Effect of Advertising on Manufacturer's Liability to Ultimate Purchaser

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INTRODUCTION

Today the manufacturer, by means of newspapers, television and other media of communication, extols his products in an effort to persuade the public to purchase them. The public usually purchases from a retailer, often in reliance upon the manufacturer's advertising. When a member of the public is injured thereby, should the manufacturer be allowed to defend suit on the ground that there is no "privity" between the ultimate purchaser and himself? Many a layman, after watching his favorite television program, goes to his neighborhood store and, upon the strength of the sponsor's recommendations, purchases the product so advertised. If as a direct result he suffers injury, to himself or his property, he would certainly be surprised to learn that he cannot recover the amount of his damage from the one who has made such glowing statements, merely because he has not purchased the product directly from him.1

He has not much chance of recovery in an action for deceit. Courts have recognized that such things as radio2 and newspaper3 advertisements and statements in catalogs4 can be the basis for a cause of action in deceit. They have explicitly held that the consumer is in the class at which the advertisement is directed.5 However, the action against the advertising manufacturer would be blocked by the requirement of scienter which is imposed by most courts.6

The possibility of recovery in an action for negligence has improved somewhat since the days of Winterbottom v. Wright.7 The first exception to the requirement of privity was created in the area of food and drugs;8 the second, in the case of an "imminently dangerous"

2 Ralston Purina Co. v. Cox, 141 Neb. 432, 3 N.W. 2d 748 (1942).
3 Christakos v. Lockwood, 194 F. 2d 897 (D.C. Cir. 1952).
5 Graham v. John R. Watts & Son, 238 Ky. 96, 36 S.W. 2d 859 (1931); Roberts v. Anheuser-Busch Brewing Ass'n, 211 Mass. 449, 98 N.E. 95 (1912).
6 PROSSER, TORTS §§8 (2d ed. 1955).
7 10 Mees & W. 109, 152 Eng. 402 (1842).
8 Thomas v. Winchester, 6 N.Y. 397, 57 Am. Dec. 455 (1852). This has been applied in Hruska v. Parke, Davis & Co., 6 F. 2d 536 (8th Cir. 1925) (drug advertisement); Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S.E. 118 (1889) (patent medicine label); Parks v. G. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914) (food); Wilson v. Fergusen Co., 214 Mass. 263, 101 N.E. 381 (1913) (food, advertisement). In only one case, Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419, 178 S.W. 1009 (1915), has a court refused to extend the doctrine to cover chewing tobacco. The following courts have applied the Thomas v. Winchester exception in chewing tobacco cases: Lig-
Furthermore, where the manufacturer has advertised, the courts are quick to impose upon him a duty to warn that the product may be dangerous, or to give directions as to proper use. However, the burden of proof in a negligence action may be nearly impossible to carry, since means of proof are almost exclusively within the control of the defendant. Even where the doctrine of res ipsa loquitur is applied, plaintiff will have difficulty in proving that the product was in the exclusive control of the defendant at the time of the accident. Where a statute requires a product to be clearly labelled, the court may or may not find that a violation thereof is negligence per se. In actions against the manufacturer based on the Pure Food and Drug Acts, some courts have held that violation of the statute was negligence per se, and have allowed the consumer to recover. Others have held that violation


Levine v. Muser, 110 Neb. 515, 194 N.W. 672 (1923) (medicine).

was merely some proof of negligence. This theory does not seem to have been advanced often and is relatively unimportant today, since courts are having little difficulty in imposing an absolute liability on the manufacturer of food or beverages. Printers' Ink statutes impose absolute criminal liability on one who issues false or misleading advertising, but have apparently not been employed to impose civil liability on the advertiser. The Uniform Commercial Code purposely avoids this problem.

Eliminating, then, the possibilities of deceit and negligence, it becomes clear that the ultimate purchaser's best chance for recovery lies in the area of express warranty. It is the purpose of this article to demonstrate that he should have an action for breach of express warranty, either at common law or under the Uniform Sales Act against the manufacturer who advertises, even though the goods were purchased from a retailer.

I. PRIVITY AN HISTORICAL ACCIDENT

The stumbling block in the path of the ultimate purchaser who wishes to sue the manufacturer for breach of warranty is, of course, the judicially-imposed requirement of privity. Of late, it has frequently been pointed out that this requirement originated in the courts' misinterpretation of the original common law action for breach of warranty. Originally, the injured consumer's relief was in an action on the case for deceit, in which an essential allegation was warrantiendo vendidit or warrantizando bargainizasset. "The gist of the

19 See Part III, infra.
20 E.g., Wis. Stat. §100.18 (1957).
21 Handler, False and Misleading Advertising, 39 YALE L. J. 22 (1929); Comment, 36 YALE L. J. 1155 (1927).
22 §2-318. "A seller's warranty whether expressed 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."
23 The framers' comment on this section is as follows: "This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." This article is concerned, however, with warranties made directly to the sub-purchaser.
24 Section 12, which defines an express warranty, is considered a codification of the common law definition. 1 WILLISTON, SALES §194 (Rev. ed. 1948).
26 1 WILLISTON, SALES §195 (Rev. ed. 1948).
action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property, it was obviously immaterial whether the promisor or a third person got the benefit of what the plaintiff gave up.”27 This action was, then, regarded as purely *ex delicto,*28 and there was no need to prove either *sciente* or intent to defraud. Thus, it appears that even express warranty was, to this extent, an obligation imposed by law.29 Originally, the action of *indebitatus assumpsit*30 was also *ex delicto.*31 By a natural transition, *indebitatus assumpsit* became the method of asserting the cause of action upon a warranty,32 when it was recognized that a warranty could be a part of a sales agreement, and, therefore, not necessarily collateral in legal effect. Because of the marketing conditions of the times, the one who sold the goods to the injured consumer was generally the one who made the representation upon which the consumer relied. Thus, even though privity was not an essential part of the cause of action, since warranty was an obligation imposed by law, it was, coincidentally, present in the early cases. In fact, only with the advent of our modern communication system would it be possible to have a fact situation where there was the reliance necessary to support a warranty action except where the parties had actually dealt with each other.33 If, then, reliance be recognized as the basis for an action on express warranty, there is no justification in allowing the advertising manufacturer to hide behind the skirts of the ancient, mistakenly-imposed requirement of privity.34

II. ADVERTISING AS EXPRESS WARRANTY

Where the manufacturer’s advertising amounts to an express warranty, the ultimate purchaser should be able to recover tort damages for a breach, notwithstanding lack of privity. The first case to drop the requirement of privity when advertising entered the scene was *Baxter v. Ford Motor Co.*35 The court held that privity was unnec-

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28 Breach of warranty is considered today as *ex delicto,* at least in part. Vold, *Sales* §140 (1931).
29 Skeel, *supra* note 25, at 98.
30 Slade’s Case; 4 Rep. 92b; Yelv 21; Moore, 433,667 (1603).
31 Ames, *supra* note 27, at 3.
32 Stuart v. Wilkins, 1 Douglas 18, 99 Eng. Rep. 15 (1778), is the first reported decision in which *assumpsit* was brought upon a vendor’s warranty, but two of the Justices remarked that the practice was a familiar one. This was acknowledged in Williamson v. Allison, 2 East 446, 102 Eng. Rep. 439 (1802), to be the first case which discussed the question.
34 “If privity of contract is required, then, under the situation and circumstances of modern merchandise in such matters, privity of contract exists in the consciousness and understanding of all right-thinking persons.” Madourous v. Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W. 2d 445 (1936).
35 168 Wash. 456, 12 P. 2d (1932). "Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would
sary since the manufacturer had made representations about its product, in its printed circular, upon which the plaintiff had relied when he purchased.36

That an advertisement can constitute an express warranty has been recognized several times.37 Some courts have specifically held Section 12 of the Uniform Sales Act, which defines an express warranty,38 applicable in suits by consumers where the manufacturers' statements appeared in circulars and on labels. The Nebraska Court held that manufacturer's statement in its circular that its bacterin would establish immunity (in animals) in ten to twelve days was an express warranty.39 The Court of Appeals of the Third Circuit found that a table of tensile strengths, contained in a manufacturers' manual, was an express warranty under the Pennsylvania Uniform Sales Act.40 In California, it was held that an analysis, appearing on the label of the container, of the insecticide therein, was an express warranty "that the ingredients listed were the only active ones contained in the spray."41 Where the label on a bottle of liniment read "For man and beast . . . Follow directions carefully and you will be rewarded with good results," the Minnesota Court found an express warranty.42

It is unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable." Id. at 412.

This case has been the subject of considerable speculation. When the case reached the Washington Supreme Court again, after retrial on the issue of proximate cause, the court recognized that its decision had been based on breach of warranty and reluctantly reaffirmed its stand, in language appropriate for an action in deceit. 179 Wash. 123, 35 P. 2d 1090 (1934). The author of a note at 7 WASH. L. Rev. 351 (1932) argues that the basis of the holding must have been breach of express warranty. This, in turn, is what a later Washington Court, in Murphy v. Plymouth Motor Corp., 3 Wash. 2d 180, 100 P. 2d 30 (1940), called it. Another writer dubbed it negligent advertising. Note, 22 WASH. U.L.Q. 406 (1937). Still another listed four possibilities: that historically warranty was a tort action in which privity was not required, that the decision was an application of the MacPherson rule, deceit, or a holding that warranty runs with personal property as does a covenant with land. Note, 18 Colin. L.Q. 445 (1933). See also Freezer, Manufacturer's Liability for Injuries Caused by His Product: Defective Automobiles, 37 Mich. L. Rev. 1 (1938); Note, 46 HARY. L. Rev. 161 (1932).


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


Mannsz v. Macwhyte Co., 155 F. 2d 445 (3rd Cir. 1946). However, the court disallowed recovery since the rope, as to which the affirmation had been made, had not been used as intended by the manufacturer.


Several other courts, without reference to the Uniform Sales Act, have found express warranties in manufacturers' statements appearing in newspaper advertisements, in circulars, on labels and on tags, and, disregarding the privity usually required in consumer-manufacturer suits, have allowed the purchaser to recover. The year after the California Supreme Court decided *Burr v. Sherwin Williams*, a District Court of Appeals in that state held, without direct mention of the Uniform Sales Act, that the manufacturer's statement, "Boned Chicken," in newspaper advertisements and on the label of a can, was an express warranty. In an analogous situation another appellate court found the manufacturer liable to a retailer who, through middlemen, had purchased soap on the label of which were the words, "Guaranty of Quality . . . If Frederick's granulated soap does not meet with your entire approval your dealer will cheerfully refund the full purchase price," where the soap was inferior and did not sell. Where an automobile manufacturer made the statement, in circulars furnished to its dealers, that the roofs of its cars were made of "seamless steel," the Michigan Court found an express warranty. The Nebraska Court held that manufacturer's statement on the label of a bottle of insecticide that the substance was "not poisonous to human beings" was an express warranty where plaintiff became infected with boils after having come into contact with the solution. Before the Uniform Sales Act was passed in Pennsylvania, the tag on a case of tobacco, which described the contents as to number and weight, was held, by application of trade custom, to constitute an express warranty. The requirement of privity has since been obliterated from Pennsylvania law. An automobile manufacturer's warranty, buried, with the reservation of its right to change model or design, in the fine print of the order blank used by the retailer, was held in New York to base an action for breach of express warranty.

The Ohio Court, admittedly overturning precedent, recently held that nation-wide advertising by the manufacturer of a home permanent

47 Simpson v. American Oil Co., 217 N.C. 542, 8 S.E. 2d 813 (1940). The court expressed its belief that the warranty "runs with the product into the consumer's hands." *Id.* at 816. This language is typical of cases in implied warranty, but the over-all language of the opinion indicates that the court considered the warranty express.
48 Conestoga Cigar Co. v. Finke, 144 Pa. 159, 22 Atl. 868 (1891).
constituted an express warranty in a suit by the purchaser after she lost her hair from using the product.\footnote{Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612 (1958).}

Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance upon such representations and later suffers because the product proves to be defective or deleterious.\footnote{Smith v. Coca-Cola Bottling Co., 92 N.H. 97, 25 A. 2d 125 (1942).}

Thus, the court indicates that the statements must constitute an express warranty, and that the plaintiff must have relied thereon. On the other hand, it appears to require no relationship between the advertisement and the type of harm suffered. This comes to the very brink of saying that nation-wide advertising, \textit{per se}, amounts to an express warranty, without regard to plaintiff's right to rely thereon.

Only two courts have adhered to the requirement of privity where the plaintiff, basing his cause of action upon manufacturer's statements, has pleaded and proved the elements of breach of an express warranty.\footnote{However, in Whitehorn v. Nash-Finch Co., 67 S.D. 465, 293 N.W. 859 (1940), where defendant was a wholesaler, the court denied recovery saying, "We are inclined to the view that lacking representation to the public in the form of advertisements, labels, or other similar forms, there is no warranty to a sub-purchaser upon which to predicate liability." \textit{Id}. at 860.} Where no specific advertisement was apparently involved, the New Hampshire Court explicitly rejected as minority law the theory that manufacturers' advertisements became warranties by reason of their being directed to the ultimate purchaser.\footnote{Frier v. Proctor & Gamble Distributing Co., 173 Kan. 733, 252 P. 2d 850 (1953); Degouveia v. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W. 2d 336 (1936) (wholesaler). In the former case, the court held that the manufacturer's statement on a box of detergent, "Tide is kind to hands," was not an express warranty. Both of these cases should be compared to a more recent Missouri case, Worley v. Proctor & Gamble Mfg. Co., 241 Mo. App. 1114, 253 S.W. 2d 532 (St. Louis Ct. App. 1952), in which the court found that the statement, "Tide is kind to hands," created an \textit{implied} warranty.} The theory, however, is no longer minority, although the specific issue has not been presented to many courts.

\section*{III. Imposition of Liability as Trend}

In fact, the recent trend, in the area of warranties generally, has been to impose liability on the manufacturer, even though the element of advertising is not present.\footnote{Frier v. Proctor & Gamble Distributing Co., \textit{supra} note 51, at 615-616.} This is most obvious in those cases

\begin{quote}
\textit{Rogers v. Toni Home Permanent Co.,} supra note 51, at 615-616.
\end{quote}
in which plaintiff has incurred physical injury from food or drink.\textsuperscript{56} In such cases, the courts of at least twenty states have held the manufacturer liable to the ultimate purchaser usually under the theory of implied warranty.\textsuperscript{57} This is in accord with the position of the common law courts even prior to the action of assumpsit. The seller of food and drink was bound by the nature of his calling to sell wholesome wares.\textsuperscript{58} so in a deceit action against him for false warranty it was not necessary to allege an express warranty of quality.\textsuperscript{59} Today, most courts which impose liability without privity do so under this same "broad principle of the public policy to protect human health and life."\textsuperscript{60} Advertising has had an effect upon the food manufacturer's liability under this imposed-by-law obligation in some states.\textsuperscript{61}

\textsuperscript{56} This is parallel to the first exception which was developed to the rule that privity must support an action for negligence. See supra note 8.


\textsuperscript{58} "[N]o man can justify selling corrupt victual, but an action on the case lies against the seller, whether the victual was warranted to be good or not." Note in Keilway's Rep. 91 (22 Hen. VII, 72 Eng. 254).

\textsuperscript{59} Ames, supra note 27, at 8.

\textsuperscript{60} Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W. 2d 828, 829 (1942).

\textsuperscript{61} Swengel v. F & E Wholesale Grocery Co., 147 Kan. 555, 77 P. 2d 930 (1938); Le Blanc v. Coca-Cola Bottling Co., 221 La. 919, 60 So. 2d 873 (1952); Coca-Cola Bottling Co. v. Smith, 97 S.W. 2d 761 (Tex. Civ. App. 1936); Lardaro v. M B S Cigar Corp., 177 N.Y.S. 2d 6 (N.Y. Mun. Ct. 1957). "It would be but to acknowledge a weakness in the law to say that [the manufacturer] could thus [by using newspapers, magazines, billboards and the radio to build up the psychology to buy and consume his products] create a demand for his products by inducing a belief that they are suitable for human consumption, when, as a matter of fact, they are not, and reap the benefits of the public confidence thus created, and then avoid liability for the injuries caused thereby merely because there was no privity of contract between him and the one whom he induced to consume the food." Jacob E. Decker & Sons v Capps, supra note 60, at 833.
In their endeavor to give relief to the injured consumer, the courts have employed a variety of fictions. These can best be summarized as follows: that the contract between manufacturer and retailer is for the consumer’s benefit,\textsuperscript{62} that the consumer is assignee of retailer’s rights,\textsuperscript{63} that the retailer is the manufacturer’s agent,\textsuperscript{64} that the manufacturer’s implied warranty runs with the chattel as does a covenant with land.\textsuperscript{65} All of these have been used to find liability in the food and beverage area.\textsuperscript{66} Two were used to extend liability into other areas. Under the third party beneficiary contract theory, an Ohio Court of Appeals found an implied warranty where a rusty wire was imbedded in a cake of soap.\textsuperscript{67} The view that implied warranty runs with the chattel was expressed by a federal district court, where a shipment combining ferrous and non-ferrous materials resulted in damage to plaintiff’s property.\textsuperscript{68} An additional argument has been presented by a few writers who point out that, by authority of the \textit{Carbolic Smoke Ball} case,\textsuperscript{69} an advertisement can constitute an offer. They argue from this that the manufacturer’s representations could be regarded as a unilateral contract, or a general offer which is accepted by the consumer when he purchases from the retailer.\textsuperscript{70} The use of these fictions illustrates the tendency to dispense with the requirement of privity, but such use of fiction would be clearly unnecessary if the plaintiff had a cause of action in express warranty based upon advertisements by the manufacturer.


\textsuperscript{63} Madouro v. Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W. 2d 445 (1936) (beverage).

\textsuperscript{64} Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913) (food).


\textsuperscript{66} The theory applied in \textit{Hertzler v. Manshum}, 228 Mich. 416, 200 N.W. 155 (1924), is frequently referred to as a “fiction.” The court held that the manufacturer of food had a duty to guard against poison and that placing the product on the market was an implied warranty of freedom from poison. It does not seem accurate to call the manufacturer’s “duty to public” fictitious.

\textsuperscript{67} Kruper v. Procter & Gamble Co., 113 N.E. 2d 605 (Ohio App. 1953). Hassbrouch v. Armour & Co., 139 Wis. 357, 121 N.W. 157 (1909) involved the same facts but the action was brought in negligence. The court denied recovery on the ground that the case did not fall within one of the three exceptions to the privity requirement.

\textsuperscript{68} Laclede Steel Co. v. Silas Mason Co., 67 F. Supp. 751 (W.D. La. 1946). Defendant had advertised that its shipment would conform to O.P.A. and W.P.B. requirements, which prohibited such combination.

\textsuperscript{69} Carlill v. \textit{Carbolic Smoke Ball} Co., 1 Q.B. 256 (1893).

\textsuperscript{70} 1 \textit{WILLISTON, CONTRACTS} §27 (Rev. ed. 1936); Jeanblanc, \textit{Manufacturer’s Liability to Persons Other Than Their Immediate Vendees}, 24 \textit{VA. L. REV.} 134 (1937); Note, 6 \textit{VAND. L. REV.} 376 (1953); Note, 22 \textit{WASH. U.L.Q.} 406 (1937).
The courts' inclination to allow recovery notwithstanding lack of privity is further demonstrated by cases in which advertising has been held to give rise to an implied, rather than express, warranty. Where the manufacturer stated on its box of detergent that "Tide is kind to hands," the St. Louis Court of Appeals, taking cognizance of the extensive advertising done by manufacturers, held that the manufacturer could be liable for breach of implied warranty.

Such representations, being inducements to buyers making the purchase, should be regarded as warranties imposed by law, independent of the vendor's contractual intentions. The liability thus imposed springs from representations directed to the ultimate consumer, and not from the breach of any contractual undertaking on the part of the vendor.

An assertion that a product is "kind to hands" seems little different from one which states that the user of a product "will be rewarded with good results." Yet, in the latter situation, the Minnesota Court found an express warranty. However, where the label on a bottle merely indicated that the intended use of the product was as shampoo, the same court allowed recovery on the theory of implied warranty. Applying this case, a federal district court held that instructions on the label of a jar of shampoo gave rise to an implied warranty.

The statement on a label of a can of beans that "The contents of this can are ready for the table and can be served hot or cold," was construed not as an express warranty, but as an implied warranty of fitness for human consumption. Such fact situations should be compared to those in which the manufacturer definitely states that his product is "non-poisonous,"

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71 A newspaper advertisement was held to create an implied warranty in an action between buyer and seller, as well. Huscher v. Pfost, 122 Col. 301, 221 P. 2d 831 (1950).
72 Worley v. Procter & Gamble Co., 241 Mo. App. 1114, 253 S.W. 2d 532 (1952). However, the court denied recovery since plaintiff had not proved proximate cause.
73 Worley v. Procter & Gamble Co., *supra* note 72, at 537. Compare this with the language used by the court in the Rogers case, *supra* note 52, where the court found an express warranty.
75 Pietrus v. Watkins Co., 229 Minn. 179, 38 N.W. 2d 799 (1949). "Implied therein was a warranty that for such purposes it was suitable and fit." *Id.* at 801.
76 Raymond v. J. R. Watkins Co., 88 F. Supp. 932 (D. Minn. 1950). However, on appeal the judgment for plaintiff was reversed on the ground that she had not proved causation. 184 F. 2d 925 (8th Cir. 1950).
77 Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920). However, the decision was based on manufacturer's absolute duty to distribute pure and wholesome food, rather than upon its statement. In Nelson v. Armour Packing Co., 76 Ark. 352, 90 S.W. 288 (1905), where the label on a can of meat read "These tongues are selected, preserved and packed with due reference to their keeping in all climates, guaranteed," and plaintiff alleged breach of implied warranty based thereon, the court, without reference to the label, held that there could be no recovery without privity.
78 Simpson v. American Oil Co., 217 N.C. 542, 8 S.E. 2d 813 (1940). However, in Williams v. Kress & Co., 48 Wash. 2d 88, 291 P. 2d 662 (1956), where manufacturer's label said that its mouthwash was "safe," plaintiff could not
or made of "seamless steel," or "boneless," where courts have found express warranties. These decisions indicate that at least some courts are influenced by the contents of the statement.

On the other hand, as has been shown, courts have found express warranties in such seemingly vague statements as that the product was "gentle," "would establish immunity," or "would meet with your entire approval," and in a mere table of tensile strengths, and in a chemical analysis of contents, and in a description of contents. Thus it appears that most courts will give a liberal, if not strained, construction to the language employed by the advertising manufacturer.

Such construction will apparently no longer be necessary in Ohio where the Court of Appeals whose decision was affirmed in the Rogers v. Toni Home Permanent Co. case, thereafter went a step further, under facts identical with those in the Rogers case, and held that nation-wide advertising by a manufacturer gave rise to an implied, as well as an express warranty. The court reasoned that since implied warranty is an obligation imposed by law, the law can impose an obligation where the manufacturer has engaged in an extensive advertising campaign.

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recover on the theory of implied warranty since she had not relied on retailer's skill and judgment. The court did not consider the possibility of express warranty. It would seem that even if implied warranty were the proper basis for an action involving advertising, reliance upon retailer's skill and judgment should not be an element of a suit against a manufacturer. Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 228 N.W. 309 (1939).

81 Murphy v. Plymouth Motor Corp., 3 Wash. 2d 180, 100 P. 2d 30 (1940), the court rejected plaintiff's theory that pictures, rather than statements, published by manufacturer, established an implied warranty.

82 Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612 (1958).
85 Mannsz v. Macwhyte Co., 155 F. 2d 445 (3rd Cir. 1946).
87 Conestoga Cigar Co v. Finke, 144 Pa. 159, 22 Atl. 868 (1891).
88 The tendency is "to construe every affirmation by [the seller] to be a warranty when such construction is at all reasonable," Lane v. Swanson & Sons, 130 Cal. App. 2d 210, 278 P. 2d 723, 726 (Dist. Ct. App. 1955).
90 167 Ohio St. 2d 445, 147 N.E. 2d 612 (1958).
92 The ultimate buyer would not have become a purchaser of the subject of the sale had it not been for the representations of the manufacturer or producer made to the ultimate purchaser to induce his use of the product. If such representations are such (as requiring a purchase by description or for a particular purpose), the law would imply a warranty under the circumstances and such implied warranty becomes an obligation of the manufacturer or producer inducing the purchase." Markovich v. McKesson & Robbins, Inc., supra note 91, at 188.
IV. RIGHT TO RELY ON ADVERTISING

However, it seems a distortion of the early common law to find that a statement can give rise to an implied warranty. The action of express warranty was intended to cover cases in which representations had been made; while an implied warranty arose where there had been no representation. It is understandable that the courts should have overlooked this distinction in their endeavor to provide relief for the injured consumer. The same philosophy, no doubt, underlies the ease with which courts will find that vague statements amount to an express warranty.

However, if it be granted that express warranty be the proper basis of recovery—as the fundamental distinction between express and implied warranties indicates that it must—then, as in cases not involving advertising, plaintiff's reliance, and his right to rely, should remain essential to his cause of action. Where the statements constituting the advertisement are vague or indefinite, or do not relate directly to the type of harm suffered, reliance on them would not seem justified.

For example, where a manufacturer advertises that his electric coffee-maker is "convenient, lovely, and will brew delicious coffee" and the product explodes upon the first attempted use, injuring the purchaser or causing damage to his home, can it be said that his advertisement warranted against such an event? The same problem is presented where the advertising is mere "puffing," rather than an "affirmation of fact." The solution appears to lie in the adoption of a "reasonable
man” test to determine plaintiff’s right to rely on the statements. What would the reasonable man have understood the manufacturer to mean by the language employed? This test balances the time-honored doctrine of *caveat emptor* against the glowing eulogies sung by the manufacturer and, thanks to our present day system of communication, heard by everyone.100 If the reasonable man would have understood the advertisement as warranting against the type of harm suffered, plaintiff’s right to rely thereon would be established. If he can further prove actual reliance, he should be allowed to recover. On the other hand, if the reasonable man would not have understood the advertisement as warranting against the type of harm suffered, no right to rely would be established. In such case, the statement does not amount to an express warranty and it would seem that the advertisement becomes immaterial and falls out of the picture. The case should then be decided as if no advertising were involved and liability should be predicated upon proof of defective manufacture.101

This would not seem to be the result, however, under the *Rogers v. Toni Home Permanent Co.* case,102 which indicated that so long as plaintiff relied on the advertisement, no relationship between statement and harm need be shown. Disregard of the right to reply, especially in view of the tendency to construe statements as express warranties, would impose something very close to absolute liability on the advertising manufacturer. The “reasonable man” test would avoid such result. To allow the reasonable man to solve the problem of the purchaser’s right to rely seems sound in view of the fact that an express warranty action is at least part tort—an area with which he is very familiar.

V. PROPERTY DAMAGE CASES

Furthermore, the same considerations should be involved whether the case be one of personal injury or property damage. It does not

100 The advertising of manufacturer’s product is “undoubtedly intended to and would naturally have a tendency to induce a buyer to purchase it and to rely thereon in doing so.” Brown v. Globe Laboratories, 165 Neb. 138, 84 N.W. 2d 151, 161 (1957).
101 “This is not to say that a manufacturer who does not make public representations to induce the sale of his product is to be held liable to the ultimate consumer without privity upon any other basis than negligence in the process of manufacture or use of materials.” Judge Skeel in *Rogers v. Toni Home Permanent Co.*, 105 Ohio App. 53, 139 N.E. 2d 871, 885 (1957).
102 167 Ohio St. 244, 147 N.E. 2d 612 (1958).
seem justifiable to allow plaintiff to recover, for example, a small amount for a cut finger but nothing if his house burns down. This has been recognized, at least impliedly, by those courts which have allowed recovery in property damage cases, where the manufacturer's statements were considered express warranties. In California, the manufacturer was liable for damage to cotton crops where his analysis of the contents appeared on the label of insecticide. In the same state, the manufacturer was liable under his guarantee of quality on the label of his soap, to retailers for loss of business when the soap did not sell—though retailers had purchased the product through middlemen. In Nebraska, plaintiff was allowed to recover for injury to his lambs, which he had vaccinated with the bacterin represented by manufacturer to produce immunity in ten days. Under Louisiana law, plaintiff recovered for property damage where, contrary to his advertisement, defendant-manufacturer had shipped a mixture of ferrous and non-ferrous materials. The Georgia Court would have allowed recovery where the manufacturer, on an order blank furnished to retailer, warranted its automobile to be free from defects, had plaintiff proved the amount of damage incurred when the roof of the automobile leaked. In Pennsylvania, manufacturer was liable to consumer for the purchase price of tobacco, under a tag describing it, which the trade considered an express warranty.

Other courts, however, expressly distinguish between cases of personal injury and those involving property damage. Where the manufacturer's label on a jar of anti-freeze stated that the product was safe and would prevent rust, the plaintiff alleged breach of express warranty when the substance ruined the motor of his automobile. The Ohio Court of Appeals refused to extend the "exception to the rule of privity where

104 Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P. 2d 1041 (1954). In a case of implied warranty, where advertising was not involved, California law was construed to abrogate the necessity of privity where food manufactured by defendant caused injury to plaintiff's show dogs, by extension of the food-exception to the privity requirement. McAfee v. Cargill, 121 F. Supp. 5 (S.D. Cal. 1954).

105 Free v. Sluss, 87 Cal. App. 2d 933, 197 P. 2d 854 (App. Dept. 1948). In Silverman v. Samuel Mallinger Co., 375 Pa. 422, 100 A. 2d 715 (1953), manufacturer would have been liable for commercial loss, notwithstanding lack of privity, had his statement not been construed as puffing. But where there were no statements involved, manufacturers were not liable for such loss under theory of implied warranty. Gladiola Biscuit Co. v. Southern Ice Co., 163 F. Supp. 570 (E.D. Tex. 1958); Karl's Shoe Stores, Ltd. v. United Shoe Machinery Corp., 145 F. Supp. 376 (D. Mass. 1956). Contra, Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913), where food manufacturer was liable to restauranteur for loss of business, over defendant's objection that plaintiff had sustained no personal injury. Decision was based on the public policy which places an absolute duty on the manufacturer of food.


109 Conestoga Cigar Co. v. Finke, 144 Pa. 159, 222 Atl. 868 (1891).
injury results to the person of plaintiff,110 and held that liability must be based on negligence.111 This case seems clearly to have been overruled by the two recent Ohio decisions,112 despite the fact that neither was a property damage case. Under similar facts in another case, plaintiff tried to establish that manufacturer’s label created an implied warranty as against the wholesaler. The Washington Court adhered to the requirement of privity since there was no question of public health involved.113 Similarly, the Texas Court, where the element of advertising was not present, denied recovery under the theory of implied warranty, where plaintiff’s cattle were injured by insecticide manufactured by defendant, on the ground that, since the case did not concern food for human consumption, there could be no liability without privity.114

Thus it appears that the trend is to allow recovery for property damage where the manufacturer’s advertising constitutes an express warranty. As in personal injury cases, the “reasonable man” test should be used to determine plaintiff’s right to rely on the advertising.

CONCLUSION

Lack of the privity requirement at common law, together with the dispensation thereof by most courts today where the manufacturer’s advertising amounts to an express warranty, justifies, historically, the over-throw of privity in such cases.

It is justified economically by the modern systems of manufacture, distribution, and communication. The presence on today’s marketing scene of the middleman, an economic necessity, should not be allowed to undermine substantive rights. Whether the maker sells his goods to the consumer direct or whether he does so through independent conduits, the essentials of the transaction—placing the goods in the stream

111 The court followed this rule in Wood v. General Electric Co., 159 Ohio St. 273, 112 N.E. 2d 8 (1953), where there was no advertising involved and plaintiff sought to hold manufacturer liable in implied warranty when an electric blanket set fire to his house. In the Rogers Case, 167 Ohio St. 244, 147 N.E. 2d 612, 616 (1958), the court said, “Without commenting on the soundness of the holding in the Wood case... suffice it to say that should a case come before this court with facts resembling those in the Wood case, it would then be time to re-examine and reappraise that decision,” but it was referring to the question of whether privity was necessary to sustain an action in implied warranty.
113 Cochran v. McDonald, 23 Wash. 2d 348, 161 P. 2d 305 (1945).
114 Brown v. Howard, 285 S.W. 2d 752 (Tex. Civ. App. 1955). However, where the cause of action was express warranty, made by the manufacturer to a corporation which contracted with plaintiff, the city was allowed to recover from the manufacturer since “the tendency of modern courts [is] away from the narrow legalistic view of the necessity of formal immediate privity of contract...” United States Pipe & Foundry Co. v. City of Waco, 130 Tex. 126, 108 S.W. 2d 432, 435 (1937).
of commerce, statements made to the ultimate consumer and intended to induce him to purchase, and reliance thereon by the consumer to his damage—remain the same. Today, "the basic question underlying liability is whether or not the manufacturer induced the sale of his goods by direct representations of quality which were not true, and the purchaser relied on such representations to his damage."\(^{115}\)

The liability of the manufacturer whose advertisement constitutes an express warranty is justified morally by reason of the fact that even after elimination of the privity requirement and the elements of intent or negligence, a basis for liability still remains.\(^{116}\) This basis is the duty not to make false statements and warranties, which, it is submitted, is assumed by the manufacturer to the extent that he has spoken.\(^{117}\) This duty is the correlative of plaintiff's right to rely and should be governed by the same considerations. To the extent that the manufacturer has expressly warranted his product, as interpreted by the reasonable man, he has given the plaintiff a right to rely on his statements. If the plaintiff is injured by statements upon which he has a right to rely, the manufacturer's correlative duty not to make false statements must give rise to a duty to compensate.

It is not justifiable that one who expressly warrants his product, thereby creating in another the right to rely on his statement, should be able to escape liability for harm suffered by one who does rely on it. If a manufacturer opens his mouth, he should be made to open his pocket-book.

MARY ALICE HOHMANN

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\(^{116}\) See Lucey, Liability without Fault and the Natural Law, 24 TENN. L. REV. 952 (1957) for a moral justification of the imposition of absolute liability upon a manufacturer. However, Father Lucey does not consider the problem from the point of view of the effect of advertising.