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George H. Seefeld

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TORT LIABILITY OF MANUFACTURERS TO USERS OF THEIR GOODS*

GEORGE H. SEE Feld†

A. THE GENERAL RULE

THE manufacture of articles to meet the need of an increasingly complex civilization has grown from the work-shop stage to multiple factory size. The manufacturer has sought centralization in management and economically advantageous location, compelling him to depend upon the wholesaler, jobber, and retailer for distribution, which dependence has still proved its strength as against a struggling manufacturer-direct-to-consumer movement. On the other hand, the persons using manufactured goods are not the purchasers of such goods, in many cases, but the sub-purchasers, or agents, servants, and employees of the purchasers. With this development of interdependency has come a corresponding severance of the immediate and direct relation between maker and user.

*The scope of this article is limited to the liability of manufacturers to users of their goods, and it does not include the liability of lessors or vendors of defective goods, except incidentally. Particular attention is given to Wisconsin law.

†Member of the Milwaukee bar.
Liability of the manufacturer for injuries resulting to users of defective articles has developed, with the traditional lag, upon theories created to meet the factual change just outlined. Breach of contractual duties, including breach of conditions and of warranties, express or implied, are no longer suitable as the bases for liability of a manufacturer to a user, since such principles are useful only where the relation between user and maker is contractual. In meeting the situation where the user of a defective article is someone other than the purchaser from the manufacturer, the American courts have generally concluded that the manufacturer is not liable for injury resulting from the defect except in certain unusual cases. This principle has been developed through a number of different lines of reasoning, some of which result from a misconception of decided cases and of negligence rules in general.

One of the cases most frequently cited in support of the general rule indicated above, is Winterbottom v. Wright. This case, however, is on close analysis unsatisfactory as establishing any principle similar to that for which it is usually cited. Winterbottom sued the defendant, Wright, for injuries resulting from the breaking down of a coach which the defendant had contracted to keep in repair. The declaration alleged that the defendant had contracted to furnish the Postmaster-General with a mail coach, and to keep the coach in repair; and that the plaintiff, knowing and relying on such contract, undertook to drive the mail coach and suffered injury, when the coach broke down, because of the defendant's failure to perform his duty, in disregard of his contract. It is apparent that, in view of the strict rules of pleading, extant at the time, the court properly ruled on demurrer that no duty toward the plaintiff was alleged, since the action was brought "simply because the defendant was a contractor with another."

The Winterbottom case differs from the situation in which the manufacturer has made a defective article which is sold indirectly to the plaintiff. In the latter case, the duty resting on the manufacturer is properly one owed not only to an immediate contracting party, but to anyone who might reasonably be injured from failure to perform such duty. This obligation is essentially one of tort. The defendant in

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1 Kerwin v. Chippewa Shoe Mfg. Co., 163 Wis. 428, 157 N.W. 1101 (1916); Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N.W. 157 (1909); Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865 (1903); Lynch v. Internat. Harvester Co. of Amer., 60 F. (2d) 223 (1932); (This case may be explained on the ground that the lapse of five years between the sale of the machine and the injury was a conclusive contradiction of the claim that the machine was imminently dangerous to life and limb when sold.) 3 Cooley on Torts, 463. Notes: 17 A.L.R. 672, 39 A.L.R. 992, 63 A.L.R. 340, 2 Wis. L. Rev. 431.

2 10 M. & W. 109 (1842).

3 Lord Abinger, p. 114.
the Winterbottom case, on the other hand, was a lessor on whom no other duty rested than the duty created by virtue of his contract with the Postmaster-General. The failure to repair occurred after possession had been transferred to the Postmaster-General, and with the transfer of possession, all obligation to third parties ceased. If the defendant had improperly performed repairs, he might have been liable to the plaintiff in a tort action.

One of the most frequently cited cases in America is *Huset v. J. I. Case Threshing Machine Co.*, a case which has probably been more influential in crystallizing the principles used in support of decisions than any other decision up to *MacPherson v. Buick Motor Car Co.* decided in 1916. It has, moreover, shifted the emphasis from a rational attack to a purely formalistic approach, contrary to ordinary experience.

In the *Huset* case the plaintiff alleged in his complaint that his employer had purchased from the defendant a threshing machine manufactured by it. The cylinder was covered by a wooden platform, alleged to be defectively constructed by the defendant, and known to the defendant to be defective. It was the plaintiff's duty to feed the machine by standing on this platform, and the first day the machine was used, this covering broke and the plaintiff's leg was severely injured. The lower court sustained the defendant's demurrer to the complaint, but the Court of Appeals for the 8th Circuit reversed this decision.

The court, through Sanborn, J., pointed out that generally a manufacturer is not liable to any person other than the purchaser, for injuries resulting from defects in the goods purchased. The reasons given for this rule were, first, that injury to a third person other than the purchaser is not generally the probable result of negligence in manufacture, because such result cannot be anticipated, and because the purchase is an intervening cause; and second, that a wise public policy

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4 The lessor of land is not liable to a third party for failure to repair condition arising after the lease is made, in the absence of statute: *Atwill v. Blatz*, 118 Wis. 226, 95 N.W. 99 (1903). See *Kinney v. Luebkeman*, 214 Wis. 1, 252 N.W. 282 (1934).

Even if there is a covenant to repair in the lease, there is no liability of the lessor to third parties, by general rule. *Conahan v. Fisher*, 233 Mass. 234, 124 N.E. 13 (1919); *Silverman v. Isaac*, 183 N.Y. App. 542, 170 N.Y. Supp. 290 (1918); *McGinn v. French*, 107 Wis. 54, 82 N.W. 724 (1900). But see *Flood v. Pabst Brewing Co.*, 158 Wis. 626, 149 N.W. 489 (1914); 8 A.L.R. 765, 766.

In case of personal property, the lessee has been held liable in the absence of concealment of defect, even for a defect existing at time of lease: *In re New York Dock Co.*, 61 Fed. (2d) 777 (1932).


6 120 Fed. 865 (C.C.A. 8th, 1903).

7 217 N.Y. 382, 111 N.E. 1050 (1916).
requires that there be a definite limit to the liability of makers of machines to be used by all kinds of people, far and near.

In considering the first reason, attention should be given again to the brief survey of present day conditions, as outlined at the beginning of this article. To say that injury to someone other than the purchaser from the maker is not generally the probable result of negligence in manufacture, is to presuppose a factual condition unrelated to the present. In the ordinary course of events today, the person most likely to be injured in using a manufactured article is one who has had no dealings with the manufacturer, and knows nothing whatever about him other perhaps than his trademark. Furthermore, the maker of the defective article can and should anticipate that the ultimate user of his article will be someone other than the retailer or wholesaler to whom he sells.8

Liability of the manufacturer cannot be cut off by the purchase since such purchase is not an intervening cause, but rather a link in the chain of causation. One essential characteristic of an intervening cause is that it could not have been foreseen by exercise of reasonable diligence.9 If the defect is latent, any reasonable inspection on the part of the purchaser would not disclose it and the manufacturer must contemplate that the user will not discover the defect. Even where it might be discoverable upon close examination, the breach of a duty to examine by the user should not relieve the maker from liability.10 The wrongful act of another should not relieve the first wrongdoer from liability, if the latter would have been liable regardless of the second wrongdoer.11

The American courts have generally followed the rule that the purchase is an intervening cause, and this rule has been effectively applied in cases where the article purchased is a structure built according to plans, and inspected by the purchaser before acceptance.12 In a

8 Schubert v. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892).
10 In Moon v. R. R., 46 Minn. 106, 48 N.W. 679 (1891), the court held that the admitted negligence of the Manitoba Railroad in not examining a freight car supplied to it by the defendant railroad, did not relieve the defendant from liability to a brakeman employed by the Manitoba Railroad. Atkinson v. The Goodrich Transp. Co., 60 Wis. 141, 18 N.W. 764 (1884).
11 See Pizzo v. Wiemann, 149 Wis. 235, 134 N.W. 899 (1912). But where the act of a third party changes conditions so as to cause a result which could not have been contemplated by the manufacturer, and which would not have happened but for such act, the manufacturer is not liable. See Derouso v. Internat. Harvester Co. of Amer., 157 Wis. 32, 145 N.W. 771 (1914); Galst v. American Ladder Co., 165 Wis. 307, 162 N.W. 319 (1917).
case such as Marvin Safe Co. v. Ward, where the plans were furnished by purchaser, and the contractor was careful in building according to the plans, he should not be held liable for injury to one using the structure.

It is apparent that the sounder of the two reasons given by Sanborn, J., is the second, relating to public policy. He says:

"... for the reason that a wise and conservative public policy has impressed the Courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines and structures, which are to be operated or used by the intelligent and ignorant, the skillful and the incompetent, the watchful and the careless, parties that cannot be known to the manufacturers or vendors, and who use the articles all over the country, hundreds of miles distant from the place of their manufacture or original sale, a general rule has been adopted... that the liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends, is limited to the persons to whom he is liable under his contracts of construction or sale."

The public policy argument is used in a very similar manner in the Winterbottom case, by Lord Abinger, C. B., and Baron Alderson.

With the development of powerful manufacturing interests, even this paternalistic reasoning has lost much of its force. In 1903, when the Huset case was decided, it may have been necessary to foster the growth of manufacturing by arbitrarily limiting the liability of manufacturers to their immediate purchasers. It is undoubtedly unwise to establish a standard of care requiring perfection in the manufacture of products, but there is no sound public policy which protects the manufacturer from liability to one who is injured, when carefully using goods made dangerous by lack of care in their manufacture, nor does the distance separating maker and user have any bearing. On the other hand, a misuse by a negligent or incompetent purchaser and his agents, is not to be contemplated by the maker, and he is not liable for injuries arising therefrom.

B. EXCEPTIONS TO THE GENERAL RULE

In the Huset case, three exceptions to the general rule were recognized.

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18 P. 867.
120 Fed. 865, 870-71. These exceptions are recognized in Wisconsin although the second one mentioned in the Huset case is not generally included in cases dealing with the liability of manufacturers. The Wisconsin rule and exceptions were developed in Hasbrouck v. Armour & Co., supra, note 1, and formally restated in Kerwin v. Chippewa Shoe Mfg. Co., supra, note 1.
The first is that an act of negligence of the manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life, is actionable by third parties who suffer from the negligence.

The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises, may form the basis of an action against the owner.

The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another, without notice of its qualities, is liable to any person who suffers an injury therefrom, which might have been anticipated, whether there were any contractual relations between the parties or not.

Liability of a druggist or apothecary was recognized as early as 1852 in the United States, and it was held that his duty arose out of the nature of his business and the likelihood of injury to anyone using drugs improperly prepared, compounded, labelled, or prescribed. One who prepares and sells food, drugs, and explosives, is engaging in activity which is very likely to cause harm if mismanaged even slightly. Furthermore, the improper preparation of a food, or compounding of a drug usually cannot be discovered by ordinary examination by the prospective user. Thus, by general principles of negligence, there is a duty toward all persons not to fail under such circumstances that a reasonably prudent man might anticipate injury as a natural and ordinary consequence of such failure. In Haley v. Swift & Co. the court permitted recovery from a defendant who was alleged to have negligently supplied a dealer with "adulterated link sausage which contained diseased, infected, putrid, decomposed, and poisonous animal matter." The plaintiff, a minor, ate some of the sausage and became permanently injured. The court rested its decision primarily on the Hasbrouck case, and in discussing that case said:

The basis of the decision [referring to the Hasbrouck decision] recognizes the distinction between acts which are imminently dangerous in their effects upon human life, limbs, and health, and those that are not. In the former class of cases, if the acts were wilfully or negligently committed, the guilty party is legally liable to the injured persons, regardless of any contractual relation existing between them, while in the latter class of cases there is liability only to persons with whom he has contracted or to whom he owes a duty.

16 Thomas v. Winchester, 6 N.Y. 397 (1852).
18 152 Wis. 570, 140 N.W. 292 (1913).
19 P. 572 (Wis. Rep.).
TORT LIABILITY OF MANUFACTURERS

In the *Huset* case and in *Kerwin v. Chippewa Shoe Manufacturing Company* a separate exception was made of cases involving articles intended to preserve, affect, or destroy human life. Timlin, J., in the *Hasbrouck* case really did not separately classify cases under the above heading, but gave such cases as illustrations of the general exception that a manufacturer of articles

"which by reason of negligent construction he knows to be imminently dangerous to life or limb, or is manifestly and apparently dangerous when used as it is intended to be used, is liable to any person who suffers an injury therefrom, which injury might have been reasonably anticipated."\(^{20}\)

This approach was recognized in the *Haley* case and is much more commendable than the approach of formalistic classification. Foods, drugs, explosives, and similar goods are not in and of themselves more dangerous than a machine or a ladder, for instance. But when negligently made or prepared, they become dangerous. A defective boiler is just as likely to injure a user as a mislabelled poison.\(^{21}\)

The *Haley* decision might have been rested upon the adulterated food statute, and it would then fall into that group of cases which find the duty of the manufacturer in statutory law.\(^{22}\)

The third exception made by Sanborn, J., in the *Huset* case is the most important since the majority of cases fall into this group. This exception is also the first or general exception stated by Timlin, J., in the *Hasbrouck* case. Because of its wide scope, it has served to cover a great variety of cases, and through the interpretative skill of jurists, it has been considerably extended.

The exception stated in the *Hasbrouck* case first qualifies the article as one “which invites a certain use.”\(^{23}\) One of the earliest Wisconsin cases of this kind was *Bright v. The Barnett & Record Co.*\(^{24}\) In that case the parents of a deceased employee sued the defendant for negligence in furnishing a defective plank in the scaffold built under an agreement with the deceased's employer for the use of the deceased and other employees. The deceased was fatally injured when the defective

\(^{20}\) P. 365 (Wis. Rep.).

\(^{21}\) Thus the Wisconsin legislature has seen fit to require safety devices for cornhusking and shredding machines. See § 167.12, Wis. STAT. 1925 (applied in the Derousso case, *supra*, note 11, and wood-sawing machines, see § 167.16, Wis. STATS. 1925 (applied in Edler v. Algoma Foundry & Machine Co., 200 Wis. 471, 227 N.W. 944 [1930]). If the distinction between defective machines and mislabelled poisons rests upon the fact that the sale of the latter is an indictable offense, by common law and by statute as pointed out by Hunt, J. in Loop v. Litchfield, 42 N.Y. 351 (1870), then there is no longer much of a distinction, in view of the numerous and varied statutes punishing sale of unsafe machinery.

\(^{22}\) Mossrud v. Lee, 163 Wis. 229, 157 N.W. 758 (1916). This case involved a direct sale from a druggist to a user. See also cases in note 21, *supra*.

\(^{23}\) P. 365 (Wis. Rep.).

\(^{24}\) 88 Wis. 299, 60 N.W. 418 (1894).
plank broke while he was walking on it. The court held that the case belonged to that class of cases that could be sustained on general principles outside the rule limiting recovery from a manufacturer to those with whom the latter has contracted. The two grounds of recovery were: (1) invitation, (2) duty to avoid imminently dangerous acts. This theory of implied invitation was not a discovery of the Wisconsin Supreme Court, since it was used in *Heaven v. Pender*,25 *Coughtry v. Globe W. Co.*,26 and *Mulchay v. Congregation*.27 All of these cases, however, involved a situation where the defendant owned the premises on which the injury occurred, and through misfeasance created the dangerous condition. The doctrine of implied invitation is apparently more appropriate to that group of cases which holds that a landowner or occupier of land is liable to one who enters his premises by implied or express invitation, for failure to keep the premises in a reasonably safe condition.28

In the *Bright* case the defendant company was the principal contractor for the erection of the building on which the staging was to be used. As such principal contractor, it was in control of the premises, and thus in a position analogous to the owner. But if the doctrine of implied invitation is carried that far, it has become almost synonymous with the second ground set forth by Chief Justice Orton in the *Bright* case. He said:

"This liability to third parties is held to exist when the defect is such as to render the construction in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use."

It will be noted that this principle is similar to the third exception stated in the *Huset* case,29 and to the general exception set out in the *Hasbrouck* opinion.30 Both of these statements, however, included knowledge of the danger on the part of the maker, and absence of notice of the defect to the injured party, and the question arises whether or not such knowledge and concealment are facts to be proven before recovery can be allowed.

In all of the cases cited by the court in the *Huset* case, in support of the third exception, there were both knowledge of and concealment of

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25 L.R. 11 Q.B. Div. 503 (1883).
26 56 N.Y. 124 (1874).
27 125 Mass. 487 (1878).
28 *Gorr v. Mittlestaedt*, 96 Wis. 296, 71 N.W. 656 (1897); *Lehman v. Amsterdam Coffee Co.*, 146 Wis. 213, 131 N.W. 362 (1911); *Zetley v. Jame Realty Co.*, 185 Wis. 205, 201 N.W. 252 (1924); *Schroeder v. Great Atlantic & Pacific Tea Co.*, 220 Wis. 642, 265 N.W. 559 (1936).
29 P. 307 of the Court's opinion.
30 P. 178.
31 P. 364-5 (Wis. Rep.).
the defect. Thus in *Langridge v. Levy* a dealer sold a gun to a father for the use of his son, and represented that the gun was safe, and made by a certain man. It was not safe, and was not made by the man indicated, and when the son discharged it, it exploded and injured him.

In *Wellington v. Oil Co.* the defendants, who were wholesale dealers, knowingly sold to a retail dealer, to be sold by him to his customers as oil, a dangerous and explosive fluid. The plaintiff used the oil for illuminating purposes and it exploded and injured him. In *Lewis v. Terry* a dealer, knowing that a folding bed was defective and unsafe, sold it to A without informing him of the danger. A's wife suffered a broken arm and other serious injuries when the bed folded up.

In many states, the necessity of knowledge and concealment has been referred to time and again. Illustrative of this view is the opinion in *Olds Motor Works v. Shaffer.* That case involved a manufacturer of an automobile who represented that the seats in a certain car were secure when, in fact, they were defectively constructed. The court said that though the defect was not physically concealed, the maker was still chargeable with liability, where he was guilty of representing to the purchaser that the machine was safe and sound. If the purchaser of the machine knows that it is unsafe or dangerous, a third party who is injured thereby cannot maintain an action in tort against the maker. The court said on this point:

"The reason for this is that the action against the maker proceeds on the theory, and is founded on the fact, that in selling the article he practiced fraud and deceit in concealing the defects that made its use unsafe and dangerous; and, of course, when it is admitted or proven that he has not practiced any concealment, and that the purchaser was well informed as to the defects, the bottom drops out of the case against the maker, and the liability is shifted to other shoulders. Another reason is that the maker's wrongful act in such a case is not the proximate cause of the injury, when it is shown that there was intervention of a new agent, to wit, the purchaser, who with knowledge of the danger used and permitted others to use the article."

Thus it has generally been held that where the manufacturer has informed the purchaser of the defects, he is no longer liable, since he

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32 2 M. & W. 519 (1837); 4 M. & W. 337 (1838).
33 Wellington v. Downer Kerosene Oil Co., 104 Mass. 64, 67 (1870).
34 111 Cal. 39, 43 Pac. 398 (1896).
36 145 Ky. 616, 140 S.W. 1047 (1911).
37 P. 1052 (S.W. Rep.).
has discharged his duty. There is obviously no quarrel with the salutary principle relieving the manufacturer from liability if he shows all defects to the purchaser, and does not attempt to conceal them from him. However, there is much to be said against a rule which limits liability to cases in which the manufacturer knew of the defect and failed to disclose it. If a man carelessly puts together an article which he does not know to be defective, but which is in fact defective, and injury results to the user by reason of the defect, he should not be relieved from liability just because he did not actually know of such defect. If the maker of an article is negligent, and that means if he acts in such a manner that he should know that some injury probably will result to a certain class of persons, he should be liable for injuries resulting proximately from such negligence.

C. THE PRESENT TREND

The recent tendency of many courts has been to attack the problem from that point of view, and some courts, notably the Court of Appeals of New York and the Supreme Court of Wisconsin, have almost always proceeded upon general principles of negligence as applied to a particular set of facts. The sporadic attempt of the Wisconsin Supreme Court to classify in the Hasbrouck, Haley, and Kerwin cases, was probably due to the influence of the Huset case, decided a few years prior to the Hasbrouck case.

38 Loop v. Litchfield, 42 N.Y. 351 (1870). Similarly where the purchaser provided the plans or inspected the finished article, the manufacturer is not liable according to some authorities. See Marvin Safe Co. case, supra, note 12.

39 Thus negligence was defined in Johanson v. Webster Mfg. Co., 139 Wis. 181, 120 N.W. 832 (1909): "Negligence in law is not mere carelessness, but is careless conduct under such circumstances that an ordinary prudent person would anticipate some injury to another as a reasonably probable result thereof." (p. 184).

40 The most important New York cases, in addition to those already cited, are as follows: Torgesen v. Schult, 192 N.Y. 156, 84 N.E. 956 (1908) (Vendor of syphon bottles, filled under excessive pressure); Statler v. George A. Ray Mfg. Co., 195 N.Y. 478, 88 N.E. 1063 (1909) (Defective coffee urn); Rosebrock v. General Electric Co., 236 N.Y. 227, 140 N.E. 571 (1923) (Defectively packed transformer); McGlone v. William Angus, Inc., 248 N.Y. 197, 161 N.E. 469 (1928) (Defective scaffold); Pine Grove Poultry Farm, Inc. v. Newton By-Products Mfg. Co., Inc., 248 N.Y. 293, 162 N.E. 54 (1928) (Deleterious meat scrap poultry feed, prohibited by statute); Genesee County Patrons F. R. Ass'n v. Sonneborn Sons, 263 N.Y. 463, 189 N.E. 551 (1934) (Explosive water proofing preparation); Hoenig v. Central Stamping Co., 273 N.Y. 483, 6 N.E. (2d) 415 (1936) (Defective coffee urn). The most important Wisconsin cases, in addition to those already cited, are as follows:


b. Defendant held not liable: Zieman v. The Kieckhefer Elevator Mfg. Co., 90 Wis. 397, 63 N.W. 1021 (1895); Beznor v. Howell, 203 Wis. 1, 233 N.W. 758 (1930); Spille v. Wisconsin Bridge & Iron Co., 105 Wis. 340, 81 N.W. 397 (1900) (Lower court entered judgment for plaintiff on special verdict). Supreme Court remanded case for new trial); Marsh Wood Products Co. v. Sabcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932) (Lower court entered judgment for plaintiffs; Supreme Court remanded case for new trial).
In New York, the principles partially formulated in *Thomas v. Winchester* were developed in *Devlin v. Smith*. In the *Devlin* case the plaintiff's employer contracted to paint the dome of the county court-house. He also contracted with the defendant Stevenson for the erection of a scaffold by the latter. Stevenson built a defective scaffold and the plaintiff's intestate was killed as a result of the defect. The court held that the defendant Stevenson was liable, since he undertook to build a scaffold for the express purpose of enabling the workmen of the principal contractor to stand upon it. Any defect would be likely to result in injury, and the careless construction of the scaffold was an imminently dangerous act.

Though the reasoning in the *Devlin* case hints at the doctrine of implied invitation, used by some jurists in the cases heretofore discussed, the New York court was astute enough to place little emphasis upon this ground because of the factual difference between the cases to which it properly applies and the *Devlin* case. The defendant in the latter case had no ownership, possession, or control of the real estate upon which the defective scaffolding was built. Liability was rested partly upon the argument that the defendant knew that the plaintiff and his co-employees would use the scaffold, and thus were in the group to which injury would reasonably and probably result, if there were defects in construction. The court also met the argument that the purchase is an intervening cause, by pointing out that where the purchaser is entitled to rely upon the judgment and skill of the maker, any failure on his part to examine cannot be treated as an intervening cause.

These principles of the *Devlin* case reached fruition in *MacPherson v. Buick Motor Co.*, and the admirable opinion of Cardozo in that case will be of increasing influence. A similar development in Wisconsin has culminated in *Flies v. Fox Bros. Buick Co.* in which case, the defendant, Fox Bros. Buick Co., was held liable for carelessly selling a rebuilt used car provided with inadequate brakes. As a result of the defective brakes the purchaser of the car ran into the plaintiff and injured her. The court preferred to rest the liability of the defend-
ant upon the principles relating to liability of vendors of defective articles because of certain evidence showing efficient brakes immediately after rebuilding. But the court expressly states that the principles governing a vendor's liability are exactly the same as those governing the case of a manufacturer of a new automobile.  

The Flies case fairly states the attitude of the Wisconsin court on a number of questions just considered. First, the negligence of the purchaser in failing to examine the car after purchasing it was not an intervening cause. The court said:

"In this case the jury found that at the time of the sale Fox Brothers represented to Johnson that the car was equipped with all standard equipments and in proper operating condition for use upon the streets of La Crosse. This representation must have been made by Fox Brothers with the intention of having Johnson rely upon it, in which event they must have anticipated that he would make no inspection concerning the efficiency of the brakes. Their own representations having induced or contributed to Johnson's failure to make the inspection, they cannot claim immunity from the consequences of their own negligence because of Johnson's failure to make an inspection relying upon their representations. Even though Johnson's failure to inspect constituted negligence available to the plaintiff, it did not constitute an intervening cause as to Fox Brothers."

Secondly, actual knowledge of the defect on the part of the manufacturer or maker is unnecessary. It is sufficient if a reasonably prudent person exercising ordinary care under the circumstances would have known of the defect.

Thirdly, "an automobile lacking the equipment necessary to keep it under the control of the driver is also a dangerous instrumentality, not only to the people on the street, but to people who may be in the car."

In discussing what articles are "imminently dangerous," the court incidentally throws light upon the meaning of that familiar phrase. The long course of usage has indicated that the phrasing is a short cut for 'very likely to cause harm in the usual course of events'.

It is interesting to note that in the Flies case the Devlin and Schubert cases are pointed out as the forerunners of a growing mass of cases in this country. When the Huset case was decided, these two cases were mentioned in the opinion of that case as standing alone as far as the principles formulated in the Huset case were concerned. Fortunately, the view taken by these two cases and others like them has been

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46 P. 209-10 (Wis. Rep.).
47 P. 201 (Wis. Rep.).
48 P. 209 (Wis. Rep.).
49 P. 207 (Wis. Rep.).
repeatedly recognized, and there is every indication that continued reliance will be placed upon them.

D. PROBLEMS OF PLEADING AND PROOF

To the practicing attorney, the successful building of a case includes a preparatory consideration of how a theoretically meritorious claim can be proved. A good case in the office may fail in court for lack of proper pleading and proof, and some attention is now given to a few of the rules of pleading and evidence which become important in cases involving the liability of manufacturers.

The liberalization of code pleading in the code states has not yet eliminated the necessity of stating facts sufficient to constitute a cause of action, and it is elementary that the complainant must allege facts which will satisfy the rules of substantive law applicable to his case. In cases of the kind under discussion, it will be necessary in most states to allege facts showing: (1) Careless manufacture or assembly of product intended to preserve, destroy, or affect human life; or (1a) Careless manufacture or assembly of a product which is so defective as to be dangerous to life and limb;50 (2) That the defendant knew of the defect when it sold the article, or at least ought to have known of it; (3) That the defect was the proximate cause of the injury; (4) That the article was intended for the purpose for which it was being used; (5) That plaintiff was one of the class of persons by whom it was contemplated the article would be used; (6) Damages.

In cases where the article sold is so defective as to be dangerous to life and limb, but is not one intended to preserve, destroy, or affect human life, an additional allegation to those mentioned above must be included, namely (7) That the defect was concealed to such an extent that ordinary observation on the part of the plaintiff would not discover it.51 The last allegation is one of the most necessary in many jurisdictions, in cases that do not involve the so-called inherently dangerous articles. There is much to be said for the argument that no manufacturer should be held liable for an injury resulting from a danger about which he warned the buyer, even though user was not informed, or which was so apparent as to make it unlikely that anyone would fail to notice it. Under such circumstances, the manufacturer is not liable for negligence, since his duty under most current theories is satisfied. The real question is, how far shall the duty be extended? In cases where the maker sells to a retailer or middleman, a warning

50 In states which follow the Huset case, there is a third possible allegation to correspond with the second exception as quoted, supra.

51 For a clear statement of conditions necessary to recover in cases of articles not classed as inherently dangerous (explosives, drugs, etc.) see Krahn v. J. L. Owens Co., 125 Minn. 33, 145 N.W. 626 (1914) and charge to the jury in Pierce v. C. H. Bidwell Thresher Co., 153 Mich. 323, 116 N.W. 1104 (1908).
about the dangers in the use of the article is a mere gesture, and a very ineffective protection to the user. In such a situation, the duty of the maker should be extended to requiring warning which will reach the user. On the other hand, where the dangers are obvious to the ordinary person, the manufacturer should not be required to pay damages for injury to the ignorant or incompetent user. Such a risk is properly one for an insurance company.

A complaint which is formed with allegations like those previously mentioned, is one framed on negligence theories. The question has often arisen whether or not an action could be based upon an implied warranty in cases where the plaintiff is not the purchaser from the manufacturer. Though there is a great conflict of authority on this question the majority rule is against the application of implied warranty in cases of this kind.

The theory of warranty is an outgrowth of the ancient principles of deceit and developed as a part of the law of contracts, and particularly of sales, although it originated prior to the action of assumpsit. It has been so closely associated with contractual rights, and the buyer-seller relationship, that its applicability to situations involving a subpurchaser or remote user, is not clearly recognized.

Those courts which apply it often do so without giving any further reason than that privity is not controlling. On the basis of origin, this may be a sound argument, but in view of the development of the doctrine of implied warranty, it is contrary to the prevalent juristic reasoning. Furthermore, it will be noted that in many of the cases in which implied warranty was approved, the defendant was a dealer who sold to the plaintiff or some member of his family; that the article involved was a food or beverage, and in most cases it was sold in a sealed container or bottle, bearing some sort of label. Under such circumstances, it is easier to believe that the manufacturer in effect promised the user that the product so sold was ready for human consumption, without examination. A high degree of care is and should be placed upon the manufacturer who undertakes to provide food for the public.

On the other hand, the large majority of manufacturers who put ordinary articles other than food, beverage, explosives, etc., on the


53 4 WILLISTON, CONTRACTS (Rev. ed. 1936) 970.

54 4 WILLISTON, CONTRACTS (Rev. ed. 1936) 998.


56 Davis v. Van Camp Packing Co., 189 Ia. 775, 176 N.W. 382 (1920), and cases therein cited.
market, not wrapped in sealed packages, are not held to as high a degree of care, and certainly make no implied promises to the world at large about the quality of their products. Their liability is sufficiently broad if limited to negligence or misrepresentation.

In order to escape the difficulties indicated above, some courts have permitted the subpurchaser to recover from the retailer on the basis of warranty, and the retailer in turn to recover from the manufacturer on a like basis.56 A few courts have even gone as far as permitting recovery by the retailer from the manufacturer, before the subpurchaser gets judgment against the retailer.57 The limitations of these principles are obvious; the resulting multiplicity of suits alone strikes the death knell in these days of expedition.

Considering briefly the misrepresentation theory mentioned above it will be noted in the suggested allegations previously set out58 that the one numbered 7 contains an element of deceit. Realizing the sensible desire for relief but being hesitant about the applicability of rules of implied warranty, some courts have developed the idea behind requirement number 7, supra, into a principle of liability on the basis of misrepresentation, express or implied.59 Thus in Kuelling v. Roderick Lean Manufacturing Co.60 it was held that the manufacturer of a road roller, who wilfully and fraudulently used defective materials concealed by putty and paint, was liable for injuries caused thereby to one who put it to its intended use, even though the injured party had no privity of contract with the manufacturer. The court held that there was not only fraudulent deceit and concealment, but also what amounted to an affirmative representation that the roller was sound. The concealment of the defects so that no weakness could be detected was a misrepresentation that the roller was in a perfectly marketable condition.

The theory of misrepresentation, like all theories, has its limitations, one of which is the unlikelihood that it would be extended to cases where the defendant should have known but did not actually know of the dangerous defect. If the facts of the case permit its use at all, it is a better approach than the principles of implied warranty in the type of cases considered herein. Neither, however, is a very satisfactory substitute for negligence doctrines. Both lines of reasoning were very likely developed because of difficulties in many actions of proving negligence on the part of the defendant, and we now con-

58 See notes in A.L.R. supra, note 52.
60 183 N.Y. 78, 75 N.E. 1098 (1905).
sider a few of the problems of proof of negligence raised by rules of evidence in the trial of this type of case.

In all cases the burden of proof in the sense of the risk of non-persuasion of the jury is on the plaintiff, and if he is to win, he must produce enough facts to prove the defendant negligent. Because of the complete separation of user and manufacturer in most situations, both in distance and business relationship, this burden is of crushing force. Were it not for certain presumptions, the plaintiff would often lose where he might win if he had the means of proving the facts.

For almost 75 years, res ipsa loquitur has been recognized in England as an equitable rule of evidence, founded on reason and perhaps expediency. In the United States it has spread rapidly, and has been applied frequently in cases where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or property as to permit of no inference save that of negligence on the part of the person in control of the injurious agency.61

In cases involving liability of manufacturers, the courts have usually applied the doctrine with difficulty. Jurists have in general found it easier to apply this principle in cases where food, drugs, explosives, and the other so-called inherently dangerous articles have caused harm. Though there is a conflict of authority, an increasing number of recent cases are applying this rule.62 With the passage of statutes in many states regulating the preparation and sale of foods and drugs, as well as firearms and explosives, the presumption of negligence arising from the violation of such statutes is often applied.63

In cases other than those involving food, drugs, and the so-called inherently dangerous articles, the courts generally have experienced more difficulty in applying the doctrine of res ipsa loquitur, though the

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63 See A.L.R. notes, supra, note 52.
growing tendency is toward acceptance of it.64 One of the chief difficulties is the lack of control by the defendant of the defective article at the time of the injury in practically every case. It will be noted that this doctrine originally, and quite consistently throughout its growth, included control by the defendant,65 for the reason that the defendant is more apt to be very familiar with the condition of things under his immediate supervision than the plaintiff would be. Furthermore, if control is not present, there is less reason for presuming that the defendant is better able to explain the causes for the injury than the plaintiff. A few courts have escaped this requirement of control by construing it to mean control at the time of the injury,66 or by eliminating it altogether.67

In the last analysis, the doctrine of res ipsa loquitur is merely an effort to place the burden of producing evidence of certain facts on the party most likely to know them. In most cases, the injured party is less able to prove the presence of a dangerous defect in the article made by the defendant as the proximate cause of the injury, than the manufacturer is to prove that he took every precaution, and put a carefully made product on the market. Application of the doctrine of res ipsa loquitur to manufacturer-user cases is beneficial in that it protects the public by permitting recovery unless the manufacturer shows he has used the necessary means to put only carefully made products on the market.

The element of control at the time of the injury is really important in this connection only as a precaution against change in the condition of the article between the time it leaves the manufacturer's hands and reaches those of the user. In the case of goods sold in the original wrapper or container,68 the possibility of such change by an intervening cause is negligible, and in the case of most other manufactured

64 29 Cyc. p. 594, and cases cited in notes therein. Compare 45 C.J. (1203 & notes). There is a square conflict of authority in numerous cases involving the explosion of carbonated beverage containers: The res ipsa loquitur doctrine was applied in Macon Coca-Cola Bottling Co. v. Crane, 55 Ga. A. Rep. 573, 190 S.E. 879 (1937); Taylor v. Berner, 106 N.J.L. 469, 150 Atl. 371 (1930); Stolle v. Anheuser-Busch, Inc., 307 Mo. 520, 271 S.W. 497 (1925). It was not applied in Winfree v. Coca-Cola Bottling Works, 19 Tenn. App. 144, 83 S.W. (2d) 903 (1935); Frank Fehr Brewing Co. v. Corley, 265 Ky. 308, 96 S.W. (2d) 860 (1936); Wheeler v. Laurel Bottling Works, 111 Miss. 442, 71 So. 743 (1916); In Spille v. Wisconsin Bridge & Iron Co., 105 Wis. 340, 81 N.W. 397 (1900) res ipsa loquitur was held inapplicable.
67 Macon Coca-Cola Bottling Co. v. Crane, supra note 64.
68 Thus Block v. Liggett & Myers Tobacco Co., 296 N.Y. Supp. 920 (1937) held that inference of negligence arises when steel blade is found in cigarette taken from unbroken original container.
products, it is substantially improbable. Even in the few cases where
the possibility is large, the manufacturer is not unduly burdened by
application of res ipsa loquitur, since he overcomes the presumption
of negligence by proof of careful manufacture.\textsuperscript{69}

In other words, there is a balancing of the general presumption of
due care against this special presumption of negligence; the defendant
is presumed to be careful unless the facts shown by plaintiff indicate a
grave likelihood that defendant was negligent. Where a user is in-
jured by an extraordinary condition, or activity, of a manufactured
product, and there is nothing to indicate external cause, common sense
points toward some failure on the part of the manufacturer during
the process of manufacture, and he should be required to show that he
took adequate steps to prevent dangerously defective goods from going
on the market.\textsuperscript{70}

Assuming that the plaintiff has proven sufficient facts to take the
case to the jury, it becomes important for the defendant to prove due
care. It will be remembered that the plaintiff must under all circum-
stances prove the defendant liable by a preponderance of the evidence,
and bears this burden of non-persuasion of the jury throughout the
case.\textsuperscript{71} The defendant, on the other hand, must prove facts to overcome
any presumption of negligence which may be applicable, and to refute
evidence tending toward lack of care. Without extensively discussing
all the ways and means of overcoming evidence of negligence, a few
points may be considered here.

It has been held that if the defendant knew of previous explosions
of heavily charged bottles, this is evidence of negligence in later
explosions.\textsuperscript{72} However, the defendant may testify that the only other
times that he knew of in which his product exploded, were times when
the user was negligent.\textsuperscript{73}

The custom and practice of manufacturers in production methods
are important on the question of due care. Proof of inspection to the

\textsuperscript{69} Thus in case of injury to employee, proof that machine is free from discover-
erable defects overcomes presumption of negligence arising from unexplained
(1897). Also, proof that machine worked perfectly before and after accident
casts burden back onto plaintiff to show its alleged defective action was
caused by defect in machine. Chybowski v. Bucyrus Co., 127 Wis. 332, 106 N.W.
833 (1906). Whether the tests made by manufacturer were suitable and
actually made are jury questions. Holzman v. Harkavy Beverage Co., 293
N.Y.S. 832 (1937).

\textsuperscript{70} Distinguish this situation from one like that of public carrier in Stimson v.
The Milw. Lake Shore & Western Ry. Co., 75 Wis. 381, 44 N.W. 748 (1890),
or Ashton v. Chicago & N. W. Ry. Co., supra, note 65, in which the likelihood
of an intervening cause is very large, so that the necessity of control is
reasonable.

\textsuperscript{71} See note 61, supra.

\textsuperscript{72} Colvar v. Little Rock Bottling Works, 114 Ark. 140, 169 S.W. 810 (1914).

extent customarily followed by the manufacturers in a particular field is not conclusive, but is good evidence to be considered by the jury on the issue of due care.\footnote{The present tendency of rules of pleading and evidence seems to be toward increasing the burden on the defendant manufacturer. With increase in varieties of mechanical articles, having possibilities of danger not obvious to the unwary user, and the almost complete absence of physical and contractual relationship between makers and users of such articles, the stress must be shifted from proof of fault by plaintiff to proof of care by defendant if the injured user is to have adequate protection.}

However, the fact that other manufacturers have used similar petcocks and gauges for instance, is not admissible to show defendant was not negligent in using such devices on his product.\footnote{Marsh Wood Products Co. v. Baccock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Cadillac Motor Co. v. Johnson, 221 Fed. 801 (1915).}

\footnote{Nat. Pressure Cooker Co. v. Stroeter, 50 F. (2d) 642 (1931).}