assumption of risk ordinarily demands.[118]

Contributory negligence has also been the language used when the

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[115] *E.g.*, Jarnot v. Ford Motor Co., *supra* note 107; Simmons v. Wichita Coca-Cola Bottling Co., 181 Kan. 35, 309 P. 2d 633 (1957); Hansen v. Firestone Tire & Rubber Co., 276 F. 2d 254 (6th Cir. 1960).

[116] Walker v. Hickory Packing Co., 220 N.C. 158, 16 S.E. 2d 668 (1941).

[117] Prosser, *supra* note 90, at 1147-48.

[118] See Chapman v. Brown, 198 F. Supp. 78 (Hawaii 1961), where the court said that contributory negligence is not a complete defense in implied warranty "unless the contributory negligence practically amounts to an assumption of risk. On appeal the circuit court said: "Contributory negligence less than assumption of risk will not bar recovery in implied warranty *under the facts of this case.*" Brown v. Chapman, 304 F. 2d 149, 153 (9th Cir. 1962). (Emphasis added.)

damages which the plaintiff has been able to recover have been limited to those arising before discovery of the defect. This is essentially an application of the doctrine of avoidable consequences which denies recovery for damages which reasonably could have been avoided.[119] In *Nelson v. Anderson*[120] the court said:

> While there are cases to the contrary, we believe that the weight of authority and sound reason support the view that, in an action based on a breach of implied warranty, contributory negligence of the buyer is a good defense insofar as a right to recover consequential damages is concerned.

The effect is the same whether the doctrine of avoidable consequences or the defense of contributory negligence (amounting to assumption of risk) is followed. However, one difference between the two theories is that the latter must be pleaded as an affirmative defense.

C. *Intervening Cause*

A common means of limiting liability is by finding that the conduct of the defendant was not the proximate cause of the plaintiff's damages. This approach has not often appeared in warranty cases, probably because it is either easier or traditional to find some other language by which to limit liability. However, it may be beneficial to argue, on occasion, that even though there may have been a breach of warranty, another or intervening cause was the proximate cause of plaintiff's loss.

One intervening cause, which has previously been discussed in terms of whether a warranty exists at all, is the buyer's failure to inspect. Comment 13 of UCC section 2-314 gives a good summary:

> In an action based on breach of warranty, it is of course *necessary to show* not only the existence of the warranty, but the fact that the warranty was broken and *that the breach of the warranty was the proximate cause of the loss sustained.* In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense. . . . Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as matter bearing on whether the breach itself was the cause of the injury. (Emphasis added.)

Another possible intervening cause is the conduct of a third party.

In *Halpern v. Jad Constr. Co.*,[121] causes of action in warranty against a tire manufacturer were dismissed because the intervening handlers had knowledge of the defect. This case is of questionable weight, however, as this was the extent of the opinion, and the court cited no authority for its holding.

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[119] See McCORMICK, DAMAGES, ch. 5 (1935).

[120] 245 Minn. 445, 450, 72 N.W. 2d 861, 865 (1955); see Razey v. J. B. Colt Co., 106 App. Div. 103, 94 N.Y.S. 59 (Sup. Ct. 1905).

[121] 27 Misc. 2d 675, 202 NY..S. 2d 945 (Sup. Ct. 1960).

In *Schneider v. Suhrmann*,[122] the plaintiff contracted trichinosis from mettwurst which, contrary to the expectations of the wholesaler, the retailer had failed to process. In refusing to find the wholesaler liable, the court said:

> [T]he supplier is deemed to warrant the product to be reasonably safe and suitable for the use for which it is intended. That rule, sound where applicable, may only be invoked where the supplier knows, or reasonably should know, that the retailer is to sell the product to consumers without further processing.[123]

What this case may really be saying, however, is not that the conduct of the retailer was an intervening cause, but that it was the sole cause and there was no breach of warranty.[124]

In *Standard Oil Co. v. Daniel Burkhartsmeier Cooperage Co.*,[125] a young boy was severely burned when he lit a match, causing a nearby barrel to explode. Plaintiff, a dealer in petroleum products, sold these barrels for the storage of its products. The boy recovered against the plaintiff, and plaintiff sought indemnity from the defendant on the basis of an express warranty that the barrels had been thoroughly cleaned. The defendant argued that the lighting of the match was an independent intervening cause of the injury. Although the court rejected the defense contention, it indicated that the plaintiff might be denied recovery in warranty even though he was not negligent, if the cause of the injury was not probable or foreseeable:

> Likelihood of an explosion from contact with an open flame was reasonably probable and foreseeable as a direct result of the delivery of the barrel to persons ignorant of its dangerous contents. It is not necessary that the precise manner of the explosion should have been foreseen.[126]

The application of the negligence concept of foreseeability as a possible means of limiting liability is evident in cases such as *Schneider* and *Burkhartsmeier*. However, both cases are concerned with foreseeability of cause. This should be contrasted with the modern tendency, previously discussed in the section on extent of liability, to use the concept of foreseeability of plaintiff as a means of extending warranty liability.

Where the plaintiff has been negligent, the cases do not appear to talk in terms of his negligence being the superseding or proximate cause of his injuries. These cases are generally discussed in terms of contributory negligence. But it is still arguable, especially in those jurisdic-

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[122] 8 Utah 2d 35, 327 P. 2d 822 (1958).
[123] *Id.* at 39, 327 P. 2d at 825.
[124] See Magee v. Wyeth Labs., Inc., 214 Cal. App. 2d 340, 29 Cal. Rptr. 322 (1963).
[125] 333 Ill. App. 338, 77 N.E. 2d 526 (1948).
[126] *Id.* at 351, 77 N.E. 2d at 533.

tions which do not permit the defense of contributory negligence in warranty actions, that liability should be denied because the negligence of the plaintiff was the proximate cause of his damages.

Another argument, similar to the foreseeability approach, is that there should not be liability for unknowable risks. This is an argument that has been made in the cigarette-cancer cases in which it is contended that there should be no liability if existing human knowledge, at the time the plaintiff contracted cancer, did not show any causal relationship between cigarettes and cancer. The argument was successful in *Lartique v. R. J. Reynolds Co.*[127] in which the court, applying Louisiana law, said that it is reasonable to draw the line somewhere and that Louisiana draws it at "unknowable risks." Further, it need only be shown that the present state of human knowledge does not show any risk, and it is not necessary to show that the effects were such that "no developed human skill or foresight could have avoided them."[128]

This same argument failed when the same court applied Florida law in *Green v. American Tobacco Co.*[129] The court had certified the question of whether liability was limited by the extent of existing human knowledge to the Florida Supreme Court and had received a negative answer.

D. *Misuse of the Product*

A few cases have said that there can be no recovery where there has been a misuse of the product by the plaintiff.[130] This may also be discussed in terms of contributory negligence, but what is really being said is that the warranty did not extend to the use being made of the product or that no warranty was breached.

This situation is likely to come up when the plaintiff has not followed directions as to the proper use of the product.[131] Similarly, the court in *Silverman v. Swift & Co.*[132] said: "The implied warranty that goes with a sale of raw pork is that it is fit for eating only after it has been cooked with the commonly used precautions prevailing among the general public."

E. *Failure to Give Notice*

There were no notice requirements under common law, but both the USA[133] and the UCC[134] require that notice of a breach of warranty be given within a reasonable time. This requirement has not been strictly enforced, however. It has been held not to apply where per-

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[127] 317 F. 2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963).
[128] *Id.* at 39.
[129] 325 F. 2d 673 (5th Cir. 1963).
[130] Landers v. Safeway Stores, Inc. 172 Ore. 116, 139 P. 2d 788 (1943).
[131] Taylor v. Jacobson, 336 Mass. 709, 147 N.E. 2d 770 (1958).
[132] 141 Conn. 450, 107 A. 2d 277 (1954).
[133] UNIFORM SALES ACT §49.
[134] UNIFORM COMMERCIAL CODE §2-607(3)(a).

sonal injuries have been sustained[135] or, assuming that lack of privity is not otherwise an obstacle to recovery, where the parties are remote.

A major case holding that the notice requirement does not apply where the parties are not in a buyer-seller relationship is *Greenman v. Yuba Power Prods., Inc.*[136] In that case the court held that the liability in question was independent of a sales contract and thus not governed by the notice provisions of the Sales Act: "The notice . . . requirement is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt."[137] The court did think that as between the immediate parties the notice requirement was a sound rule designed to protect the seller against unduly delayed claims.

Where notice of breach is necessary, it must be timely and adequate. These are generally questions for the jury, and the defendant would probably have to show prejudice for notice to be defective as a matter of law.[138] Comment 4 to UCC section 2-607 indicates that what constitutes a "reasonable time" will vary with the position of the buyer.

In some jurisdictions the giving of notice must be affirmatively pleaded,[139] while in others the filing of the complaint within a reasonable time will be sufficient notice.[140] Failure of the indemnitee to give notice to the indemnitor will bar him from recovering.[141]

F. *Statute of Limitations*

Plaintiffs have often contended that warranty was a contract action so as to get the benefit of a longer statute of limitations. This contention has generally been upheld where the plaintiff's loss has been of a commercial nature. But where the plaintiff has suffered a personal injury, limitations governing personal injury have been applied regardless of the theory of warranty adopted.[142]

Another problem is determining when the cause of action arises. Most cases hold that a cause of action on a warranty does not arise until the defect is or should have been discovered.[143] Some states, however, hold that the breach occurred at the time of the sale and action

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[135] Wright-Bachman, Inc. v. Hodnett, 235 Ind. 307, 133 N.E. 2d 713 (1956).
[136] 59 Cal. 2d 57, 377 P. 2d 897 (1962).
[137] *Id.* at 61, 377 P. 2d at 900.
[138] American Furniture Co. v. Veazie, 131 Colo. 340, 281 P. 2d 803 (1955) (notice not timely); Clarizo v. Spada Distrib. Co., 231 Ore. 516, 373 P. 2d 689 (1962) (notice adequate); Nadeau v. Robert H. Irwin Motors, Inc., 102 N.H. 212, 153 A .2d 791 (1959) (timeliness of notice question of fact for trial court).
[139] Smith v. Pizitz, Inc., 271 Ala. 101, 122 So. 2d 591 (1960).
[140] Silverstein v. R. H. Macy & Co., 265 App. Div. 5, 40 N.Y.S. 2d 916 (Sup. Ct. 1943).
[141] Columbia Axle Co. v. American Auto Ins. Co., 63 F. 2d 206 (6th Cir. 1933).
[142] Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P. 2d 163 (1954).
[143] Puretex Lemon Juice, Inc. v. S. Riekes & Sons, 351 S.W. 2d 119 (Tex. Civ. App. 1961).

accrues at that time whether the defect is discovered or not.[144] Where privity is not otherwise a bar, the action against the manufacturer usually does not arise until the final sale to the remote purchaser.[145]

Some cases hold that an indemnitee's right of action arises at the time he purchases from the indemnitor,[146] while others say that the action accrues when he knew or should have known of the defect.[147]

The Uniform Commercial Code states that the cause of action arises when tender of delivery is made, regardless of the buyer's lack of knowledge of the defect.[148] But an exception is made where the warranty *explicitly* extends to the future performance of the goods. In adopting this provision, it was thought that uniformity and stability in commercial transactions justified the possibility that a plaintiff might occasionally be barred by the four-year statute of limitations of the Code.

VIII. Food and Beverages

Long before the growth of the modern law of implied warranties, the vendor of food and beverages was held to a special responsibility to the consumer. In the early days of the manorial courts, local regulations governed quantity and quality. The first of a series of English statutes imposing criminal penalties for the marketing of "corrupt" food and drink for immediate consumption appeared in 1266.[149] It is probable that those who failed to show the degree of skill prevailing in the trade were also civilly liable in some sort of action on the case.

Beginning in the fifteenth century, the English cases talked of this special responsibility in terms of implied warranty, but only by way of dictum.[150] Subsequent American cases, in finding the seller liable, adopted this language of warranty; and today the seller of food and beverages impliedly warrants, at least to the immediate buyer, that his goods are wholesome and reasonably fit for human consumption.[151] With minor differences, the implied warranty with respect to food and beverage is the same as implied warranties in general.

Before the plaintiff can recover he must show that the food was not wholesome or fit, that the unwholesomeness existed at the time of the sale, and that the defect caused his illness or injury.

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[144] See Kakargo v. Grange Silo Co., 11 App. Div. 2d 796, 204 N.Y.S. 2d 1010 (Sup. Ct. 1960) (memorandum decision).

[145] See Bernstein v. Remington Arms Co., 18 App. Div. 2d 910, 238 N.Y.S. 2d 78 (Sup. Ct. 1963) (memorandum decision).

[146] Outwater v. Miller, 3 App. Dic. 2d 670, 215 N.Y.S. 2d 838 (Sup. Ct. 1961) (memorandum decision); E. O. Painter Fertilizer Co. v. Kil-Tone Co., 105 N.J.L. 109, 143 Atl. 332 (Ct. Err. & App. 1928).

[147] See Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 12 Cal. Rptr. 257, 360 P. 2d 897 (1961).

[148] Uniform Commercial Code §2-725.

[149] See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1099, 1103 (1960).

[150] Y.B. 9 Hen. VI, f. 53 B, pl. 37 (1431).

[151] See, *e.g.*, Simon v. Graham Bakery, 31 N.J. Super. 117, 105 A. 2d 877 (1954).

The unwholesomeness of the food is most easily shown when a foreign substance is found. Some substances, such as worms[152] or mice,[153] are sufficiently repulsive so as to make the food unwholesome without any further showing. Where the foreign substance is not commonly regarded as repulsive, such as pieces of cork[154] or a nail,[155] further proof that it rendered the food or beverage unfit may be necessary.

Food has been found not to be unwholesome as a matter of law where the invading substance is natural to that type of food or its presence should have been anticipated by the plaintiff. This situation occurs most often when bones or seeds are found in the food. Liability has been denied where a chicken bone was found in a chicken pie,[156] a fish bone found in a fish dinner,[157] or a prune pit encountered in a jar of prune butter.[158] It is not necessary that the natural substance be a usual thing; it is enough that it is occasionally present and that the consumer ought to anticipate its presence.[159] Other courts have held that it is a jury question whether the injury was caused by a natural substance,[160] and the Wisconsin court has adopted the test of "reasonable expectation."[161] Although the substance is natural to some dishes, it may be foreign to the specific item involved, as where a piece of crab shell is found in a food not containing crab.[162]

If a foreign substance is not involved, unwholesomeness may be proved by showing that others suffered similar ill effects. This is most often appropriate in food poisoning cases where the food is not outwardly unfit or harmful.[163] Conversely, the fact that others did not become ill may be proof that the food was not unwholesome.[164]

The plaintiff must also show that the defect existed at the time of the sale. This is most easily done when a foreign substance is found in a tightly sealed container or where food not outwardly harmful, but shown to be unwholesome, has come in a sealed package.[165] Proof is

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[152] Food Fair Stores v. Macurda, 93 So. 2d 860 (Fla. 1957).
[153] Hope Coca-Cola Bottling Co. v. Jones, 222 Ark. 52, 257 S.W. 2d 272 (1953).
[154] Willis v. Safeway Stores, Inc., 199 Misc. 821, 105 N.Y.S. 2d 9 (Sup. Ct. 1951) (per curiam).
[155] Copeland v. F. W. Woolworth Co., 187 Misc. 456, 62 N.Y.S. 2d 660 (Sup. Ct. 1946).
[156] Lamb v. Hill, 112 Cal. App. 2d 41, 245 P. 2d 316 (1952); Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P. 2d 144 (1936).
[157] Shapiro v. Hotel Statler Corp., 132 F. Supp. 891 (S.D. Cal. 1955).
[158] Courter v. Dilbert Bros., 19 Misc. 2d 935, 186 N.Y.S. 2d 334 (Sup. Ct. 1958).
[159] Mix v. Ingersoll Candy Co., *supra* note 156.
[160] Bryer v. Rath Packing Co., 221 Md. 105, 156 A. 2d 442 (1959).
[161] Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W. 2d 64 (1960).
[162] Arnaud's Restaurant v. Cotter, 212 F. 2d 883 (5th Cir. 1954).
[163] Duncan v. Martin's Restaurant, Inc., 347 Ill. App. 183, 106 N.E. 2d 731 (1952).
[164] See Geisness v. Scow Bay Packing Co., 16 Wash. 2d 1, 132 P. 2d 740 (1942).
[165] *E.g.*, Manzoni v. Detroit Coca-Cola Bottling Co., 363 Mich. 235, 109 N.W. 2d 918 (1961); Gonzales Safeway Stores, Inc., 147 Colo. 358, 363 P. 2d 667 (1961); Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P. 2d 799 (1939); Kassouf v. Lee Bros., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962).

more difficult where a foreign substance is found in an unsealed product, but the circumstances may show that the foreign substance must have made its invasion at the time of manufacture, as where it is deeply embedded in the food.[166] The most difficult of proof cases are those in which the food is unpackaged and not outwardly harmful, and it is particularly difficult if the food is subject to spoilage.[167]

Closely connected with the necessity of showing unwholesomeness is proof of causation, and the mere fact that several people suffered ill effects may not be sufficient to allow recovery where other possible causes are not eliminated. For example, in *Walraven v. Sprague, Warner & Co.*[168] a number of people became ill after eating contaminated crab salad. Recovery against the vendor of the meat was denied because other ingredients added by the housewife or the use of utensils or her hands might also have been the cause.

Recovery may be had where other possible causes are eliminated. Evidence that another person ate the same things as the plaintiff with the exception of the item allegedly causing the illness is sufficient proof of causation.[169] But recovery has been denied where the plaintiff's illness might have been caused by a virus infection prevalent in the community, in spite of evidence that a doctor had diagnosed the illness as food poisoning.[170]

Showing the illness of others may be combined with the elimination of other causes. In *Armour & Co. v. Leasure*[171] recovery was had when it was shown that several persons became ill after eating corned beef and there was medical testimony that the corned beef was the only thing that could have caused botulism.

The plaintiff may have to show that there was no reasonable opportunity for tampering or no actual tampering with the product.[172] However, most courts, realizing the difficulty in proving the absence of tampering, put the burden on the defendant to show that tampering did occur.[173] The question of tampering usually arises in bottle cases where the cap may be removed and replaced with relative ease.

In accord with a reluctance to give damages solely for emotional distress for fear of fraudulent claims, recovery may be denied where the plaintiff has suffered some mental shock, but no physical injury.[174]

[166] Walraven v. Sprague, Warner & Co., 235 Wis. 259, 292 N.W. 883 (1940).
[167] Great Atl. & Pac. Tea Co. v. Adams, 213 Md. 521, 132 A. 2d 484 (1956).
[168] 235 Wis. 259, 292 N.W. 883 (1940).
[169] Barfield v. F. W. Woolworth Co., 329 Mass. 641, 110 N.E. 2d 103 (1953).
[170] Payton v. Lee, 88 Ga. App. 422, 77 S.E. 2d 77 (1953).
[171] 177 Md. 393, 9 A. 2d 572 (1939).
[172] Sharpe v. Danville Coca-Cola Bottling Co., 9 Ill. App. 2d 175, 132 N.E. 2d 442 (1956).
[173] Miami Coca-Cola Bottling Co. v. Todd, 101 So. 2d 34 (Fla. 1958). Paul v. Rodgers Bottling Co., 183 Cal. App. 2d 680, 6 Cal. Rptr. 867 (1960), has even said that the defendant assumed the risk of tampering.
[174] Tuttle v. Meyer Dairy Prods. Co., 75 Ohio L. Abs. 587, 138 N.E. 2d 429 (Ct. App. 1956).

He may even be denied recovery where the physical suffering is the result of a psychological reaction and not due to the harmful effects of the contaminated food or beverage.[175] The majority, however, permits recovery for nausea, vomiting, and other consequential illnesses, even if they result from psychological distress rather than the harmful effects of a "corrupt" food or beverage or mere contact therewith.[176] Nominal damages for emotional distress alone may even be recovered in some cases.[177]

IX. DRUGS

Although there have been few drug cases dealing with implied warranties, it is a rapidly growing and increasingly complex area. Warranties in the field of drugs are, for the most part, governed by the general rules of warranty law. The warranty of merchantability is that the drug is reasonably fit for its general purposes. The warranty of fitness requires that the seller have knowledge of the particular purpose of the buyer or user and that the buyer or user rely on the skill and judgment of the seller. It is arguable that, at least as to prescribed drugs, there are only particular purposes.

The retailer is much less likely to be liable than the manufacturer in a drug case. Where the drug is purchased by its trade or brand name or by prescription, there would seldom be reliance on the druggist's skill and judgment, and thus no warranty of fitness. Further, the druggist may not even be aware of the buyer's particular purpose, at least where it is not indicated by the prescription.

The retailer may still be liable under an implied warranty of merchantability, however, where the drug is prescribed. If the drug is not fit only as to the plaintiff, there is obviously no breach, because the drug is fit for ordinary purposes. If the drug is safe as prescribed, but wrongfully prepared by the druggist, the latter may have breached the warranty of merchantability if that warranty can exist as to prescribed drugs. In any case, the druggist would probably be negligent. The warranty is also probably breached where the drug was properly prescribed by a doctor on the basis of the manufacturer's literature, was properly prepared by the pharmacist, and still caused harm.

Retailer liability would be easier to establish where the drug is not prepared on the basis of a prescription. The buyer frequently may make his purpose known, and thus he probably relies on the skill and judgment of the druggist. It may be arguable that reliance is precluded in some circumstances, as where a statute makes it unlawful to dispense drugs without a prescription.

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[175] Cushing Coca-Cola Bottling Co. v. Francis, 206 Okla. 553, 245 P. 2d 84 (1952).
[176] See, *e.g.*, Cernes v. Pittsburgh Coca-Cola Bottling Co., 183 Kan. 758, 332 P. 2d 258 (1958).
[177] Sullivan v. H. P. Hood & Sons, 341 Mass. 216, 168 N.E. 2d 80 (1960).

Many drugs are produced by large companies and merely distributed by the druggist. Where privity is still a requirement, the manufacturer may not be accessible to the plaintiff. However, drugs are treated in the same category as foods,[178] so privity is not likely to be a bar—particularly in view of the general breakdown of privity in many areas.

The problem of privity becomes increasingly significant as more drugs and more powerful drugs are being manufactured, with the druggist serving as a mere conduit to the buyer. In these cases, there is little reason for holding the retailer liable and, as he must stock these drugs for sale by prescription, it is arguable that he is merely performing a service as mentioned in connection with the *Perlmutter* case.[179] It may also be arguable that there is no "sale," but merely a "service" rendered, when a drug administered by a physician causes the patient some harm. This argument was made and rejected in *Gottsdanker v. Cutter Labs.*[180]

As to the manufacturer of drugs capable of harmful effects, a duty of meticulous compliance with an extremely high standard of conduct may be imposed. The ability or possibility of causing serious harmful effects is considered in establishing the standard of conduct required. Rigid compliance with all statutory and governmental requirements are necessary, particularly as to testing, experiments, and reporting. Full and frank warnings of possible dangers and explicit directions as to usage are mandatory.

An unresolved question is the extent of liability of the manufacturer of a useful drug which has permanent side effects even when made without defect or impurity. It has been suggested that there is no breach of warranty for such deleterious effect, liability being confined to that imposed for failure to give adequate warning.

As to the manufacturer in general, the problem is primarily one of degree as to what constitutes a breach or lack of breach of any alleged warranty involved. Otherwise the general rules of warranty and the applicable defenses thereto apply.

X. Allergies

The problem of allergic reactions generally comes up when a drug, or cosmetic, or something which comes in contact with the body is involved. However, there is no liability where there is an allergic reaction to a food, such as strawberries, at least when it is sold in its natural state. But where an artificial substance, such as an additive, has been added to the food before the sale, a warranty would probably

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[178] Gottsdanker v. Cutter Labs., 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960), 79 A.L.R. 2d 290 (1961).
[179] See p. 148 and note 52 *supra*.
[180] 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960), 79 A.L.R. 2d 290 (1961).

arise. Once again, before the plaintiff can recover he must show a warranty, a breach, and causation.

The most difficult task for the plaintiff is showing that the reaction was caused by a defect in the product rather than an individual idiosyncrasy. In the majority of jurisdictions, the plaintiff must show that the product is harmful and would be injurious to the "normal" person.[181] If he does so, he will have little difficulty in recovering. Other courts, however, only require a showing that a "small proportion" of the users would be afflicted.[182] Although these appear to be different tests, all of the allergy cases are reconcilable on their facts: in those cases in which the plaintiff failed to show that the product would be injurious to the normal person, he also failed to show that even a small proportion of users would be harmed.[183]

Evidence of other complaints about the product in question, or a lack thereof, is relevant in determining the "normality" and "foreseeability" of the plaintiff.[184]

Denial of liability may be predicated on finding either that no warranty was breached or that the breach was not the proximate cause of the allergic reaction. The fact that the plaintiff suffers some reaction does not preclude a finding that the product was fit for ordinary purposes and thus of merchantable quality. Or if it is found that the product was an actual cause of the reaction, it may still be held that the unusual physical makeup of the plaintiff was the proximate cause of his suffering.

Foreseeability is often discussed in allergy-warranty cases. The court in *Esborg v. Bailey Drug Co.*[185] said that the plaintiff must show that

> (a) the product involved contains a harmful ingredient;
> (b) such ingredient is harmful to a reasonably *foreseeable* and appreciable class or number of potential users of the product; and
> (c) plaintiff has been innocently injured in the use of the product in the manner and for the purpose intended.[186] (Emphasis added.)

This is an area in which the cigarette-cancer argument that there should not be liability for unknowable risks might be significant.[187]

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[181] Ray v. J. C. Penney Co., 274 F. 2d 519 (10th Cir. 1959); Bonowski v. Revlon, Inc., 251 Iowa 141, 100 N.W. 2d 5 (1959).
[182] Zirpola v. Adam Hat Stores, Inc., 122 N.J.L. 21, 4 A. 2d 73 (Ct. Err. & App. 1939); Bianchi v. Denholm & McKay Co., 302 Mass. 469, 19 N.E. 2d 697 (1939).
[183] See Esborg v. Bailey Drug Co., 61 Wash. 2d 347, 378 P. 2d 298 (1963).
[184] See Stanton v. Sears, Roebuck & Co., 312 Ill. App. 496, 499, 38 N.E. 2d 801, 802 (1942).
[185] 61 Wash. 2d 347, 378 P. 2d 298 (1963).
[186] *Id.* at 358, 378 P. 2d at 304.
[187] See p. 159 *supra.*

For the risk to be "unknowable," however, it would probably be necessary to have carried out at least a certain minimum amount of testing and investigation.

If the allergic reaction is foreseeable, there is a duty to warn and failure to do so will give rise to an action for negligence. When the warranty of merchantability is at issue, the existence of a warning is most appropriate to the question of assumption of risk, although it has been said in a non-allergy case that a failure to warn was "the factor which caused the warranty to be breached."[188] Whatever else it may be, the absence or presence of a warning is not the cause of the breach. If there has not been a warning, the warranty is breached when some damage is done. If there has been a warning, it may be said that there was no warranty as to the harm suffered because the use was not ordinary, or it may be raised as a matter of assumption of risk (or contributory negligence). If the warranty of fitness is at issue, the existence of a warning is important to the question of reliance.

In what is possibly the leading case in this area, *Crotty v. Shartenberg's-New Haven, Inc.*,[189] the defendant was held liable even though a warning and instructions to take a patch test had been given, where the test was ineffective. In this case the plaintiff was not even required to show that an appreciable number of people for whom the test was also ineffective were also allergic to the product. This case may have been subsequently limited by *Hamon v. Digliani*[190] which said that there is an implied warranty to the ultimate consumer "that the product is reasonably *fit for the purpose intended* and that it does not contain any harmful and deleterious ingredient of which *due and ample warning has not been given.*"[191] (Emphasis added.) The court in the *Crotty* case also said that "if a buyer has either actual or constructive knowledge that he is allergic to a particular substance, and knows or should know that he is allergic to that substance, he cannot recover nor can he recover for improper use."[192]

XI. Strict Liability

There has recently been a great deal of excitement over the apparent willingness of some courts to accept a theory of strict liability in products liability cases. Much of the excitement is due to a failure to understand what is meant by strict liability, which is not to say that it can be understood. It is an amorphous term at best.

Strict liability is not absolute liability such as is found in the case of an ultra-hazardous product. There are no defenses to absolute liability, while there are some to strict liability. Some writers have

[188] See Hanson v. Murray, 190 Cal. App. 2d 617, 623-24, 12 Cal. Rptr. 304, 308 (1961).
[189] 147 Conn. 460, 162 A. 2d 513 (1960).
[190] 148 Conn. 710, 174 A. 2d 294 (1961).
[191] *Id.* at 718, 174 A. 2d at 297.
[192] 147 Conn. at 467, 162 A. 2d at 517.

referred to the breakdown of the privity requirement as the imposition of strict liability. The refusal of the courts to honor a disclaimer has been called strict liability. These are simply means by which the scope of liability has been expanded within the field of warranty law, and these methods and trends have been discussed previously.

There is another kind of strict liability which is unfolding outside of the field of warranty law, at least in California, and which has clearly been denominated as a tort action. This new liability is not based on negligence, nor is it absolute liability. It is somewhere in between. The forerunner of this type of strict liability can be found in section 402A of the *Restatement of Torts,* which provides for strict liability in tort in the case of sellers of food and products for intimate bodily use. The comment to this section makes it clear that liability is not governed by the rules of warranty law:

> The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption. The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the hands of the consumer. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here settled as merely one of strict liability in tort.[193]

But the rapid changes in the development of the law through judicial decisions outmoded the 1962 tentative draft of section 402A.[194] By the most recently approved tentative draft, this section now applies to any product regardless of whether or not it is intended for intimate bodily use:

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[193] See comments to RESTATEMENT (SECOND), TORTS §402A (Tent. Draft No. 7, 1962).

[194] RESTATEMENT (SECOND), TORTS §402A (Tent. Draft No. 10, 1964). The new tentative draft has placed limitations on the expansion of products liability which are actually contrary to common law liability developed within the past few years. It would impose liability neither on a cigarette manufacturer because smoking has a harmful side effect (comment *i*) nor on a drug manufacturer for a drug which is unavoidably unsafe (comment *k*). *Contra,* Green v. American Tobacco Co., 154 S. 2d 169 (Fla. 1963), and Gottsdanker v. Cutter Labs., *supra* note 178.

Special Liability of Seller of Product to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer ,or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to reach the user or consumer in the condition in which it is sold.

(2) The rule stated in subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[195]

This change in the Restatement was prompted in substantial part by the case of *Greenman v. Yuba Products, Inc.*,[196] in which the California court held the manufacturer of a combination power tool strictly liable to the user. In that case the plaintiff's wife bought him the power tool as a present. The plaintiff had previously observed a demonstration of the tool by a retailer and had studied the manufacturer's brochure. While the plaintiff was working on a piece of wood, it suddenly flew out and struck him in the forehead. Suit was brought against both the manufacturer and the retailer for breaches of warranties and negligence. The plaintiff's expert witness testified that the design of the tool was defective. The trial judge ruled that there was no evidence that the retailer was negligent or that he had breached an express warranty. He also ruled that the manufacturer was not liable for breach of an implied warranty. The jury found for the retailer but against the manufacturer, with no indication whether the verdict was based on negligence or warranty or both.

On appeal, the California Supreme Court held that notice requirements as to warranty applied only as to the immediate seller and not as to the manufacturer. Thus the plaintiff would not be barred by failure to give timely notice. The court also held that the warranty rules would not apply anyway because the manufacturer was strictly liable to the user in tort when he placed an article on the market knowing that it would be used without further inspection for defects.

What is the effect of finding strict liability in tort? In *Greenman*, it simply meant that the plaintiff was not bound by the notice requirements of warranty law. More important, it means that the plaintiff need not establish the existence of either an express or an implied warranty.

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[195] "With the exception of prenatal injuries, this is the most radical and spectacular development in tort law during this century." RESTATEMENT (SECOND), TORTS, Note to Institute §402A (Tent. Draft No. 10, 1964).

[196] 59 Cal. 2d 57, 377 P. 2d 897 (1962); see Vandermark v. Ford, 61 A.C. 245, 37 Cal. Rptr. 896, 391 P. 2d 168 (1964), extending strict liability to retailers.

The failure of the plaintiff to show the existence of a warranty and a breach thereof has often proved the best defense. But the effect of not requiring the plaintiff to show a warranty is really the same as if the scope of the warranty had been expanded. Strict liability is often referred to as having originated in food cases, but those cases were generally decided in a warranty context, with the scope of the warranty simply being broadened.

Greenman does not mean that proximate cause no longer need be shown or that other defenses would not apply. In California, contributory negligence is not a defense to a warranty action.[197] However, it may be a defense to a strict liability claim because that action is in tort.

California recently held that the retailer is also strictly liable.[198] Presumably, this strict liability arises under the same circumstances as the strict liability of the manufacturer—when the product is to be used without further inspection. Because the retailer is strictly liable, the supreme court further held that disclaimers or restrictions on contractual liability are not material.

The development of strict liability reflects, in part, a desire to spread the losses resulting from a defective product. By making the manufacturer liable, the losses can be passed on to the consumers through increased prices. It may also reflect a feeling that the manufacturer, although he was not negligent, is somehow at fault because he created a defective product. Whatever the reasons, strict liability is not a death knell to the defense lawyer. Although some defenses may be eliminated, assumption of risk and its many facets surely remains. And the defense of contributory negligence may be even more readily available.[199]

XII. Conclusion

It would be unrealistic to think that it will not become increasingly easier for the plaintiff to recover in a products liability case. This simply means that the defense lawyer must work harder and with imagination. The best possible defense is important not only in an individual case,

[197] Kassouf v. Lee Bros., Inc., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (1962); Vassallo v. Sabatte Land Co., 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (1963).

[198] Vandermark v. Ford, *supra* note 196, where the notice requirement was held not applicable where the question was one of strict liability.

[199] Restatement (Second), Torts §402A, comment *n* (Tent. Draft No. 10, 1964), is as follows: "*n. Contributory negligence.* Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases . . . applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery."

but in helping to keep further expansion within sane and reasonable bounds.

The purpose of this monograph is to provide a practical introduction into the field of implied warranties and perhaps serve as a rough guide in leading the defense lawyer to more detailed and pertinent information. Hopefully it has done so.