

SOME THOUGHTS ABOUT PHYSICAL HARM, DISCLAIMERS AND WARRANTIES

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On March 6th in the year 1815 the issue before King's Bench was whether the purchaser of waste silk had the right to expect that it would possess any special qualities, absent an express warranty. Lord Ellenborough, speaking for the court in *Gardiner v. Gray*,¹ was of the opinion that the silk would have to be saleable in the market under the contract description, and so the implied warranty of merchantable quality was born.²

It is possible to accord this implied warranty of merchantability a dubious honor by noting that after almost 150 years there still remains a substantial doubt as to the content and *rationale* of the assurance. There is also a continuing debate concerning avoidance of liability by the potential warrantor, witness the recent lengthy decision in *Henningsen v. Bloomfield Motors*.³ At least some of the confusion can be traced to a lack of agreement as to the reasons for this liability. The content of this warranty cannot be correctly outlined without first referring to the reason for its existence. This discussion is an attempt to display and analyze some of the cross currents present in thought concerning the relation between this remedy and compensation for personal injuries.

Lord Ellenborough, in the course of his opinion, remarked that "The purchaser cannot be supposed to buy goods to lay them on the dunghill."⁴ Although this would appear to be belaboring the obvious, apparently, 140 odd years has not been long enough to accept the truth

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¹ 4 Camp. 144, 171 Eng. Rep. 46 (1815).

² This warranty is the sole warranty under discussion in this article. Although developed by case law, it is now enshrined in Section 15(2) of the Uniform Sales Act and in Section 2-314 of the Uniform Commercial Code. This implied warranty of merchantability may overlap to some extent its companion, the implied warranty of fitness for a special or particular purpose found in Section 15(1) of the Uniform Sales Act and Section 2-315 of the Uniform Commercial Code. See 1 Williston, Sales § 235 (3d ed. 1948). Many of the cases cited herein may involve both warranties or only the implied warranty of fitness. Generally, this has not been indicated in the citation if the proposition would not be altered by reason of the involvement of the other warranty.

The statement that the implied warranty of merchantability was born in 1815 may not be wholly accurate because *Holcombe v. Hewson*, 2 Camp. 391, 170 Eng. Rep. 1194 (1810), predates *Gardiner v. Gray* by five years. However, the latter is the leading case on this subject. For a discussion of the development of this warranty, see Prosser, *The Implied Warranty of Merchantable Quality*, 27 Minn. L. Rev. 117, 118-22 (1943).

³ 32 N.J. 358, 161 A.2d 69 (1960).

⁴ *Supra* note 1, at 145, 171 Eng. Rep. at 47.

of this earthy statement. In 1961, Judge Goodrich was unable to concur in the opinion of the Court of Appeals for the Third Circuit that there was a jury question as to whether a cigarette, if shown to contain a cancer causing agent, was of merchantable quality.⁵ Assuming proof of causation,⁶ it is hard to imagine anything better fitted for the mythical dunghill than Mr. Pritchard's cigarettes⁷ but the question of what constitutes a defective chattel for warranty purposes is far from settled. The food and allergy cases⁸ present problems which are essentially the same as the one discussed in *Pritchard v. Liggett & Meyers Tobacco Co.* In all these cases there is no general agreement as to when the goods are not of merchantable quality.

WARRANTY AND FAULT

The first analytical problem in this area is that the implied warranty of merchantable quality is but one of several possible liabilities. The generic phrase "products liability" covers a variety of remedies available to the disgruntled purchaser. Perhaps the most familiar is negligence through which the purchaser seeks to impose responsibility upon the manufacturer or marketer traceable to use of a product either upon a theory of fault in the process of production or fault in the process of distribution.⁹ A second remedy, that of the implied warranty in question, apparently rejects fault as a basis for liability and seeks to compensate the purchaser on some other theory. This is where the difficulty arises. Under our system for compensating individuals for losses factually attributable to acts of others, we require a reason for shifting loss other than causation alone, and tort, contract and warranty are all loss shifting doctrines.¹⁰ In a negligence

⁵ *Pritchard v. Liggett & Meyers Tobacco Co.*, 295 F.2d 292, 301-02 (3d Cir. 1961). Since this article was written, the jury has brought in a verdict for the defendant in a retrial of this case. It is reported that the jury found that there was no implied warranty and also that Mr. Pritchard assumed the risk of smoking. N.Y. Times, Nov. 10, 1962, p. 27.

⁶ For a brief discussion of proof of causation in the cigarette cases, see 13 W. Res. L. Rev. 782 (1962).

⁷ It is clear from Judge Goodrich's concurring opinion that he believed there was no breach of implied warranty. The majority approved the implied warranty theory but not in a way that lends support to the thesis advanced later in this article that the consumer can always expect freedom from harm. The court would permit the jury to take into account the quality of cigarettes distributed by other manufacturers. See 295 F.2d at 297.

⁸ For a general discussion of these cases, see Dickerson, *Products Liability and the Food Consumer*, 183-230 (1951); 1 Frumer & Friedman, *Products Liability* § 25 (1961); 2 *Id.* § 29.

⁹ Fault in distribution generally arises from failure to give adequate directions for use. See Dillard and Hart, *Product Liability: Directions For Use and the Duty to Warn*, 41 Va. L. Rev. 145 (1955).

¹⁰ As thus embodied in a set of fairly concrete rules or presumptions, the 'implied warranty' is a much more useful guide in apportioning risks than either of the ones above mentioned. It is far more highly standardized than the

action we find the reason for shifting the loss in some characteristic of the conduct of the factual-loss causer which deviates from an established norm.¹¹ If the action is contract then we find the reason for loss shifting in consent.¹² Warranty, unfortunately, stands in a no-man's land or perhaps, better still, in a legal fourth dimension because fault is not required¹³ and neither is contractual intent. Historically, it sounds both in tort and in contract¹⁴ and the purchaser will argue for the interpretation of history that best suits his immediate purpose. The tort theory is warmly embraced when the defense of privity is invoked¹⁵ but the plaintiff urges contract when a short tort statute of limitations is raised.¹⁶ However, the historical studies are not much help in resolving the current issue. The passage of time has seen im-

concept of 'impossibility' and much more thoroughly disassociated from the 'contemplation of the parties.' It avoids the difficult introspective inference which is associated with the conception of mutual mistake as to subject matter, and deals, if at all, with standardized rather than individualized mental states. Finally it avoids the difficulty of proof of negligence and the unpredictability of a jury's administration of the standard of 'ordinary care under the circumstances,' thus imposing an insurer's liability upon the seller.

Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 *Colum. L. Rev.* 335, 357-58 (1924).

¹¹ The struggle between punishment and compensation as the basis for defining fault is outlined in Morris, *Rough Justice and Utopian Ideals*, 24 *Ill. L. Rev.* 730 (1930). So far this struggle has also plagued implied warranty. See Wilson, *Products Liability*, 43 *Calif. L. Rev.* 614, 615-16 (1955).

¹² Consent as a concept of legal or moral significance (as distinguished from that isolated realm sometimes known as individual ethics) is manifested consent; it has here no significance except in reference to another individual. Hence promise which includes consent also includes some expectation or interest aroused in the promise or beneficiary. This expectation or interest is typically determined by the language or symbolization of the promise, read in its context of circumstances. The primary character of contract is thus a symbol which prescribes the scope of the (primary) obligation assumed.

In this respect contract differs from tort, in which the obligation is not ascertained from the symbolic content of the actor's conduct. The intentional aggressor, the negligent driver, does not symbolize his tort obligation to the threatened victim; even defamatory utterance does not express an obligation. Deceitful utterances may manifest consent to an undertaking, and thus be viewed as contract or as tort. . . . Everyone knows the difference between a broken promise and a broken head, even though at the borderland the distinction between tort and contract becomes subtler as the symbolization of the promise becomes less explicit and legal presumption fills larger and larger gaps.

Patterson, *Compulsory Contracts in the Crystal Ball*, 43 *Colum. L. Rev.* 731, 740-41 (1943).

¹³ 1 Williston, *Sales* § 237 (3d ed. 1948).

¹⁴ The hybrid nature of warranty is discussed in Fisher, *Implied Warranties of Quality—A Tort Peg in a Contract Hole*, 11 *Food Drug Cosm. L. J.* 262 (1956) and Dickerson, *op. cit. supra* note 8, at 34-44.

¹⁵ The rise of strict liability as a remedy available to the disgruntled purchaser is due, in large part, to the search for a way around the defense of privity. See discussion of strict liability *infra*.

¹⁶ An interesting case is *Challis v. Hartloff*, 136 Kan. 823, 18 P.2d 199 (1933), in which the plaintiff convinced the court to award what are traditionally thought of as tort damages and also to not apply the tort statute of limitations.

plied warranty evolve from a merchantile remedy to a device for protecting the injured consumer, and the answer to the question of what goes on the dunghill must be found in an understanding of the significance of the remedy today.

The cigarette cases,¹⁷ the cosmetic cases,¹⁸ the bone-in-the-chicken pie cases¹⁹ reflect the current struggle between causation in fact and fault as the reason for assessing warranty liability. It is possible to find statements that warranty is liability for fault only²⁰ and liability without fault.²¹ If the latter be true we may well ask: "If not for fault, then for what?" While it is helpful to know what warranty is not, complete understanding is an affirmative matter. Lacking an understanding of what it is, fault, because it is the backbone of our personal injury compensation system, is bound to return to shape warranty responsibility.

The influence of fault as a basis for liability is demonstrated in the now famous case of *Perlmutter v. Beth David Hosp.*²² in which the plaintiff sought compensation for injuries sustained when she received a transfusion of blood containing jaundice causing agents. Her theory was that the hospital had sold her blood that was not of merchantable quality. A majority of the New York Court of Appeals never found it necessary to decide whether the blood was defective since these judges believed the transaction was not a sale and therefore the obligation found in Section 14(2) of the Uniform Sales Act²³ could not attach to it. No doubt the then unsettled question of charitable immunity in New York played a part in the decision²⁴ but prominently

¹⁷ *Pritchard v. Liggett & Meyers Tobacco Co.*, supra note 5; *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962). Twelve to fifteen more suits are currently pending. Wall St. Jour. Nov. 13, 1962, p. 4.

¹⁸ E.g. *Crotty v. Shartenberg's-New Haven, Inc.*, 147 Conn. 460, 162 A.2d 513 (1960). See also the cases collected in 2 *Frumer & Friedman, Products Liability* § 29 (1961).

¹⁹ *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 59 P.2d 144 (1936). See also *Brown v. Nebiker*, 229 Iowa 1223, 296 N.W. 366 (1941) (sliver of bone in breaded pork chop); *Goodwin v. Country Club of Peoria*, 323 Ill. App. 1, 54 N.E.2d 612 (1944) (turkey bone in creamed chicken actually made out of turkey); *Betchia v. Cape Cod Corp.*, 10 Wis. 2d 323, 103 N.W.2d 64 (1960) (bone in chicken sandwich); *Lane v. Swanson*, 130 Cal. App. 2d 210, 278 P.2d 723 (1955) (express warranty, bone in boneless chicken.)

²⁰ Bold statements that warranty always requires fault of some kind are hard to find. Usually the proposition is put defensively, that warranty liability in this case should not be imposed because the defendant was not at fault. See, e.g., 27 Wash. & Lee L. Rev. 167 (1960); 13 Stan. L. Rev. 645 (1961). However, a relentlessly consistent view that fault is required can be found in *Freedman, The Three-Pronged Sword of Damocles: Cutter, Hennigson and Greenberg* (1961).

²¹ E.g., 2 *Harper and James, The Law of Torts* 1586 (1956). Cf. 1 *Frumer & Friedman, Products Liability* § 16.01 (1961).

²² 308 N.Y. 100, 123 N.E.2d 792 (1954).

²³ N.Y. Pers. Prop. Law § 96(2).

²⁴ See generally, Note, 40 Cornell L.Q. 803, 807-08 (1955).

displayed in the majority opinion was reliance upon absence of fault as a basis for denying liability. The majority stated:

If, however, the court were to stamp as a sale the supplying of blood—or the furnishing of other medical aid—it would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not possibly be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of 'bad' blood . . . According to the complaint, the blood administered to plaintiff was 'contaminated' with jaundice viruses, with the result that she was afflicted with homologous serum hepatitis or serum jaundice. Informed opinion is at hand that there is today neither a means of detecting the presence of the jaundice-producing agent in the donor's blood nor a practical method of treating the blood to be used for transfusion so that the danger may be eliminated . . . but, whether that is so or not, the fact is that, if the transaction were to be deemed a sale, liability would attach irrespective of negligence or other fault. The art of healing frequently calls for a balancing of risks and dangers to a patient. Consequently, if injury results from the course adopted, where no negligence or fault is present, liability should not be imposed upon the institution or agency actually seeking to save or otherwise assist the patient.²⁵

Here is a curious situation in which the decision not to apply a statutory non-fault liability is based on the fact that the defendant was not at fault in traditional negligence terms. Such an approach can only be explained in terms of a lack of an understanding as to what the implied warranty of merchantability means.²⁶ A sounder approach would be to ascertain the *rationalc* of this warranty obligation and then decide whether to invoke the statute by analogy²⁷ in light of the basis of that obligation.

Another example of intermingling fault and no-fault concepts can be found in cases involving privity. For instance, *Spence v. Three*

²⁵ Supra note 22, at 106-07, 123 N.E.2d at 795.

²⁶ It has been suggested that if fault was necessary to support warranty liability in this case it might have been found in the fact that a hospital deals in blood and can test the reliability of its source of supply. Note, 31 Ind. L.J. 367, 373 (1956). This seems to be a rather artificial concept of fault related to the particular product. There should be no need to search for fault in an attempt to justify the result.

²⁷ See generally, Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L. Rev. 653 (1957). On the question of how statutes can be used in this respect, see Landis, Statutes and the Sources of Law, Harvard Legal Essays 213 (1934) and Witherspoon, Administrative Discretion to Determine Statutory Meaning: "The Middle Road," 40 Texas L. Rev. 751, 822-48 (1962).

*Rivers Builders & Masonry Supply Co.*²⁸ was hailed by some commentators²⁹ as abolishing the defense of privity in all Michigan products liability cases. In *Spence* the plaintiff had purchased some defective cinder blocks from an independent contractor. She subsequently brought an action for breach of warranty against the manufacturer, although the evidence at trial, according to the appellate court, would also have substantiated a negligence claim.³⁰ The trial court dismissed the action because of lack of privity but the Michigan Supreme Court reversed. The court's action was prompted by a belief that the plaintiff had been induced not to plead negligence by previous opinions of the court equating warranty with a duty to exercise due care. Apparently the majority felt that privity should fail in at least this instance. Justice Voelker, then proceeded to increase the confusion:

Care does not increase or diminish by calling it names. We think the abstract concept of reasonable care is in itself quite difficult enough to grapple with and apply in our law without our courts gratuitously conferring honorary degrees upon it. There is only *one* degree of care in the law, and that is the standard of care which may reasonably be required or expected under all the circumstances of a given situation, whether arising in the manufacture of canned beans or cinder blocks. Such confusion of care with privity in these cases is not only bad in itself, but, worse yet, it inevitably tends to maim and muddy up the larger field of law in both contracts and torts.

We observe—and the defendant seeks to make much of the fact—that the declaration in the present action is not in terms grounded upon negligence of the defendant, although certain of the proofs, as already indicated, tend rather clearly to show its negligence. We also find that in Michigan—whatever the rule may be elsewhere—there is authority for treating actions of this kind based upon implied warranty by the manufacturer as though they were explicitly grounded upon negligence.

Thus, we said in *Hertzler v. Manshum*, 228 Mich. 416, 423 (although we limited our remarks to foodstuffs):

The implied warranty, so-called, reaching from the

²⁸ 353 Mich. 120, 90 N.W.2d 873 (1958).

²⁹ Note, 48 Geo. L.J. 606, 607 (1960); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1107 n.54 (1960); Bowles v. Zimmer Mfg. Co., 277 F.2d 868, 874 (7th Cir. 1960). But cf. Note, 34 Notre Dame Law. 149, 151 (1958).

³⁰ "In this case it appears that there was a lack of due care. Merely to describe what happened to the blocks should be showing enough on that score—but here the defendant admitted it inspected or tested neither the raw materials nor the finished blocks." 353 Mich. at 135, 90 N.W.2d at 881.

manufacturer of foodstuffs to the ultimate purchaser for immediate consumption is in the nature of a representation that the highest degree of care has been exercised and a breach of such duty inflicting personal injury is a wrong in the nature of a tort and not a mere breach of contract to be counted on in *assumpsit*. Except in name and to establish privity between the manufacturer and the ultimate consumer it is the same thing as negligence. *Plaintiff's case, in its last analysis, is bottomed on negligence. . . .*

Whether this notion only adds to the confusion or is any sounder legal reasoning than some of the other things we have said in the past in this area may be open to some dispute, but if we have thus solemnly told litigants and their counsel that suing for breach of an implied warranty is in effect tantamount to suing for negligence (one might think, for one thing, that the burden of proof might in some cases be more onerous on the plaintiff in the latter situation) we lack the heart to banish this plaintiff in this case because she trustingly took us at our word. We suggest in the future, however, that, where warranted by the circumstances, such declarations should sound explicitly in negligence as well as for claimed breach of warranty.³¹

Two things may be noted concerning this opinion. First, if it did signal the abandonment of privity in Michigan,³² this occurred in a case where fault was evident. This illustrates a tendency sometimes present to abolish privity at first where fault is most likely. The converse of this proposition is that warranty liability may lag where fault is least likely. Thus, the Texas court in *Jacob E. Decker & Sons, Inc. v. Capps*³³ found privity between manufacturer and consumer no bar to warranty liability when food sold in a sealed container proved defective, and on the same day held the retailer of the sealed container responsible.³⁴ But when the question of wholesaler's liability was presented the result was 5 to 4 in favor of retaining the defense for the wholesaler who passed along the sealed package.³⁵ The judge with the crucial vote did not see why the wholesaler should

³¹ 353 Mich. at 130-31, 90 N.W.2d at 878-79.

³² There is still some lingering doubt as to whether the Michigan court is willing to let go of privity. See Boshkoff, Sales and Secured Transactions, 1961 Annual Survey of Michigan Law, 9 Wayne L. Rev. — (1962).

³³ 139 Tex. 609, 164 S.W.2d 828 (1942).

³⁴ Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942).

³⁵ Bowman Biscuit Co. v. Hines, 151 Tex. 370, 251 S.W.2d 153 (1952); 31 Texas L. Rev. 594 (1953).

be held liable. He was unable to find "fault" in the wholesaler's conduct.³⁶

Consider further a statement made in a 1960 law review comment on a Virginia case³⁷ holding the manufacturer of defective food liable in implied warranty. After noting that the consumer apparently has an action against both the manufacturer and the retailer the writer comments on a situation almost the reverse of *Decker*:

A principal effect of this holding is to permit the consumer the convenience of suing the local retailer rather than the less accessible manufacturer, but public policy should not be predicated upon the convenience of one party at the expense and inconvenience of another party who is *without fault*.³⁸ (Emphasis supplied.)

The second interesting aspect of the *Spence* opinion, is that the majority admitted that they had previously confused the difference between warranty and negligence but then refused to take the definite position that negligence was immaterial in imposing warranty liability. The failure to make clear, what at this late date should be obvious,³⁹ induced counsel in a recent case to argue that negligence had to be proved to establish breach of warranty.⁴⁰ Happily, this position was finally repudiated by the court. Nevertheless, it was an event much too long in anticipation and illustrates graphically the hesitancy to admit that warranty is in a class apart from negligence.

A final example of the influence of fault on the implied warranty of merchantability may be found in those food cases which draw the line of responsibility with the aid of the "natural to the object test." The classic case here is *Mix v. Ingersoll Candy Co.*⁴¹ in which the consumer sought to recover damages occasioned by a chicken bone in a chicken pie. Recovery was denied on the basis that the bone was natural to the object consumed.⁴² Initially, it would seem that this test apparently has an appealing objective nature;⁴³ however, its rationality

³⁶ "Neither does the rationale of the *Decker* case fit his situation since there is neither opportunity to know and control the contents of the sealed package nor representations or inducements made by him to the consumer." *Id.* at 372, 251 S.W.2d at 168.

³⁷ *Swift & Co. v. Wells*, 201 Va. 213, 110 S.E.2d 203, (1959).

³⁸ 27 Wash. & Lee L. Rev. 167, 169 (1960). See also Waite, *Retail Responsibility and Judicial Law Making*, 34 Mich. L. Rev. 494 (1936).

³⁹ See 1 Williston, *Sales* § 237 (3d ed. 1948).

⁴⁰ *Manzoni v. Detroit Coca-Cola Bottling Co.*, 363 Mich. 235, 109 N.W.2d 918 (1961).

⁴¹ 6 Cal. 2d 674, 59 P.2d 144 (1936).

⁴² See also *Brown v. Nebiker*, 229 Iowa 1223, 296 N.W. 366 (1941) (sliver of bone in breaded pork chop) and *Maiss v. Hatch*, 8 Cal. Repr. 351 (Super. Ct. 1960) (bone in hamburger).

⁴³ Its objectivity disappears when we realize that naturalness depends upon the food in question. As the court pointed out in *Betehia v. Cape Cod Corp.*, 10 Wis. 2d 323, 328, 103 N.W.2d 64, 67 (1960), what is natural at one stage of preparation may not be

has been questioned.⁴⁴ It is likely, whatever the merits or demerits of the distinction, that it owes its existence to a confusion of warranty and negligence liability.⁴⁵ If we focus only on the duty not to add impurities to food and forget about the duty to remove impurities, we may feel that there is more probably careless processing when the offending object is not a normally constituent part of the food product prior to the start of processing.

It is submitted that the first difficulty we have in resolving whether Mr. Pritchard's cigarettes belong on the mythical dunghill is the still present inability to reject some type of fault as the basis for compensating injured consumers. To secure an answer to this question, a substitute *rationale* is needed.

WARRANTY AND CONSUMER EXPECTATIONS

The law of warranty, because it did not originate as an attempt to solve the problem of accidental injuries,⁴⁶ presents a second difficulty in thinking through the question of whether Mr. Pritchard's cigarettes are of merchantable quality. Originally, warranty was a commercial remedy. Consequently, assimilating it into the arsenal of the injured consumer's attorney has not been entirely easy because what might be commercially merchantable may not be satisfactory for the consumer.

Viewing implied warranty as a device for satisfying the profit expectation inherent in a transaction, it is possible to accept the proposition that perfection need not be the characteristic of any particular chattel.⁴⁷ The doctrine of consideration does not require exact equality in the exchange of promises. Commercially, implied warranty complements this rule by securing to the purchaser, in the absence of express agreement, neither the best nor the worst and, like consideration, it merely sets minimum standards. If we view each purchase of a chattel as a business deal involving a risk, it is possible to state that implied warranty satisfies the purchaser's expectation that he is taking only a normal risk. While he may hope that each chattel purchased is perfect, the implied warranty of merchantability

natural at another. Thus the test still requires analysis of the supposed qualities of the food in question.

⁴⁴ Dickerson, *Products Liability and the Food Consumer* 184-85 (1951); Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A.L. Rev. 281, 304 (1961).

⁴⁵ *Betehia v. Cape Cod Corp.*, supra note 43.

⁴⁶ 2 Harper & James, *The Law of Torts* 1570 (1956).

⁴⁷ The characteristics required are discussed in Prosser, *The Implied Warranty of Merchantable Quality*, 27 Minn. L. Rev. 117, 125-39 (1943). The Uniform Commercial Code, unlike the Uniform Sales Act spells out the minimum attributes of the warranty. Some attributes, at least, provide for less than perfection. See §§ 2-313(b), (d) & Comment 7.

insures that occasional disappointments of this hope will be more than balanced by long run gains secured through prudent bargaining.

When the transition is made from a commercial remedy to the personal injury area there is no longer margin for error. Purchase of goods by a consumer involves only the expectation that they will not harm him. Perfection is required. There can be no balancing of gains and losses as far as his health is concerned.⁴⁸ Prudent bargaining here is not directed toward the acquisition of a profit opportunity, it seeks instead freedom from the danger of personal injury. However, it is in differentiating between these two expectations that the difficulty arises.

Returning to the case of Mr. Pritchard's cigarettes we may note that law review comment has not been favorable. As one student writer states:

[T]he standard of merchantability is not so rigid. The case law and tort writers seem to agree that a product of fair average quality would clearly satisfy the warranty of merchantability. Since there was no evidence to show that Chesterfields were inferior to other cigarettes on the market, the jury should not have been permitted to find for the plaintiff on that count.⁴⁹

Another adds:

[There was no] . . . showing that defendant's product was made of commercially unsatisfactorily tobacco or that it differed substantially from other cigarettes Judged by the cigarettes which pass on the market, it is submitted that Chesterfield cigarettes could not have been found to be unmerchantable under any previous application of the law.⁵⁰

And finally:

The Chesterfields purchased by plaintiff would also seem suitable for the general purpose for which goods described as Chesterfields or as cigarettes, generally, are manufactured. The warranty must be reasonably construed in light of common knowledge with reference to the nature of the article or product sold.⁵¹

All these statements are illustrative of the concept of merchanta-

⁴⁸ It is interesting to note that Harper and James mention the commercial expectation theory of warranty. However, when consumers' injuries are involved the expectation theory is dropped and the problem is seen as one of minimizing danger and distributing losses. 2 Harper & James, *op cit.* *supra* note 46, at 1571. Later, it is noted that the standard of safety is the same as in negligence. *Id.* at 1584.

⁴⁹ 42 B.U.L. Rev. 250, 255 (1962).

⁵⁰ 26 Albany L. Rev. 354, 359 (1962).

⁵¹ 50 Calif. L. Rev. 566, 568 (1962).

bility only as a commercial remedy.⁵² One is inclined to ask the somewhat facetious question of whether the lack of cancer-causing ingredients in any particular pack of cigarettes would make that pack unmerchantable. Of course not, since the quality absent is not desired. Why, then, is it so easy to shrug off the presence of this undesirable quality? The answer must be found in a general unwillingness to believe that consumer expectations demand, in some cases, perfection, as contrasted with the merchantile expectation of average quality.

The reluctance of the law review commentators to find cigarettes defective has parallels in other situations involving injured consumers. For instance, consider the line of cases which offer an alternative to the "natural to the object test" discussed earlier, *i.e.*, one requiring "reasonable reliance" by the consumer. In *Goodwin v. Country Club of Peoria*,⁵³ where a turkey bone in creamed turkey caused the death of plaintiff's decedent, judgment was for the defendant because the court felt that warranty should be considered in light of common knowledge with reference to the nature and character of the food being served. So too, a 3 × 2 cm. oyster shell in fried oysters did not create a breach of implied warranty, the theory being that a reasonable consumer expects to get an occasional oyster shell in fried oysters.⁵⁴ In the same year, the North Carolina Supreme Court was of the opinion that a reasonable consumer would expect to find a crystalized piece of corn in a box of Kelloggs Corn Flakes.⁵⁵

However, to say that a consumer can reasonably expect an oyster shell in fried oysters invokes the picture of a person sitting and chewing carefully because he expects that he may run across something which might injure him. This reasonable expectation test is not based on reality. If we admit that the consumer is not abusing the product, we should also admit that he expects that it will not injure him in any manner. Denying liability on the basis that his expectation of safety is unreasonable is equivalent to stating that the consumer, as a matter of law, is guilty of contributory negligence. One can imagine the reaction of a typical jury to the defense that the plaintiff should have chewed his food more carefully so as to avoid choking on a turkey bone,⁵⁶ but in any event the theory of these cases is defective from another viewpoint. The reasonable expectation test looks to the manner

⁵² Even the majority opinion in *Pritchard* does reject the commercial conception completely. See the discussion at note 7 *supra*.

⁵³ 323 Ill. App. 1, 54 N.E.2d 612 (1944).

⁵⁴ *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167 (1960).

⁵⁵ *Adams v. Great Atl. & Pac. Tea Co.*, 251 N.C. 565, 112 S.E.2d 92 (1960).

⁵⁶ See *Arnaud's Restaurant, Inc. v. Cotter*, 212 F.2d 883 (5th Cir. 1954), in which the defense of contributory negligence failed. For a discussion of this defense and an assertion that warranty law can do without it, see Note, 15 U. Fla. L. Rev. 85 (1962). See also 1 Frumer & Friedman, *Products Liability* § 27.02 (1961).

in which injury is inflicted. Suppose that two identical consumers receive identical throat injuries from objects in turkey pies. One consumer is unfortunate enough to choke on a turkey bone. He loses because he ought to have expected it. The second man chokes on a nail. Are we prepared to say that he should have expected a nail? Unless we are, he should recover in warranty and it seems that we have made a distinction in the rights of the two consumers that cannot be defended. The trouble is that the real consumer expectation is that there will be no harm accruing from the eating of a turkey pie in a normal manner and there is a breach of the implied warranty of merchantability when this expectation is not fulfilled.

At one point it would have been possible to say that the implied warranty of merchantability extended protection only to commercial interests, protecting merely the "contract price." However, the door was closed on this possibility when it was decided that the doctrine announced in *Hadley v. Baxendale*⁵⁷ did not prevent recovery of consequential damages for physical harm.

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such a breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury, which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

As Professor Patterson has pointed out, since the scope of damages under this doctrine is much narrower than the "proximate consequence" rule in tort law, the *Hadley* decision allows the law to encourage the entrepreneur engaged in a risky business by reducing the extent of his risk below the amount of damage arguably attributable to his acts.⁵⁸ Application of the limitation inherent in a *Hadley* test involves a decision as to what interests of the plaintiff are to be

⁵⁷ 9 Exch. 341, 355, 156 Eng. Rep. 145, 151 (1845).

⁵⁸ Patterson, The Apportionment of Business Risks through Legal Devices, 24 Colum. L. Rev. 335, 342 (1924).

protected.⁵⁹ This was precisely the issue when Judge Cardozo wrote his opinion in *Ryan v. Progressive Grocery Stores*.⁶⁰ Recovery in that case was sought on an implied warranty theory for injuries caused by a pin in a loaf of bread. The defendant argued that under the Uniform Sales Act⁶¹ the purchaser was limited to recovery of the purchase price. Judge Cardozo rejected this contention and permitted recovery for personal injuries occasioned by the offending pin. The dealer obviously had notice of the nature of the transaction, bread purchased for human consumption, and so consequential damages were awarded.⁶² There is no question that the *Ryan* opinion is sound. However, manipulation of the concept of merchantability to deny recovery in certain cases actually represents an erosion of the principles enunciated by Judge Cardozo. If we accept the proposition that physical harm comes within the contemplation rule, it requires a substantial amount of mental gymnastics then to conclude that the product causing such contemplated harm is merchantable.⁶³

WARRANTY AND STRICT LIABILITY

A further source of confusion may be found in the recent ascendancy of strict liability as the ultimate remedy available to the consumer. The extent of this liability is stated in the proposed section 402A of the new Restatement of Torts:⁶⁴

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

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

⁵⁹ Green, *Rationale of Proximate Cause* 50-55 (1927). See also McCormick, *The Contemplation Rule as a Limitation Upon Damages for Breach of Contract*, 19 Minn. L. Rev. 497, 503-04 (1935).

⁶⁰ 255 N.Y. 388, 175 N.E. 105 (1931).

⁶¹ N.Y. Pers. Prop. Law §§ 150(6) & (7). However, the defendants did not go far enough into the statute as the court pointed out. "The measure is more liberal where special circumstances are present with proof of special damage (§§ 150(7) & 151). Here the dealer had notice from the nature of the transaction that the bread was to be eaten. Knowledge that it was to be eaten was knowledge that the damage would be greater than the price. . . ." *Supra* note 60, at 395, 175 N.E. at 107.

⁶² See also *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932) and *Challis v. Hartloff*, 136 Kan. 823, 18 P.2d 199 (1933). Dean McCormick notes that the issue is usually phrased in terms of whether there exists an implied warranty in favor of the particular plaintiff, McCormick, *Damages* 673 n.62 (1935).

⁶³ Where the Uniform Commercial Code is not in force then it would be theoretically possible to backtrack by ignoring or repudiating *Ryan* and similar decisions. The Code closes this loophole by specifically stating in Section 2-175(2)(b) that injuries to persons are considered to be consequential damages flowing from breach of warranty.

⁶⁴ Restatement (Second), Torts § 402A (Tent. Draft No. 7, 1962).

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

There is no doubt that the growth of strict liability was greatly encouraged by the intricacies of the law of sales. Privity and notice were two very sore spots and a comment to the proposed section 402A tells us that it is definitely not a traditional warranty liability.⁶⁵ Dean Prosser, in a view which is probably shared by many others, clearly indicated his dissatisfaction with warranty:

All this is pernicious and entirely unnecessary. . . . No one doubts that, unless there is privity, liability to the consumer must be in tort and not in contract. There is no need to borrow a concept from the contract law of sales; and it is 'only by some violent pounding and twisting' that 'warranty' can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask. Such strict liability is familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, and respondeat superior. There is nothing so shocking about it today that cannot be accepted and stand on its own feet in this new and additional field, provided always that public sentiment, public demand, and 'public policy' have reached the point where the change is called for. There are not lacking indications that some of the courts are about ready to throw away the crutch, and to admit what they are really doing, when they say that the warranty is not the one made on the original sale, and does not run with the goods, but is a new and independent one made directly to the consumer; and that it does not arise out of or depend upon any contract, but is imposed by the law, in tort, as a matter of policy.⁶⁶

That this theory of strict liability is meritorious is without question. But what is to become of implied warranty? Perhaps it will coalesce with the theory of strict liability⁶⁷ but this would seem to be an unfortunate development. There is a place for both types of liability because they actually attempt to accomplish different things.

⁶⁵ Id. Comment m. For a discussion of this proposed section, see Condon, *Restatement or Reformation?*, 16 *Food Drug Cosm. L.J.* 473 (1961) and Dickerson, *The Basis of Strict Products Liability*, 16 *id.* 585 (1961).

⁶⁶ Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1099, 1134 (1960).

⁶⁷ Cf. James, *Products Liability*, 34 *Texas L. Rev.* 192, 227-28 (1955) and James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 *Tenn. L. Rev.* 923, 926-27 (1957).

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Strict liability as set forth in the Restatement will not protect the consumer in all cases. The product must not only be defective, it must be unreasonably dangerous. Presumably this contemplates a balancing of the community interest in having the product marketed against the individual consumer interest in freedom from harm.⁶⁸ Pasteur serum is a good example of such a product because it is unavoidably unsafe.⁶⁹ So too, "[Good] tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful. . . ."⁷⁰ Since this is true, it would seem unwise to amalgamate the two liabilities. Where we are speaking of a liability which is imposed as a matter of public policy and cannot be disclaimed, such a balancing of interests is proper. But why should this be extended to implied warranty?⁷¹ Just because a product is socially desirable does not mean that consumers do not have certain expectations concerning this product which should not be disappointed. It is not inconsistent to say that a product is socially desirable and still enforce consumer expectations concerning it. A cigarette may be considered useful and still the consumer may expect that its use will not hurt him. This is why the test for strict liability ought not to pre-empt the field. It defines an obligation that may not be disclaimed.⁷² It is only when we assume that the consumer expectation may not be influenced by the marketer or manufacturer that we ought to be concerned with the possibility that production of the product may be discouraged. On the other hand a balancing of interests test is not essential where the consumer expectation may be varied by the manufacturer or distributor.

Both theories have their place. Strict liability seeks to protect the consumer from unreasonable dangers arising from the non-negligent marketing of defective products. Implied warranty can serve to protect the consumer's expectation that he will not be harmed through use of the product. Thus the test suggested for defining breach of the implied warranty of merchantability is this: Did use of the chattel in a normal manner result in unexpected personal injury to the consumer? If the answer is yes, then liability is established. Essentially, the only items of proof for the plaintiff would be causation and damages. Under this test a cigarette causing cancer, a turkey pie containing a turkey bone and a cosmetic causing an isolated allergic reaction would all be unmerchantable. Judge Cameron, dissenting in another recent case⁷³ involving the warranty liability of a cigarette

⁶⁸ Cf. Restatement (Second), Torts § 402A, Comment k (Tent. Draft No. 7, 1962).

⁶⁹ *Ibid.*

⁷⁰ Restatement (Second), Torts § 402A, Comment i (Tent. Draft No. 7, 1962).

⁷¹ But cf. Keeton, Products Liability—Current Developments, 40 Texas L. Rev. 193, 209-10 (1961).

⁷² Restatement (Second), Torts § 402A, Comment m. (Tent. Draft No. 7 1962).

See also Prosser, *supra* note 66, at 1131-33.

⁷³ *Green v. American Tobacco Co.*, 304 F.2d 70, (5th Cir. 1962).

manufacturer, thought that an appropriate way to state the obligation would be as follows:

American guarantees that the cigarettes contained in this package are fit to be used by purchaser, a human being, by lighting and drawing smoke from them into the lungs, so that the ingredients of the cigarettes carried in on the smoke may be deposited on the walls of the blood vessels situated therein, to the end that said ingredients will be absorbed into the blood stream and will produce in the smoker the soothing and relaxing sensations normally attending such use; that said cigarettes do not contain any harmful or deleterious substance; and that it will indemnify the user against any injury, loss or damage which may result from the smoking of said cigarettes.⁷⁴

Such a statement, however far it goes toward satisfaction of the ordinary customer's expectation, could not command a majority vote of his colleagues.⁷⁵ We have also seen before that consumer expectations are not always satisfactory, witness the bone in the pie and similar situations. Perhaps, the difficulties faced by the consumer have been caused by some fundamental reasons for non-compensation of this type of harm. Before accepting the test proposed it would be wise to consider some objections to it.

SOME OBJECTIONS TO THE EXPECTATION TEST

One objection to this type of liability might be that it will increase the possibility of fraudulent claims against the manufacturer or retailer. This same objection has been voiced with respect to the allergy cases, which, as Professor Dickerson has indicated, may be behind the denial of recovery in some of these cases.⁷⁶ On the other hand, he points out that the possibilities for fraud will not vary with the rationale of responsibility.⁷⁷ Thus it is submitted that, even under the consumer expectation test advanced here, the plaintiff will still have to establish a causal relation between object and injury. Manufacturers are not without weapons to fight fraud⁷⁸ and, if it is thought to be a problem, a fairer approach would be to acknowledge its existence and seek to find an antidote by tightening requirements of proof. Unexpressed and untested premises only increase the chances for irrational growth of legal doctrine.

⁷⁴ *Id.* at 81-82 [interpreting Florida law].

⁷⁵ Because Florida law was involved and also because Judge Cameron dissented, the court on rehearing granted a motion to certify questions on Florida law to the Florida Supreme Court. See 304 F.2d at 85-86.

⁷⁶ Dickerson, *Products Liability and the Food Consumer* 215 (1951).

⁷⁷ *Id.* at 263-64.

⁷⁸ *Ibid.*

A second difficulty involved in securing observance of the test suggested is the thought seldom stated openly that this type of liability would be an undue burden on industry or in some way would be unfair.⁷⁹ Apparently, the idea is that the marketer would be subject to staggering losses which it would be unable to prevent or insure against. Assuming this is arguable, the results of the theory in operation are certainly not impressive, and this is best illustrated by the allergy cases.

In some cases, notably those in which a cosmetic is involved, recovery for personal injury is denied on the ground that the plaintiff is "peculiar" or that an idiosyncrasy is involved. Thus when plaintiff can show that he is a member of a class of persons who will be injured through the use of a product recovery follows,⁸⁰ otherwise it is denied.⁸¹ A recent law review note⁸² has suggested that the majority rule denying recovery to an allergic person is consistent in result with the minority rule permitting it. In all cases where a sizable class of allergic persons was involved the minority rule was invoked. Where the plaintiff appeared to be an isolated individual the majority rule was announced. But this does not explain why an allergic victim should receive different legal treatment than the victim of a toxic reaction. One writer has argued that the peculiar treatment of allergies is due to the thought that there are so many allergic persons around that the liability involved is too fantastic to be imposed.⁸³ However, this idea of an "undue burden" cannot be accepted. Since the courts hesitate to grant recovery when they consider the reaction peculiar to the plaintiff and grant it when the plaintiff becomes the member of a class, they are actually granting recovery when the potential liability through all claimants is great and denying it when only a single potential claim is involved. Assuming a constant figure for all allergy claims, it is the isolated claim which presents the smallest chance of disaster for the particular defendant.

Another branch of the undue burden argument would seem to be that since everybody is allergic to something,⁸⁴ the potential liability of all types of allergic reaction per product is such that recovery should be denied. If this is true then the allergy cases are incon-

⁷⁹ Dickerson, *supra* note 76, at 216-17; *Bennett v. Pilot Prod. Co.*, 120 Utah 474, 235 P.2d 525 (1951) (negligence); Note, 46 Cornell L.Q. 465, 472 (1961). *Contra*, Lane v. Swanson, 130 Cal. App. 2d 210, 278 P.2d 723 (1955) (express warranty).

⁸⁰ See, e.g., *Zirpola v. Adam Hat Stores*, 122 N.J.L. 21, 4 A.2d 73 (1939); *Crotty v. Shartenberg's New Haven, Inc.*, 147 Conn. 460, 162 A.2d 513 (1960).

⁸¹ See, e.g., *Merrill v. Beaute Vues Corp.*, 235 F.2d 893 (10th Cir. 1956).

⁸² Note, 46 Cornell L.Q. 465, 469 (1961).

⁸³ Horowitz, *Allergy of the Plaintiff as a Defense in Actions Based Upon Breach of Implied Warranty of Quality*, 24 So. Calif. L. Rev. 221, 235 (1951).

⁸⁴ For the medical background of allergies, see 2 Frumer & Friedman, *Products Liability* § 28 (1961).

sistent. There should be no recovery even if a recognizable class is involved. But is it reasonable to say that because so many consumer expectations will be disappointed we ought not to satisfy them? Is the warranty rule to be that consumers' expectations are to be fulfilled as long as it does not involve giving a cause of action to too many consumers? The allergy cases are a good example of the lack of agreement about the nature of implied warranty. Insofar as they represent a worry about some undue burden they either are worrying about a non-existent danger or they deny a consumer expectation rationale for warranty liability. The latter possibility then returns us to the initial part of this discussion which dealt with the affirmative reasons for warranty liability. Unless it is thought that warranty is another name for negligence or for enterprise liability,⁸⁵ it is suggested that recovery must be granted for all allergic reactions which the consumer does not expect to incur.

Somewhat related to the undue burden argument is the thought that imposing responsibility for unforeseeable consequences of use will stifle progress. It is to be expected that our increasing scientific knowledge concerning causation will lead to an ever increasing number of claims. The cigarette cancer lawsuits are one example of this trend. The increasing awareness of allergies is another. There is a paradox here. Before knowledge of cancer and allergies became widespread the consumer could not sue because he could not show causation. Now that we are becoming aware of the hazards accompanying the use of some products there is hesitancy in imposing liability because the causation link may be found to be so common.

Perhaps there is reason to worry that the manufacturer of new products will hesitate to market them because of the danger that harm will occur even though all due care has been taken to see that the product is safe. This seems particularly true in regard to the drug industry which has argued that warranty liability will deter product development.⁸⁶ The answer to this argument appears obvious. The manufacturer who worries about possible unforeseen consequences from use of his product need merely destroy the consumer expectation that it is absolutely harmless. If the marketer lets the consumer know that he (the marketer) is not sure that the product is safe for all to use the consumer can intelligently appraise the desirability of this product.⁸⁷

There is another answer to the drug industry's problem. There may be certain manufacturers and sellers who do not create a con-

⁸⁵ Cf. Wilson, *Products Liability*, 43 *Calif. L. Rev.* 809 (1955).

⁸⁶ Comment, *Strict Liability for Drug Manufacturers: Public Policy Misconceived*, 13 *Stan. L. Rev.* 645, 649 (1961).

⁸⁷ Dillard and Hart, *Product Liability: Directions For Use and the Duty to Warn*, 41 *Va. L. Rev.* 145, 160 (1955).

sumer expectation through the marketing of their product because of the manner of distribution. The *Gottsdanker* case⁸⁸ is such an example where implied warranty liability arose out of the sale of polio vaccine. It is questionable whether the user had any expectation regarding the purchase of that vaccine that is comparable to the expectation formed by the purchaser of a new car.⁸⁹ So too in the *Perlmutter* case already discussed,⁹⁰ the decision to not apply the Uniform Sales Act by analogy should have been based on a lack of consumer expectation rather than on the question of lack of fault. However, where there is a consumer expectation arising out of a certain transaction, it seems logical to state that the expectation will be satisfied perforce the warranty while still permitting the marketer to change it by appropriate means.

The same analysis should dispose of the argument that we will not impose this absolute liability upon the manufacturer of an item whose social utility outweighs the risk of harm to the individual. This is the strict liability test found in the Restatement of Torts. The answer is that we certainly will not impose this absolute liability if the manufacturer wishes to inform the consumer of the danger of use. The consumer, informed of the dangers of use or of the manufacturer's uncertainty about unforeseeable side effects, can decide for himself whether the product is to be purchased.

DISCLAIMERS: *Henningsen v. Bloomfield Motors*

The argument up to this point has assumed that the manufacturer or marketer has, and will continue to have, the power to mold the expectations of potential consumers. This assumption now invites a brief look at *Henningsen v. Bloomfield Motors*,⁹¹ a case notable not only for the length of the opinion written by the court but also for the blow aimed at the use of a standard disclaimer in the automobile industry. Although the result is not questioned, an examination of the basis for ignoring the disclaimer may be worth-while.

We start with the assumption that the Uniform Sales Act authorizes at least some disclaimers;⁹² so does the Uniform Commercial Code.⁹³ However, since the "Big Three"; G.M., Ford and Chrysler, represented 93.5 per cent of the passenger car production for 1958,⁹⁴ the *Henningsen* court felt that the monopolistic character of the industry altered this picture. Thus it stated:

⁸⁸ *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 694, 6 Cal. Rep. 320 (1960).

⁸⁹ Consumer expectations of safety may be reinforced by advertising designed to boost the prestige of a firm or industry. Brief for Plaintiff, pp. 122-27, *Gottsdanker v. Cutter Laboratories*, *supra* note 88.

⁹⁰ See text accompanying note 22 et. seq.

⁹¹ 32 N.J. 358, 161 A.2d 69 (1960).

⁹² Uniform Sales Act § 71.

⁹³ UCC § 2-316; cf. § 2-719(3).

⁹⁴ *Supra* note 91, at 390, 161 A.2d at 87.

The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice, the grave danger of injury to himself and others that attends the sale of such a dangerous instrumentality as a defectively made automobile.⁹⁵

The thought expressed here is that the buyer must have freedom of choice and that such freedom is not possible in the face of a monopolistic seller. Accepting the court's definition of the relevant market,⁹⁶ what is meant by a free choice? Free choice may be used in one of two senses. We may say that the buyer has a free choice if he can buy a car without a disclaimer from one of the Big Three. We might also say that buyer has a free choice if he may decide to buy a car instead of doing without one. Apparently, the court is thinking of free choice in the first sense. If so, how does this relate to the disclaimer problem? Even if Ford avoided the dubious sales practice indulged in by Chrysler it would have been of no avail to Mr. Henningsen since he failed to read the contract and a reading would have been necessary to alert him to the necessity for exercising this free choice. It seems inappropriate to urge protection of this freedom of choice for a consumer ignorant of the possibilities of the advantage inherent in choice.

But further still, there is no clear indication of why there should be this type of freedom to choose. This supposed freedom is not just to choose a product but to choose the characteristics that this particular product shall have. Let us suppose that the Big Three decided to market cars in only three colors: blue, black and white. Could a purchaser argue that a contract designation of black for a car ordered was invalid and that he was entitled to damages because the uniform marketing practice deprived him of the opportunity to choose a red car? Such a hypothetical situation seems ridiculous but *Henningsen* purports to grant the consumer the right to ignore a contract provision. If we have decided that the consumer has the right to insist on certain product characteristics, it would seem that such a holding should be made after analyzing the type of product involved and its social necessity, and not on the basis of the industry market structure. The attention of the *Henningsen* court, therefore, seems somewhat misdirected. If the consumer is to be given the right to demand freedom from personal injury, it does not matter at all how monopolistic the

⁹⁵ Id. at 404, 161 A.2d at 95.

⁹⁶ However, if used car sales were considered, then the Big Three's share in any one year would decrease sharply. Also the purchaser would not be met with a standard disclaimer.

seller is. It is the product involved that counts.⁹⁷ Since such a decision is an intricate one, it should not be made where easier but adequate grounds for a decision exist. It seems that a sounder but less involved basis for rejecting use of the disclaimer in *Henningsen* is the manner in which it is presented to the consumer. The court noted in this regard:

The draftsmanship is reflective of the care and skill of the Automotive Manufacturers Association in undertaking to avoid warranty obligations without drawing too much attention to its effort in that regard. No one can doubt that if the will to do so were present, the ability to inform the buying public of the intention to disclaim liability for injury claims arising from breach of warranty would present no problem.⁹⁸

It seems perfectly fair to ignore the disclaimer in the instant case because of the way in which it is phrased. However, if the Big Three wish to bring home to their customers the fact that automobiles sometimes are defective and that they will not be responsible for personal injuries unless traceable to their negligence, what is wrong with this? On the other hand, a clear distinction ought to be drawn between attempts to inform consumers of product characteristics and attempts to induce purchase while simultaneously absolving the seller from liability for the existence of these characteristics. For instance there is nothing reprehensible about inducing the purchase of a car by painting it an attractive shade of blue and simultaneously informing the purchaser that the color may fade and disclaiming responsibility for such fading. But when the disclaimer follows an attempt to create the impression that the fading will not take place then there is little need to judicially sanction this procedure. It is only the most sophisticated purchaser that could comprehend the substance of the provision denying him the benefit of the expectation just created.⁹⁹

The danger in the *Henningsen* opinion is that all of it may be

⁹⁷ At this point the question becomes one of strict liability. In a contract setting, the question is the enforceability of a contract of adhesion. See generally, Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *Colum. L. Rev.* 628 (1943). It is my belief that what matters is not only the content of the contract of adhesion but also the object to which it adheres. If the contract is to be disregarded, in toto or in part, it must be due to the fact that a product of great social desirability is involved.

⁹⁸ *Supra* note 91, at 400, 161 A.2d at 93.

⁹⁹ This is best illustrated by the seed cases in which the expectation created by the description of the product is denied by the disclaimer. E.g. *Pyle v. Eastern Seed Co.*, 145 *Tex.* 385, 198 S.W.2d 562 (1946). See also Llewellyn, *What Price Contract—An Essay in Perspective*, 40 *Yale L.J.* 704, 733 n.62 (1931).

The Big Three have not yet changed their ways. They still are trying hard to avoid shaping consumer expectations, by using three separate forms which are just as uninformative as the common one previously used. See Honnold, *Supplement to Sales and Secured Financing* 422-33 (1962).

accepted. It may be thought of as a condemnation, not only of the double faced warranty disclaimer, but also as a condemnation of a monopolistic attempt to influence the expectations of his customers. Permitting the manufacturer or marketer of the product to influence the expectations of the consumer is consistent with the rationale of consumer protection embodied in implied warranty which has already been discussed. Actually, it would be unwise to impose absolute liability upon the manufacturer of an automobile for all defects under a theory of consumer expectation, and at the same time deny him the right to mold this expectation. If the liability is unalterable then it would be better to talk in terms of strict liability and section 402A of the proposed Restatement of Torts. As noted earlier, that liability cannot be disclaimed. Here, however, the consumer pays a price. This liability which may not be disclaimed does not extend to all defects, it is present only when the object is unreasonably dangerous.

If it is admitted that the chattel purchased is unmerchantable whenever unexpected harm results from its normal use and, at the same time the marketer is always permitted to escape liability by informing the purchaser of potential harm, reality may eventually be achieved in the handling of this type of liability. At present, neither the approach to imposition of liability nor negation of it is realistic. Currently, we talk of cigarettes which may cause cancer as being merchantable or invoke the reasonable expectation test in food cases. At the same time, clauses are approved which exempt the manufacturer from liability but which in no way inform the purchaser of the potentialities for harm inherent in the product.¹⁰⁰ If we allow the manufacturer to shape consumer expectation at any time without regard to market structure or inequality in bargaining power, we then will be in a position to extend to the consumer protection against all harm from normal use under an implied warranty theory.

Under the suggested approach, will a manufacturer or marketer wish to use a disclaimer to inform the consumer of possible hazards? In many cases he probably will not. In a 1954 decision, Judge Frank, in dissent,¹⁰¹ thought that the manufacturer of a baby bathinette had the duty to warn purchasers of the fire hazard presented by its magnesium components. He remarked:

To comprehend the nature of defendant's negligence, one has but to ask whether defendant could have sold their bathinettes, if there had been affixed an easily-readable notice saying, 'If a fire happens in your home, this bathinette will

¹⁰⁰ Even the Uniform Commercial Code may sanction the exclusion of warranties through language that will not really inform the consumer of what is happening. Cf. §§ 2-316(2) & (3).

¹⁰¹ *Hentschel v. Baby Bathinette Corp.*, 215 F.2d 102, 111 (2d Cir. 1954).

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probably increase the dangers greatly, because the magnesium may ignite, causing unusual spurts of flame which will be particularly difficult to extinguish.¹

This same reasoning applies to disclaimers.¹⁰² If it was required that they really inform consumers of the hazards inherent in the use of a product, perhaps some products would go off the market. If so, then they are on the market today because consumers are deluded as to their desirable qualities. The disclaimer in *Henningsen* should be considered invalid, not because it was imposed upon a small buyer by a big seller, but because it did not tell the consumer that he might expect his car to fail within a month of purchase.

What of a new product which the manufacturer has tested and found to be safe but which it later develops has qualities injurious to some people? Of what can the manufacturer warn? All he need do is inform the purchaser of the possibility that some injurious quality may be discovered later.

What of the situation in which the product is marketed in a way that it is difficult or impossible to give warning of dangers. Such a case is illustrated by the sale of fresh fruits and vegetables, e.g., the danger of a strawberry allergy.¹⁰³ The grower of the strawberries would seem to have three choices. First, to choose a chain of distribution through which warning could be given. Second, to bear the risk of warranty liability. Third, to embark upon a program of institutional advertising to inform the public of the qualities of the product. Recently a milk association published an advertisement aimed at combating the popularity of low-fat diets.¹⁰⁴ There is no reason why large advertising

¹⁰² Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A.L. Rev. 281, 314-16 (1961).

¹⁰³ No reported cases have been found in which recovery was sought for losses caused by a strawberry allergy. However, this hypothetical allergy has received much attention. See *Crotty v. Shartenberg's—New Haven, Inc.*, 147 Conn. 460, 465, 162 A.2d 513, 516 (1960); *Bianchi v. Denholm & McKay Co.*, 302 Mass. 469, 473, 19 N.E.2d 697, 699 (1939) (reserving opinion on liability issue); *Barrett v. S. S. Kresge Co.*, 144 Pa. Super. 516, 521, 19 A.2d 502, 503 (1941); *Bennett v. Pilot Prod. Co.*, 120 Utah 474, 235 P.2d 525, 527 (1951); *Green, Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 Tenn. L. Rev. 928, 934-35 (1957); *Horowitz, Allergy of the Plaintiff as a Defense in Actions Based Upon Breach of Implied Warranty of Quality*, 24 So. Calif. L. Rev. 221, 236 (1951); *Keeton, Products Liability—Current Developments*, 40 Texas L. Rev. 193, 209 (1961); *Wilson, Products Liability*, 43 Calif. L. Rev. 809, 834 (1955); 2 *Harper & James, The Law of Torts* 1586 (1956); *Restatement (Second), Torts* § 402A, Comment j (Tent. Draft No. 7, 1962). Most authorities assume that there are good reasons for not compensating the individual who suffers from a strawberry rash, and perhaps there are. However, many of the reasons involve assumptions of fact, e.g., that such allergies are mild or very well known. If the strawberry rash case ever gets to court it is hoped that these issues of fact will be tried before a jury. It might be interesting to hear proof of the widely held knowledge about these allergies which is so often assumed to justify the position that the goods are not defective.

¹⁰⁴ *Wall St. Jour.*, Oct. 22, 1962, p. 9 (advertisement of American Dairy Ass'n).

campaigns could not inform of hazards as well as benefits. This, of course, is not human nature. Marketers of goods will continue to profit from consumer expectations concerning the benefits of their products as long as they can convince the courts that they should not be liable for all harms traceable to such wonderful products.

It is true that any rule of law may be corroded by undue rigidity. The suggested rule of liability will not work unless the marketer is permitted to mold expectations if it so chooses. Currently, disclaimers are not popular and, in light of the way they have been used, this attitude is justified. On the other hand, great care should be taken in picking situations in which their use should be denied to a whole industry. The violent reaction of the *Henningsen* court may not turn out to be in the best interest of consumers since the price of suppressing the standard disclaimer will probably be a watering down of the concept of defect for warranty purposes. Although the factual issues involved are more difficult to settle, insistence upon adequate communication in the molding of consumer expectations has, in connection with the standard of warranty liability already discussed, much greater potential for consumer protection. If the day comes when all marketers are unreservedly honest about the goods they sell, then the consumers' views about the nature of chattels will be greatly changed and there will no longer be a need for the implied warranty of merchantability, at least so far as personal injuries are concerned. The now uncertain area occupied by this warranty will be replaced by contract term, express warranty and the knowledge possessed by sophisticated and well informed consumers.