

CONFIDENTIAL

Manual of
CHEMICAL PRODUCTS LIABILITY

An analysis of the law concerning liability arising from the manufacture and sale of chemical products.

Prepared by
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Manufacturing Chemists' Association and
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CONFIDENTIAL REPORT

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P R E F A C E

The purpose of this Manual is to present in comprehensive and concise form the underlying principles of law on the subject of chemical-products liability. An effort has been made to collect and analyze all of the reported federal and state decisions dealing with the legal liability of the manufacturer, wholesaler, and retailer to persons who have suffered personal injury or property damage in consequence of the use of various types of chemical products. There has been no attempt to cover the subject of the public law regulating the manufacture and sale of these products except to the extent that it has a direct bearing on product liability in civil litigation.

The Manual has been planned and executed jointly by the Manufacturing Chemists' Association and the National Agricultural Chemicals Association primarily as a reference work for lawyers advising or handling product liability claims for manufacturers and other sellers in the chemical industry.

Part I is divided into three sections. The first includes a general discussion of the field of product liability law with emphasis on recent developments and trends. The second and third sections consist of a statement of the various legal principles which find application in chemical-products liability cases together with supporting and contra decisions under each principle. It is recognized that these principles are stated in some instances as delusively exact formulas and in others as oversimplified generalizations. For this reason these statements of legal principles should be considered primarily as vehicles for the annotations, rather than as unequivocal and exact statements of the law as it exists in all jurisdictions.

The decisions annotated in Part I principally involve chemical products. However, leading product liability decisions involving other products have been included where they enunciate important principles of general applicability.

Part II represents a digest of the reported federal and state decisions relating to chemical products. The decisions digested include those reported in the General Digest from 1658 - 1951 under the following subjects and key numbers: (1) Negligence - 27, (2) Poisons - all keys, (3) Druggists - all keys, (4) Explosives - all keys, and (5) Sales - Warranties - 246 et seq.

A Table of Contents is included to give a detailed conspectus of the content and arrangement of the Manual as a whole.

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1952 SUPPLEMENTMANUAL OF CHEMICAL PRODUCTS LIABILITY

This supplement contains the court decisions and other legal material pertaining to chemical products liability which were published during the year 1952. It is the first supplement to the Manual of Chemical Products Liability.

Fifty-one annotations are included in this supplement for insertion after Part I following page 36.

Twenty-seven decisions are digested for insertion in Part II following the particular section to which the decisions refer. Seven of these decisions relate to pesticides, one to fertilizers, three to drugs, four to cosmetics, five to household and industrial chemicals, and seven to miscellaneous products.

A table of cases arranged under chemicals is included as a supplement to the table on page A-1. A table of cases arranged alphabetically is included as a supplement to the table on page B-2.

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1953 Supplement

MANUAL OF CHEMICAL PRODUCTS LIABILITY

This supplement contains the court decisions and other legal material pertaining to chemical products liability which were published during the year 1953 and the first three months of 1954. It is the second supplement to the Manual of Chemical Products Liability.

Thirty-four court decisions are annotated in this supplement for insertion after Part I following page 36. These decisions have been integrated with those annotated in the 1952 supplement for convenience of reference.

Twenty-seven decisions are digested for insertion in Part II following the particular section to which the decisions refer. Fifteen of these decisions relate to pesticides, three to drugs, and nine to cosmetics and soaps.

A table of cases arranged under chemicals is included as a supplement to the table on page A-1. A table of cases arranged alphabetically is included as a supplement to the table on page B-2. Each of these tables has been integrated with the tables in the 1952 supplement.

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PART I

Section I. Introduction

Theories of Recovery in Chemical-Products Liability Cases

The law of product liability presents some of the most vital and intricate problems which face the chemical manufacturer. Within its framework lies vestigial remnants of law which have long lost contemporary applicability as well as recently developed principles which reflect the force of the economic changes which have occurred during the last few decades.

In no field of private litigation is the current of public policy more dynamic. Any analysis of the law of product liability must, therefore, be premised upon a consideration of the historical development of the law and contemporary public policy. The limited purpose of this Manual and limitations of space unfortunately preclude any attempt to cover except in a cursory manner these extremely important factors.

It is proposed to consider briefly in this introductory section the more important and controversial principles of law which have present-day applicability in chemical-products liability cases with emphasis upon the most noticeable trends in the law. A more detailed consideration of the basic principles will be given in Section 2 and Section 3.

The chemical manufacturer has a basic responsibility to the purchasing public to assure that the products which he manufactures and places on the market for sale are safe and efficacious for the purposes for which they are sold. Failure to discharge this responsibility opens the door to the typical product liability suit.

A farmer uses an insecticide on his cotton crop and it damages the cotton or fails to kill the bugs. A housewife applies a cosmetic to her face and her face later swells and pains and a serious skin condition results. A mechanic opens a can of cleaning fluid and it explodes in his eyes. A supposedly harmless drug is administered to a child with fatal consequences. Assuming the establishment of a causal connection between the product and the injury, the question arises as to the principles of law which would be applied in determining whether the farmer, housewife, mechanic, or the child's estate should be allowed to recover against the manufacturer of the product causing the harm.

The manufacturer's liability for personal injuries or economic loss sustained as a result of placing on the market a dangerous or defective product may be premised on either or both of two separate theories of action or recovery, i.e., negligence or breach of warranty. The theories themselves are not mutually exclusive and are commonly employed jointly or in the alternative. In most jurisdictions an action can be brought on the ground of negligence and recovery allowed for breach of warranty if the proof fails to support the former but does support the latter.

Since the measure of damages is generally the same under either theory of action, the plaintiff's selection of a particular theory depends upon many factors such as the substantive law of the particular jurisdiction where the suit can be brought and questions of proof. For example, an action of negligence may be necessary to avoid the requirement of privity where a remote party-plaintiff is concerned. On the other hand, the difficulty of proving negligence in a particular case may force the choice of an action in warranty. An action in warranty may be necessary to avoid the statute of limitations which is usually shorter for tort claims than contract claims. Where personal injury has resulted in death, recovery under the applicable wrongful death statute may be limited to negligence actions. Procedurally, an action in negligence may have the advantage in a particular jurisdiction of avoiding counterclaims of a contractual nature or of avoiding the use of certain defenses available in warranty suits such as infancy, the statute of frauds, or discharge in bankruptcy.

Specific Types of Negligence

The negligence theory of recovery has found frequent and varied application in product liability cases involving chemicals. There are, however, certain types of conduct which are persistent enough to warrant separate mention. These forms of negligence may be summarized as follows:

- (1) The manufacturer has failed to exercise due care in the selection and purchase of ingredients for incorporation into the finished product,
- (2) The manufacturer has failed to exercise due care in the adoption of a formula which will produce a finished product which is safe and efficacious for the use for which it is sold,
- (3) The manufacturer has failed to make proper inspections and tests during the course of manufacture and after the product is finished and ready for distribution,
- (4) The manufacturer has failed to label his product with appropriate warnings and directions for use or has carelessly made false and misleading representations on the label or in advertisements and sales literature as to the safety and efficaciousness of the product,
- (5) The manufacturer has failed to exercise due care in the packaging and preparation of his product for distribution and sale.

Generally, the manufacturer is not liable when he has exercised reasonable care in placing a safe and efficacious product on the market, when the plaintiff's careless conduct was the proximate cause of the injury complained of, or when the manufacturer has effectively disclaimed liability.

Specific Types of Warranties

On the other hand, the warranty theory of action is not premised on the negligent conduct of the manufacturer but derives its force from the fact that the manufacturer has placed on the market an unsafe or inefficacious product despite an express or implied representation to the purchaser that it is safe and efficacious. If a product results in damage or economic loss when put to its intended use, the sole question which concerns the court is whether the manufacturer has warranted to the contrary. The court is not concerned with the diligence of the manufacturer in conducting proper tests before marketing his product, or in adequately labeling or packaging it.

In the majority of jurisdictions, the Uniform Sales Act is in force. This Act, which is largely a codification of the common law of sales, prescribes the conditions under which a manufacturer or other seller is held to have warranted his product. The warranties prescribed in this Act and encountered in chemical-products liability cases fall within

the usual classification of (1) express warranties, and (2) implied warranties.

(1) The manufacturer is held to have warranted the safety and efficaciousness of his product when he makes any affirmation of fact or promise relative to safety or efficaciousness whose natural tendency is to induce a purchase of the product and which is relied upon by the buyer in purchasing it. Puffing statements or expressions of opinion are not express warranties, although it should be recognized that the line between acceptable exaggeration and deceptive affirmations of fact is often difficult to draw.

Generally, the manufacturer uses labels or labeling as the media for making such warranties, whereas other classes of sellers, such as dealers who deal directly with the buyer, warrant orally or in the invoice of sale. Warranties may also arise from statements made in advertising and sales literature.

(2) Even in the absence of an express warranty, the manufacturer is held to have warranted that his product is of merchantable quality and, under certain conditions specified in the Uniform Sales Act, that it is reasonably fit for the particular purpose for which it is bought. A product is generally held to be unmerchantable where it is unsafe or inefficacious for its intended use. These warranties of merchantability and fitness for use are implied by law and imposed for reasons of public policy.

The most usual defenses available in warranty actions are that the plaintiff's careless conduct or misuse of the product was the proximate cause of the injury complained of, that the manufacturer has effectively disclaimed liability, or, in most jurisdictions where implied warranties are involved, that the manufacturer and the plaintiff did not directly deal with each other in the sale of the product and that, therefore, privity of contract is lacking.

We may now consider some of the more pressing problems in chemical-products liability law which affect the manufacturer.

Contemporary Problems in Product-Liability Claims

An analysis of the present law of chemical-products liability indicates that there are six problems of contemporary significance to the chemical manufacturer in product liability claims which are the most persistent. They may either affect the manufacturer from a preventative standpoint in minimizing the risk of product injury, or, if injury has occurred, in settlement negotiations and in the preparation of the defense after an action has been brought. These problems may be summarized as follows:

- (1) The duty of the manufacturer to label his products adequately and accurately,
- (2) The duty of the manufacturer to test his products adequately before placing them on the market,
- (3) The duty of the manufacturer to comply with the statutory requirements regulating the sale and distribution of his products,
- (4) The right of the manufacturer to avoid liability through the use of appropriate disclaimers,
- (5) The effect of the lack of privity as a bar to a suit by a remote party against the manufacturer, and,
- (6) The use of the theory of strict liability as a device to impose liability on the manufacturer regardless of the amount of due care which he exercises in assuring safe and efficacious products.

(1) Adequate and Accurate Labeling

Problems of adequate and accurate labeling have been accentuated in recent years by the passage of federal and state legislation controlling the types of label statements which are required for various classes of consumer products.

At the federal level, the Federal Food, Drug, and Cosmetic Act¹ provides for the branding of food, drugs, and cosmetics, which are shipped in interstate commerce, with certain affirmative information and prohibits the false and misleading labeling of these products. The Federal Insecticide, Fungicide, and Rodenticide Act² regulates the labeling of household and agricultural insecticides, fungicides, rodenticides, herbicides, disinfectants, and other economic poisons. The Federal Caustic Poison Act³ regulates the labeling of certain specified caustic and corrosive substances. Regulations promulgated by the Interstate Commerce Commission⁴ prescribe the labeling required for certain types of explosives and inflammables shipped in interstate commerce.

At the state level, there are comprehensive laws in each state regulating the labeling of food, drugs, cosmetics, pesticides, poisons, fertilizers, inflammables, explosives and other chemicals. Many of these laws are supplemented by local ordinances.

These statutes and administrative regulations dictate what the manufacturer must show on the labels or labeling of chemical products sold in interstate and intrastate commerce. They do not represent, however, the complete glossary of the manufacturer's duty to label insofar as potential civil liability is concerned. The common law obligation of adequate disclosure of the dangerous properties of a product is generally broader than that which may be prescribed by statute. Compliance with the labeling provisions of a public law or the use of a label which has been approved by a government official pursuant to statutory authority may not amount to compliance with the common law standard and civil liability may result. The point is strikingly illustrated in the recent Pennsylvania decision, *Malze v Atlantic Refining Co.*⁵, which held that the fact that the label on a container of carbon tetrachloride had been approved by the Surgeon General of the United States was not controlling on the question of its adequacy in a product liability suit. A more liberal view was apparently taken in an earlier Missouri decision, *McClaren v G. S. Robins & Co.*⁶

Premitting the evidentiary force of compliance or noncompliance with the labeling provisions of an applicable public law, the common law duty to label generally pivots around three cardinal principles, *viz*:

- (1) The manufacturer has a positive duty to warn the public by appropriate labels or labeling of any dangerous properties in his product which would not be apparent and understood in the absence of such disclosure,
- (2) The manufacturer has a positive duty to instruct the public by appropriate labels or labeling of any directions for use which may be necessary to avoid unintended results,

1. 52 Stat. 1040, 21 U.S.C. 301 *et seq.*

2. 61 Stat. 163, 7 U.S.C. 135 *et seq.*

3. 44 Stat. 1406, 15 U.S.C. 401 *et seq.*

4. See, for example, 49 C.F.R. 73.401.

5. 41 A. (2d) 850 (Pa., 1945)

6. 162 S.W. (2d) 856 (Mo., 1942)

(3) The manufacturer who undertakes to make claims expressly or by implication for the safety or efficaciousness of his product must assure that the claims are not false or misleading. Unlike the two preceding principles, this principle is encountered in warranty actions as well as negligence actions.

The earlier chemical-products liability cases generally involved the failure of the manufacturer to label his product with a statement of its nature and character to show that it was dangerous or that it would be dangerous under certain conditions or when put to specific uses. The principle was invoked in numerous cases involving such articles as stove polish, drugs, oil stain, insecticides, insecticide sprayers, sparklers, inflammable combs, benzol, cleaning solvents, and waterproofing compounds.

Modern merchandizing practices have relegated these types of labeling problems to a plane of relatively minor importance. Labels and labeling have been depended upon more and more in recent years to serve as a selling device to secure consumer patronage in a competitive market. Accordingly, there has been a shift in industry's attitude from reluctance to label a product with sufficient information to enthusiasm for detailed and attractive labels. Today, the manufacturer wants to tell the prospective purchaser what his product is and what it will do. It is this second feature of labeling, i.e., statements showing the functional properties and advantages of a product, which presents the most formidable contemporary problem.

In product liability cases today where packaged consumer products are involved, the manufacturer is frequently subjected to liability on the ground that he has carelessly made statements on the label or in advertising and sales literature that a product is safe or efficient for certain purposes when in fact it is not, or that he has made such statements which are in fact false after a careful attempt to assure their accuracy. If the representations have been negligently made, liability is imposed under the separate tort of negligent misrepresentation. If the representation has been made in the exercise of due care, liability may be imposed under the theory of a breach of express warranty.

Ebers v General Chemical Co.⁷ is the leading decision in recent years in which misrepresentation constituted a substantial basis for allowing recovery against a chemical manufacturer. In this case, the manufacturer was held liable for representing in a pamphlet which accompanied the sale of his insecticide product that the insecticide was safe for use on peach trees, whereas, it in fact damaged peach trees when used as directed.

Generally, misrepresentation stems from the manufacturer's enthusiasm for the potentialities of his product from a selling standpoint. However, there are instances where mislabeling is traceable to other motives. The point is well illustrated in the case of Pease v Sinclair Refining Co.⁸ where a harmless bottle of water was innocently labeled as kerosene. The bottle which was part of a teacher's exhibit was used by the plaintiff as kerosene and an explosion resulted. The court allowed recovery for the resulting personal injuries on the ground that the plaintiff was justified in placing reliance on the accuracy of the statement on the manufacturer's label.

Frequently, liability is based on the ground that the manufacturer has breached an express warranty of safety or efficiency made on the label of his product or in sales literature or made orally in direct dealings with the injured party. Thus, chemical manufacturers have been held liable for placing on the market unsafe products which were labeled "not poisonous to human beings,"⁹ or represented orally as safe,¹⁰ as well as inefficacious products which were labeled with a guarantee of quality.¹¹

Before passing from the subject of the adequate and correct labeling of chemical products, three important rules of construction which guide the courts in determining whether a particular label is or is not proper or whether statements thereon constitute express warranties may profitably be noted.

First, the sufficiency and accuracy of a label depends upon the interpretation which would be placed upon it by the average purchaser, or by a specific class of purchasers, after reading the label in its entirety and in context. Single words or phrases might be so explained by other language on the label as to avoid any misrepresentation or warranty which would otherwise attach. On the other hand, isolated sentences or words when read in context with other statements on the label may be misleading and result in a misrepresentation or warranty which would not otherwise attach.

Second, a label may be true in the strict sense of the word but deceptive to the average purchaser, or to a specific class of purchasers, for whose use a product is intended. Ambiguity and indirection must be avoided to the same extent as unequivocal false statements or non-disclosure.

Third, sweeping label claims in broad, general terms will be construed strictly against the manufacturer. Labeling claims of functional uses and advantages must therefore be restricted to the specific or face the possibility of being construed to cover other matters not intended.

(2) Adequate Pre-testing

A second prime contemporary problem in chemical-products liability cases is raised by the common law duty of the chemical manufacturer to test his product properly before it is placed on the market, where the potential danger of the product is unknown or where it is known to involve a risk. The breach of this duty is generally in issue in actions premised on negligence. The necessity for pre-testing and the adequacy of testing once it is undertaken are gauged according to the rule of reason which varies with the nature of the product involved and the circumstances attending its manufacture and distribution.

Two important recent cases involving pesticides bear on the subject of pre-testing and sharply illustrate the principles of law which are likely to be applied in chemical-products liability cases where new chemicals are placed on the market.

Ebers v General Chemical Co.¹² is perhaps the landmark decision in this field. In this case, an insecticide manufacturer was held liable for damage to plaintiff's peach trees arising from the use of the manufacturer's insecticide. Prior to sale, the manufacturer had tested the product and had followed the recommendation of the Department of Agriculture that the product was safe for use on peach trees. The recommendation was based on field tests conducted in various states. However, no field tests were made in the state of Michigan where the damage was caused. The court held that it was proper for the jury to decide whether the manufacturer was negligent in not testing his product in Michigan under the soil and climatic conditions in that state before distributing the product in Michigan.

7. 17 N.W. (2d) 176 (Mich., 1945)

8. 104 F (2d) 183 (N.Y., 1939)

9. Simpson v American Oil Co., 8 S.E. (2d) 813 (N.C., 1940)

10. Ingraham v Associated Oil Co., 6 P (2d) 645 (Wash., 1932)

11. Free v Sluss, 197 P. (2d) 854 (Cal., 1948)

12. Supra, note 7.

The Ebers case would appear to stand for two principles of primary importance to the chemical manufacturer:

(1) It is a question of fact for the jury to decide whether adequate pre-testing has been conducted prior to the sale of a chemical product.

(2) Extensive pre-testing of a product may not relieve the manufacturer from liability if it has not been performed under the local conditions prevailing in the jurisdiction where damage is caused.

The second case on this subject is Chapman Chemical Co. v Taylor.¹³ In this case, the court held that the failure of a herbicide manufacturer to test his product for its drifting propensities before sale constituted negligence in itself and rendered the manufacturer liable for property damage caused by the product when it drifted. Although the opinion of the court spoke in terms of "absolute liability," the decision actually stands for the proposition that the failure to test a chemical product prior to sale may be negligence per se, instead of a question to be determined by the jury. There was a forceful dissenting opinion in the Chapman Chemical Co. case which expressed concern over the extension of strict liability in cases of this nature.

(3) Compliance with Statutory Controls

Reference has been made to the impact of the public laws regulating the manufacture and sale of chemical products upon the civil liability of the manufacturer insofar as questions of adequate and accurate labeling are concerned. However, these laws in many cases prescribe other controls and prohibit types of conduct other than mislabeling which are of importance to the manufacturer or other seller when he faces a product liability suit.

A druggist sells a dangerous drug without making inquiry as to the purchaser's appreciation of the risk as required by the applicable state pharmacy law. The purchaser takes a fatal dose of the drug. The estate of the deceased sues the druggist for wrongful death on the ground that the druggist was negligent in making the sale to the deceased. There are no facts which would permit the inference that the druggist was negligent. However, the druggist has violated the pharmacy law in making the sale.

An insecticide manufacturer sells uncolored sodium fluoride which is consumed by an innocent purchaser mistaking it for common salt. State law required the coloring of sodium fluoride. The purchaser sues the manufacturer for personal injuries on the ground that it was negligence to sell a dangerous poison which could be mistaken as harmless salt. There are no facts which would permit an inference of negligence on the part of the manufacturer. He has, however, violated the public law regulating the sale of sodium fluoride.

In both situations, the negligence of the manufacturer would be established, partially or conclusively, on the ground of a statutory violation of a requirement which was designed to protect the public from the type of harm which actually resulted. The rationale of negligence is that the legislature has prescribed by statute the standard of due care which should be utilized in civil litigation as a yardstick for determining the existence of negligence or breach of the implied warranty of merchantability.

There is some uncertainty and conflict in the decisions as to what the evidentiary effect of non-compliance with the requirements of a public law should be on the issue of negligence. Some courts take the position that such non-compliance should be regarded as evidence of negligence which should be weighed by the jury in the light of all the circumstances involved in a particular case. However, the doctrine now generally supported in the majority of jurisdictions is that such conduct is negligence per se and renders the manufacturer liable without the actual proof of specific negligence.

Although this question is generally litigated in damage claims premised on negligence, it has been held that the implied warranty of merchantability includes compliance with the statutory requirements of law and that non-compliance may result in recovery on the basis of a breach of this warranty.¹⁴

(4) Avoidance of Liability through Disclaimers

A fourth significant problem in chemical-products liability law involves the right of the manufacturer to avoid liability for negligence or breach of warranty through the use of disclaimers on the labels of his products or in contracts and invoices of sale. This question becomes increasingly important with the development of a strong pro-plaintiff attitude in product liability suits.

The courts generally hold that clear and explicit language is required to absolve a person from liability for his own neglect. One cannot disclaim for negligence unless it is established (1) that the cause of the injury was specifically excepted against, and (2) that knowledge of this was brought home to the claimant. A less strict attitude is adopted in evaluating the effect of disclaimers of warranties.

Three decisions involving chemical products spell out the principles of law which fairly typify the judicial approach to this question.

In the first of these, E. I. DuPont de Nemours & Co. v Baridon,¹⁵ the use of a fungicide resulted in property damage to the bulbs to which it was applied. In a suit brought against the manufacturer, the manufacturer based its defense partly on the ground that a provision on the label of the product disclaimed liability arising from the use of the product. The provision read:

"The use of Semesan being beyond the control of the manufacturer, no guarantee, express or implied, is made as to the effects of such use, whether or not in accordance with these directions or claimed so to be."

The court held that, as a matter of construction, the disclaimer did not operate to relieve the manufacturer of liability for damage caused to crops as it was designed to cover the consequence of inefficaciousness. Under the theory of the Baridon case, therefore, disclaimers as to the "effects of use" relate to the efficiency of the product but not to its safety.

The apparent harshness of the law of the Baridon case has been somewhat tempered in Gibson v California Spray-Chemical Corp.¹⁶ and to a greater extent in Charles Lachman Co. v Hercules Powder Co.¹⁷

13. 222 S.W. (2d) 820 (Ark., 1949)

14. Manning Mfg. Co. v Hartel Products Corp., 99 F. (2d) 813 (Vt., 1938)

15. 73 F (2d) 25 (Iowa, 1934)

16. 188 P. (2d) 316 (Wash., 1948). See also, Charles Loroni & Son v Globe Laboratories, 95 P. (2d) 173 (Cal., 1939) (disclaimer reading "since we have no control over diagnosis, method of administration, or handling of this serum")

The decision in the Gibson case illustrates the manner in which the manufacturer can effectively avoid warranty liability even where the safety factor is involved by appropriate phraseology in the disclaimer. In this case, a provision in the bill of sale of an insecticide read:

"California Spray-Chemical Corporation guarantees the above material sold to be true to label, if labeled, but makes no other representation or warranty, express or implied, and shall not be held responsible for any injury resulting from the use or handling of said material whether or not used in accordance with directions. When, mentioned, results from use of the corporation's products are given for information only. No representative of the corporation may vary any of the foregoing and the buyer hereby accepts said material subject to all the terms hereof." (italics added)

The court held that this provision effectively disclaimed liability arising from damage to crops.

In the third decision, Charles Lachman Co. v Hercules Powder Co., a disclaimer, as follows, relieved the manufacturer of a chemical product from liability for alleged negligence:

"Buyer assumes all risk and liability whatsoever resulting from the use of such materials....Seller makes no warranty of any kind, express or implied, except that the materials sold hereunder shall be of Seller's standard quality."

It should be recognized that questions of public policy inevitably play an important role in the court's disposition to particular disclaimers where recovery is sought on the ground of the manufacturer's negligence and in a representative amount of product liability decisions disclaimers are held absolutely void on the ground that a manufacturer should not be permitted to relieve himself of the public responsibility of due care. However, the argument would seem some what tenuous when it is recognized that the doctrine of assumption of risk has long been countenanced in the law of negligence, and this doctrine closely assimilates the principles involved in disclaimers. If a disclaimer is specific enough to inform the public of the reservations which the manufacturer may have as to the safety or efficacy of his product, it should follow that a buyer under such circumstances assumes the risks covered by the disclaimer. It is interesting to observe, however, that this approach has not been taken in the decided cases.

There are two further questions relating to the subject of disclaimers which should be mentioned in connection with the use of disclaimers to avoid liability from arising for a breach of an express or implied warranty.

First, where express warranties are made on the labels of a product or otherwise play a role in the sale they cannot be effectively disclaimed according to the trend of the more recent decisions. A statement on a label that a product is "safe for use," for example, has been held to constitute an express warranty that if the product is not safe the manufacturer agrees to compensate for any damages resulting therefrom. It has been held that such a statement could not be disclaimed by another statement that the "use of the product being beyond our control, we do not make any warranty express or implied, as to the effects of such use." Yet, if warranties are ex contractu and stem from the understanding of the seller and buyer as to the terms and implications of the transaction, it is difficult to appreciate a rule of law which renders it impossible for the seller to disclaim liability in the event that the product does not perform as stated on the label. If a buyer has both the warranty and the disclaimer before him he should be estopped to thereafter depend on the express warranty as a basis for a damage claim. It may be suggested that the confusion which thus appears in this aspect of product liability law has been engendered by the feeling that the average consumer does not fully appreciate the operative effect of a disclaimer. This undervaluation of the bargaining position of buyers has been perhaps the most serious impediment to the natural evolution of the law of warranty.

Second, there are a few courts which have taken the position that implied warranties cannot be disclaimed on the ground that they are imposed by the law and that it is not open to contracting parties to limit the ambit of public policy. This view has not been generally accepted.

(5) Concept of Privity

The liability of a manufacturer to a person other than the one directly supplied, as, for example, in a product liability suit in which a purchaser from a retail dealer seeks recovery against the manufacturer, has in the past posed difficult problems which have not been completely erased. The problem was created by dicta in an early English decision¹⁷ which led courts in England and the United States to adopt the rule that a remote party could not maintain a negligence action directly against the manufacturer since there was no privity of contract between the parties. Of course, this rule confused principles of contract with principles of tort but it was sustained for over a century by the force of stare decisis.

Early cases in this country developed exceptions to this general rule, the principal one being that a remote party could recover against a negligent manufacturer where the product which caused injury to the remote party was "inherently dangerous." This term came to include such articles as food, drugs, explosives, and chemicals.

It was not until 1916 in the landmark decisions by Judge Cardozo in MacPherson v Buick Motor Co.¹⁹ that the general rule began to erode. In this case, which involved the liability of an automobile manufacturer to a remote purchaser who was injured by reason of a defective wheel on the automobile, the New York Court of Appeals held the manufacturer liable for negligence despite the absence of privity. The court pitched its decision on the ground that the traditional tort theory of foreseeability rather than the technical concept of privity should apply to the manufacturer as well as to any other tortfeasor. In the words of the court:

"If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."

after it leaves our possession, we waive all responsibility following its use" held effective in warranty action based on inefficaciousness.)

17. 79 F. Supp. 206 (Pa., 1948)

18. Winterbottom v Wright, 10 M. & W. 109 (Eng., 1842)

19. 111 N.E. 1050 (N.Y., 1916)

The rule of the MacPherson case is now followed in nearly every jurisdiction. Under its rationale manufacturers have been held responsible to remote parties for the negligent manufacture of such articles as combs, paint, perfume, inflammable dresses, hair dyes, insecticides, cigarettes, gasoline stoves, sanitary napkins, and electric appliances. Although the MacPherson case was limited to the question of the liability of a manufacturer of a finished product to a remote purchaser for personal injuries, it has been extended to subject to liability manufacturers of component parts of finished products or ingredient suppliers, and in favor of purchaser's employees, members of the family and other users, and for property damage as well as personal injuries.

How directly the historical concept of privity influences the present law of negligence may be seen from the fact that a few courts yet approach the question from the standpoint of the dangerous nature of the product involved and speak in terms of whether the product is "inherently dangerous" but actually dispose of the case under the traditional negligence test of whether the harm caused was reasonably foreseeable by the manufacturer.

It may be said that the only contemporary vitality of the concept of privity is evinced in warranty actions. In warranty actions the problem is more acute.

Four factual situations may be noted which fairly typify the problem where the theory of recovery is breach of warranty, viz:

- (A) A purchaser from a retail dealer who is not a factor or consignment merchant sues the manufacturer,
- (B) A member of a purchaser's family (purchasing either directly from a dealer or from the manufacturer) sues the manufacturer,
- (C) An employee of a purchaser sues the manufacturer,
- (D) A purchaser from the manufacturer sues the manufacturer.

Under the prevailing rule in most jurisdictions, the manufacturer would not be subject to liability in situations A, B, or C in a warranty action since there is a lack of privity with the party-plaintiff. The rule is based on the traditional contractual theory that third parties cannot take advantage of the rights and liabilities flowing from a contract which they did not make.

Two important caveats must be attached to the general rule, however.

First, there is an increasing tendency of the courts to either disregard the lack of privity between the manufacturer and a remote party or to find by legal legerdemain that privity does exist. This trend is especially pronounced in the case of a suit by a member of a purchaser's family or by an employee of a purchaser.

Second, the manufacturer who undertakes to label his product with a warranty thereby assumes a direct relationship with remote parties purchasing the product and in such a situation the lack of technical privity of contract would be no defense by the manufacturer in a product liability claim based upon a breach of the warranty stated on the label.

Simpson v. American Oil Co.²⁰ is the most important chemical case dealing squarely with this question. In this case, the plaintiff purchased from a retail druggist a can of insecticide manufactured by the defendant. The can contained a statement on the label that the product was harmless to human beings. The court, in holding that this warranty extended in favor of the plaintiff, a remote vendee, stated:

"We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances, nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended."

It may be noted that in most jurisdictions where privity of contract is a prerequisite to the maintenance of a warranty action, a remote party may sue his immediate dealer and the latter can, in turn, implead the manufacturer or maintain a subsequent recovery-over action against the manufacturer. Davis v. Radford²¹ is the most recent case illustrating this procedural aspect of warranty actions.

(6) Strict Liability

There have been in recent years many advocates of the desirability of imposing strict liability on the manufacturer, principally the food manufacturer, on the theory that he is better able to assume the financial risk of product liability. Fortunately, however, the concept of strict liability as such has not been applied extensively by the courts in chemical-products liability cases. Under the theory of strict liability, a manufacturer would be responsible for damage resulting from the use of his product even though he had skillfully manufactured it and had taken every reasonable step to assure that it was safe and efficient before placing it on the market for distribution and sale. The manufacturer would be virtually an insurer of his product.

The courts have traditionally tended to confine strict liability to situations involving the keeping of wild animals, or the engaging in "ultrahazardous" or "inherently dangerous" activities such as blasting and the storing of explosives. In at least one chemical-products liability case - E. I. DuPont de Nemours v. Baridon²² - an appellate court has reversed a judgment for a claimant on the ground of error in the trial court's instructions imposing an insurer's liability on a fungicide manufacturer.

However, there are perceptible trends in the direction of absolute liability which should be noted.

First, the theory of implied warranty instead of tort is finding increasing application in chemical-products liability suits. As has been seen, implied warranty is essentially another form of imposing absolute liability.

Second, the doctrine of negligence per se, previously noted, frequently relieves a party plaintiff from proving actionable negligence on the part of the manufacturer in cases involving chemical products. This doctrine is usually relied upon when a statutory violation is involved.

Third, the doctrine of res ipsa loquitur is being more frequently invoked in product liability cases. Although this doctrine has not been operative on a large scale in chemical-products liability cases, its use in cases involving food products in particular may portend a development into other fields. Where res ipsa loquitur applies, the plaintiff is relieved from proving negligence on the part of the manufacturer so that the end result may be liability without demonstrated fault.

20. Supra, note 9.

21. 63 S.E. (2d) 822 (N.C., 1951)

22. Supra, note 15.

Up to the present time the question of absolute liability for damage caused by the use of chemical products has been dispositive in two decisions of present-day applicability, Luthringer v Moore²³ and Chapman Chemical Co. v Taylor.²⁴

In the Luthringer case, a pest control operator was held liable for personal injuries to the plaintiff resulting from the inhalation of hydrocyanic acid gas which was being used in fumigating operations. Although the operator exercised due care in the fumigating, he was held responsible on the ground that he was conducting an "ultrahazardous" activity. Although this decision did not strictly involve product liability, it has brought into focus a principle which may be used by the courts in shaping the law applicable to the liability of the manufacturer of economic poisons which involve the risk of damage to the property of persons who are not connected with the sale of the product.

In the Chapman Chemical Co. case, a herbicide manufacturer was held liable for damage to the plaintiff's cotton which was close to a field being sprayed with the herbicide. The trial court instructed the jury that the defendant was negligent if the herbicide were not adequately tested for drifting propensities prior to sale. On appeal, this instruction was upheld on the principle of absolute liability for marketing an inherently dangerous product and Luthringer v Moore was cited as controlling authority. However, it is clear that the appellate court actually decided that the failure of the manufacturer to pretest the product constituted negligence per se, although the court spoke in terms of absolute liability. The decision represents the striking interplay of the two doctrines.

A later decision, Walton v Sherwin-Williams Co., has considerably limited the doctrine of the Chapman Chemical Co. case.²⁵

The foregoing discussion has summarized the field of products liability law with emphasis on recent developments and trends which affect the responsibility of the chemical manufacturer. The next section consists of an annotation of the reported decisions and general material under the legal principles which determine the liability of the manufacturer and other sellers in the chain of distribution of chemical products. It should be recognized that these principles of law are stated, of necessity, for the purpose of annotation as delusively exact formulas and oversimplified generalizations. These statements of legal principles should be considered primarily as vehicles for the annotations, rather than as an unequivocal and exact statement of the law as it exists in all jurisdictions.

23. 190 P. (2d) 1 (Cal., 1948)

24. Supra, note 13.

25. 191 F. (2d) 277 (Ark., 1951)

PART I

Section 2. Liability of Vendors of Chemical Products for Negligence

A. Liability of Manufacturers for Negligence

B. Liability of Vendors other than Manufacturers for Negligence

C. Special Problems in Negligence Cases Involving Vendors in General

A. Liability of Manufacturers for Negligence

a. General Basis of Liability

1. A manufacturer is not an insurer of the safety of his products and is subject to liability in tort actions only when he has failed to exercise reasonable care to make his product safe for the use for which it is sold, though in some instances this principle has been avoided by indirection and a degree of care more commensurate with that of an insurer has been imposed.

Comment: The tort liability of the manufacturer of chemical products is based on the same principles of law as the liability of the manufacturer of less hazardous products. Liability depends upon the absence of due care on the part of the manufacturer in the preparation and distribution of his product. The degree of care required by law is that of the hypothetical "reasonable man" under the circumstances. Numerous considerations may play a part in determining whether the requisite degree of care has been discharged in a particular case depending upon the particular type of negligence which may be in issue. Among these considerations may be the nature of the product involved, the general understanding of the character of the product, the customs of the business, the cost and practicability of effective testing and inspection, and the probability of serious consequences flowing from careless or imperfect manufacturing methods and processes.

The courts frequently speak of the "high degree" of care which is required of the manufacturer of inherently or eminently dangerous products, but this is more of a question of terminology than a departure from the established principles of tort liability. Although there are many contemporary advocates of the social desirability of imposing insurer's liability on the manufacturer, there have been few, if any, court decisions which have actually gone so far in liability cases involving chemical products. There has been only one decision which appears to impose a high degree of care upon a manufacturer. The same objective is being accomplished under the doctrine of *res ipsa loquitur* and the use of criminal legislation to establish the standard of due care in civil cases. In many cases, what might be referred to as liability without fault has been bottomed upon the contractual theory of implied warranty, rather than upon negligence.

(a) Leading decisions asserting the general rule that liability in tort depends upon the absence of reasonable care:

- (1) *MacPherson v Buick Motor Co.*, 111 N.E. 1050 (N.Y., 1916) (automobile manufacturer)
- (2) *Brown v H. K. Mulford Co.*, 199 S.W. 582 (Mo., 1917) (manufacturing chemist)
- (3) *E. I. DuPont de Nemours v Baridon*, 73 F. (2d) 26 (Iowa, 1934) (fungicide manufacturer)
- (4) *Walton v Sherwin-Williams Co.*, 191 F. (2d) 277 (Ark., 1951) (herbicide manufacturer)

(b) Leading decisions asserting the rule that strict liability may be imposed notwithstanding the exercise of due care:

- (1) *Escola v Coca Cola Bottling Co.*, 150 P. (2d) 436 (Cal., 1944) (beverage bottler; concurring opinion)
- (2) *Luthringer v Moore*, 190 P. (2d) 1 (Cal., 1948) (pest-control operator; manufacturer not involved)
- (3) *Chapman Chemical Co. v Taylor*, 222 S.W. (2d) 820 (Ark., 1949) (herbicide manufacturer)

(c) General References:

(1) Texts and Encyclopedias

- (i) Prosser, *Torts*, secs. 56-61 (1941)
- (ii) Harper, *Law of Torts*, secs. 155-203 (1933)
- (iii) Salmond, *Law of Torts*, secs. 596-599 (1934)
- (iv) Restatement, *Torts*, secs. 519-520
- (v) 38 Am. Jur., *Negligence*, secs. 29-42

(2) Legal Periodicals

- (i) Bohlen, *The Rule in Rylands v Fletcher*, 59 U. Pa. L. Rev. 298 (1911)
- (ii) Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 Harv. L. Rev. 195 (1914)
- (iii) Thayer, *Liability Without Fault*, 29 Harv. L. Rev. 801 (1916)
- (iv) Smith, *Tort and Absolute Liability*, 30 Harv. L. Rev. 241, 319 (1917)
- (v) Isaacs, *Fault and Liability*, 31 Harv. L. Rev. 954 (1918)
- (vi) Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. Pa. L. Rev. 805 (1930)
- (vii) Carpenter, *The Doctrine of Green v General Petroleum Corporation*, 5 So. Calif. L. Rev. 263 (1932)
- (viii) Harris, *Liability Without Fault*, 6 Tulane L. Rev. 337 (1932)
- (ix) Lewis, *Theories of Action in Products Liability Litigation*, 1947 Ins. L. J. 30
- (x) Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 Harv. L. Rev. 241 (1949)
- (xi) Miller, *Liability of a Manufacturer for Harm Done by a Product*, 345 Ins. L. J. 797 (Oct., 1951) and 3 Syracuse L. Rev. 106 (1951)
- (xii) Conner and Burroughs, *Trends in Product Liability*, Vol. 7 *Agricultural Chemicals* (Feb., 1952)
- (xiii) Notes: (1947) 95 U. Pa. L. Rev. 565; (1948) 61 Harv. L. Rev. 515

(3) Annotations

- (i) 80 A. L. R. 692 - "Stored explosives, absolute liability for damage or injury from explosion of"

b. Extent of Responsibility

2. A manufacturer who has failed to exercise reasonable care to make his product safe for the use for which it is intended is subject to liability to the person or property of any person who may be expected to use his product or be in the vicinity of his product's probable use for harm resulting from such negligence.

Comment: Under the modern theory of tort liability, the manufacturer's duty to use due care in the preparation and sale of his product extends beyond the person to whom the product is immediately supplied to such persons as ultimate purchasers, ultimate users, employees of purchasers, members of the family of purchasers, and to casual bystanders. In product liability cases prior to 1916, the manufacturer was not generally subject to liability beyond his immediate purchaser, unless his product was "inherently" or "imminently" dangerous to human life. The basis for this old concept stemmed from dicta in an early English decision that tort liability could not be invoked where privity of contract between the tortfeasor and the injured party was lacking. Today, the basis of tort liability, so far as the manufacturer is concerned, is foreseeability rather than privity. If a product is reasonably certain to cause harm if negligently prepared or made, the manufacturer owes a duty to any person who may be expected to use the product to exercise due care and caution in its manufacture. This is so whether the product is dangerous per se or not. Although there are cases to the contrary, the decided weight of authority holds that the manufacturer is subject to liability for property damage as well as for personal injuries, irrespective of privity. The decisions holding insecticide manufacturers liable for damage to crops and the decisions holding manufacturers of animal remedies responsible for injury to animals are pertinent in this respect.

(a) Leading decisions asserting the general rule that a manufacturer is subject to liability to remote parties:

- (1) MacPherson v Buick Motor Co., 111 N.E. 1050 (N.Y., 1916) (automobile manufacturer liable to a purchaser from dealer)
- (2) Carter v Yardley, 64 N.E. (2d) 693 (Mass., 1946) (perfume manufacturer liable to a purchaser from dealer; reversing prior Massachusetts decisions)

(b) Early leading decisions asserting the rule of non-liability in the absence of privity:

- (1) Winterbottom v Wright, 10 M. & W. 109 (Eng., 1842) (contractor not liable to third party injured as result of breach of contract)
- (2) National Saving Bank v Ward, 100 U.S. 195 (1880) (attorney not liable to third party for negligent examination of title)
- (3) Huset v J. I. Case Threshing Machine Co., 120 Fed. 865 (C.C.A. 8th, 1903) (manufacturer liable to employee of purchaser where product was imminently dangerous)
- (4) Hasbrouck v Armour & Co., 121 N.W. 157 (Wis., 1909) (manufacturer not liable to purchaser from retailer)

(c) Cases holding manufacturer liable for personal injuries or property damage to remote parties:

- (1) Thomas v Winchester, 6 N.Y. 397 (1852) (manufacturing druggist liable for personal injury to purchaser from retail druggist)
- (2) Wellington v Downer Kerosene Oil Co., 104 Mass. 64 (1870) (naphtha manufacturer liable for personal injury and property damage to purchaser from retailer)
- (3) Blood Balm Co. v Cooper, 10 S.E. 118 (Ga., 1889) (manufacturer of proprietary medicine liable for personal injury to purchaser from retail druggist)
- (4) Weiser v Holzman, 73 Pac. 797 (Wash., 1903) (manufacturer of explosive "champagne cider" liable for personal injury to purchaser from dealer)
- (5) Burk v Creamery Package Mfg. Co., 102 N.W. 793 (Iowa, 1905) (supplier of sulphuric acid liable for personal injury to invitee of purchaser)
- (6) Clement v Crosby & Co., 111 N.W. 745 (Mich., 1907) (manufacturer of inflammable stove polish liable for personal injury to purchaser from retailer)
- (7) Wolcho v Arthur J. Rosenbluth & Co., 71 Atl. 566 (Conn., 1908) (manufacturer of inflammable stovepipe enamel liable for personal injury to purchaser from retailer)
- (8) Peterson v Standard Oil Co., 106 Pac. 337 (Ore., 1910) (manufacturer of petroleum product liable for personal injury to purchaser from retailer)
- (9) Armstrong Packing Co. v Clem, 151 S.W. 576 (Tex., 1912) (soap manufacturer liable for personal injury to purchaser from dealer who had purchased from jobber)
- (10) Marsh v Usk Hardware Co., 132 Pac. 241 (Wash., 1913) (explosives manufacturer liable for personal injury to purchaser from retailer)
- (11) Thornhill v Carpenter-Morton Co., 108 N.E. 474 (Mass., 1915) (manufacturer of oil stain liable for personal injury to purchaser from retailer)
- (12) West Disinfecting Company v Plummer, 44 App. D.C. 345 (1916) (insecticide manufacturer liable for personal injury to employee of purchaser)
- (13) Brown v H. K. Mulford Co., 199 S.W. 582 (Mo., 1917) (dicta that manufacturer of hog cholera virus and serum could be liable to owner for injury to hogs)
- (14) Henry v Crook, 195 N.Y.S. 642 (1922) (sparkler manufacturer liable for personal injury to purchaser from retailer)
- (15) Genack v Gorman, 194 N.W. 575 (Mich., 1923) (manufacturer of inflammable stove polish liable for personal injury to purchaser from retailer)
- (16) Gahill v Inecto, Inc., 203 N.Y.S. 1 (1924) (manufacturer of hair dye liable for personal injury to patron of beauty shop)
- (17) Hruska v Parke, Davis & Co., 6 F. (2d) 536 (Mo., 1925) (manufacturer of medicinal preparation liable for personal injury to patient of physician)
- (18) Gulf Refining Co. of La. v Jinright, 10 F. (2d) 306 (Ala., 1925) (supplier of petroleum product liable for personal injury to purchaser from retailer)
- (19) Kentucky Independent Oil Co. v Schnitzler, 271 S.W. 570 (Ky., 1925) (supplier of petroleum product liable for personal injury to purchaser from retailer)
- (20) Kolberg v Sherwin-Williams Co., 269 Pac. 975 (Cal., 1928) (insecticide manufacturer liable for property damage to purchaser from dealer)

- (21) Pine Grove Poultry Farm v Newtown By-Products Mfg. Co., 162 N.E. 84 (N.Y., 1928) (manufacturer of poultry feed liable to purchaser from dealer for injury to poultry)
- (22) Louisiana Oil Refining Corporation v Reed, 38 F. (2d) 159 (La., 1930) (supplier of petroleum product liable for personal injury to employee of purchaser)
- (23) Farley v Edward E. Tower & Co., 171 N.E. 639 (Mass., 1930) (manufacturer of inflammable combs liable for personal injury to patron of beauty parlor)
- (24) Read Phosphate Co. v Vickers, 11 Tenn. App. 146 (1930) (supplier of sulphuric acid liable for personal injury to employee of purchaser)
- (25) Victory Sparkler & Specialty Co. v Latimer, 53 F. (2d) 3 (Mo., 1931) (fireworks manufacturer liable for personal injury to purchaser from dealer)
- (26) W. T. Rawleigh Co. v Shoults, 56 F. (2d) 148 (Pa., 1932) (disinfectant manufacturer liable for personal injury to purchaser from dealer)
- (27) Smith v Peerless Glass Co., 181 N.E. 576 (N.Y., 1932) (manufacturer of bottle liable for personal injury to purchaser of bottled beverage from dealer)
- (28) E. I. DuPont de Nemours & Co. v Baridon, 73 F. (2d) 26 (Iowa, 1934) (fungicide manufacturer liable to purchaser from dealer for property damage; reversed on other grounds)
- (29) Genesee County Patrons Fire Relief Ass'n. v L. Sonneborn, 189 N.E. 551 (N.Y., 1934) (manufacturer of waterproofing compound liable to purchaser from dealer for property damage)
- (30) Gulf Refining Co. v Williams, 185 So. 234 (Miss., 1938) (supplier of petroleum product liable for personal injury to employee of purchaser)
- (31) Petzold v Roux Laboratories, Inc., 11 N.Y.S. (2d) 565 (1939) (manufacturer of hair dye liable for personal injury to patron of beauty shop)
- (32) Gordy v Pan American Petroleum Corp., 193 So. 27 (Miss., 1940) (distributor of petroleum product liable as manufacturer for personal injury to purchaser from retailer)
- (33) White v General Chemical Co., 136 S.W. (2d) 345 (Mo., 1940) (chemical manufacturer liable for personal injury to employee of purchaser)
- (34) Commissioners of the State Insurance Fund v City Chemical Corporation, 48 N.E. (2d) 262 (N.Y., 1943) (chemical distributor liable as manufacturer for personal injury to employee of purchaser)
- (35) Orr v Shell Oil Co., 177 S.W. (2d) 608 (Mo., 1943) (insecticide manufacturer liable for personal injury to employee of formulator)
- (36) E. I. DuPont de Nemours & Co. v Wright, 146 F. (2d) 765 (Ky., 1944) (nitro-cellulose manufacturer liable for personal injury to employee of consignee)
- (37) Noone v Fred Perlberg, Inc., 49 N.Y.S. (2d) 460 (1944), affirmed without opinion, 60 N.E. (2d) 839 (N.Y., 1945) (dress manufacturer liable for personal injury to purchaser from retailer)
- (38) Steber v Kohn, 149 F. (2d) 4 (Ill., 1945) (manufacturer of shoe dye liable for personal injury to purchaser from retailer)
- (39) Ebers v General Chemical Co., 17 N.W. (2d) 176 (Mich., 1945) (insecticide manufacturer liable to purchaser from distributor for property damage)
- (40) Maize v Atlantic Refining Co., 41 A (2d) 850 (Pa., 1945) (manufacturer of cleaning solvent liable for personal injury to purchaser from retailer)
- (41) Carter v Yardley, 64 N.E. (2d) 693 (Mass., 1946) (perfume manufacturer liable for personal injury to purchaser from retailer)
- (42) Tingey v E. F. Houghton & Co., 179 P. (2d) 807 (Cal., 1947) (manufacturer of liquid heat quench liable for personal injury to employee of purchaser)
- (43) Chapman v Deep Rock Oil Corp., 77 N.E. (2d) 883 (Ill., 1948) (supplier of petroleum product liable for personal injury and property damage to purchaser from retailer who had purchased from distributor)
- (44) Brown v Higelow, 88 N.E. (2d) 542 (Mass., 1949) (cattle feed manufacturer liable to purchaser from dealer for injury to cattle)
- (45) Chapman Chemical Co. v Taylor, 222 S.W. (2d) 820 (Ark., 1949) (herbicide manufacturer liable for damage to property adjacent to property of purchaser)
- (46) Eades v Spencer-Adams Paint Co., 60 S.E. (2d) 543 (Ga., 1950) (paint manufacturer liable to purchaser from dealer for property damage)
- (47) Green v Equitable Powder Mfg. Co., 94 F. Supp. 126 (Ark., 1950) (explosives manufacturer liable for personal injury to employee of purchaser from manufacturer)
- (48) Wechsler v Hoffman-La Roche, Inc., 99 N.Y.S. (2d) 588 (1950) (drug manufacturer liable for personal injury to sub-purchaser; fraud alleged)
- (49) Beadles v Servel Inc., 100 N.E. (2d) 405 (Ill., 1951) (refrigerator manufacturer liable for personal injury to second-hand purchaser)
- (50) Gail v Union Ice Co., 239 P. (2d) 48 (Cal., 1951) (manufacturer of sulphuric acid liable for death of bystander on premises of sub-purchaser)

(d) Cases holding manufacturer not liable to remote parties in which lack of privity was either determining factor or appeared to influence court's decision:

- (1) Slattery v Colgate, 85 Atl. 639 (R.I., 1903) (soap containing excessive alkali)
- (2) Hasbrouck v Armour & Co., 121 N.W. 157 (Wis., 1909) (soap with a concealed needle not "inherently dangerous")
- (3) Kramer v Carbolinum Wood Preserving Co., 177 Pac. 771 (Wash., 1919) (insecticide manufacturer not liable to purchaser from dealer where there was no showing that manufacturer ever had possession of particular product causing property damage)
- (4) Windren Mfg. Co. v Boston Blacking Co., 131 N.E. 454 (Mass., 1921) (privity necessary where product endangers property only)
- (5) Cliff v California Spray-Chemical Corp., 257 Pac. 99 (Cal., 1927) (insecticide not imminently or inherently dangerous)
- (6) Schrafnek v Benjamin Moore & Co., 54 F. (2d) 76 (N.Y., 1931) (wallpaper compound not imminently or inherently dangerous)

- (7) *Lenz v Standard Oil Co. of N.Y.*, 186 Atl. 329 (N.H., 1936) (lead tetraethyl not imminently dangerous for all purposes)
- (8) *Poplar v Bourjois, Inc.*, 80 N.E. (2d) 334 (N.Y., 1948) (metal star adorning cosmetic box not inherently or imminently dangerous)

(e) General References:

(1) Texts and Encyclopedias

- (i) Prosser, Torts, Sec. 83 (1941)
- (ii) Restatement, Torts, secs. 388-398
- (iii) Cooley, Torts, sec. 498 (1932)
- (iv) 38 Am. Jur., Negligence, secs. 20-22
- (v) Dickerson, Products Liability and the Food Consumer, pp. 110-113

(2) Legal Periodicals

- (i) Feezer, Tort Liability of Manufacturers and Vendors, 10 Minn. L. Rev. 1 (1925)
- (ii) Bohlen, Liability of Manufacturers to Persons other than their Immediate Vendees, 45 L. Q. Rev. 343 (1929)
- (iii) Russell, Manufacturers' Liability to the Ultimate Consumer, 21 Ky. L. J. 388 (1933)
- (iv) Feezer, Tort Liability of Manufacturers, 19 Minn. L. Rev. 752 (1935)
- (v) Phelps, Extent of Manufacturer's Duty of Care to Persons other than the Immediate Purchaser, 2 John Marshall Law Quarterly 387 (1937)
- (vi) Seefeld, Tort Liability of Manufacturers to Users of Their Goods, 25 Marq. L. Rev. 173 (1941)
- (vii) Clark, Let the Maker Beware, 19 St. John's L. Rev. 85 (1945) (criticizing *Noone v Perlberg*, *supra*)
- (viii) Friedmann, Social Insurance and the Principles of Tort Liability, 63 Harv. L. Rev. 241 (1949)
- (ix) Peairs, The God in the Machine, 29 B.U.L. Rev. 37 (1949) (criticizing *Carter v Yardley*, *supra*)

(3) Annotations

- (i) 17 A.L.R. 672; 39 A.L.R. 992; 63 A.L.R. 340; 88 A.L.R. 527; 105 A.L.R. 1502; 111 A.L.R. 1239; 140 A.L.R. 191; 142 A.L.R. 1490—"Liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from a middleman."
- (ii) 164 A.L.R. 569—"Manufacturer's liability for negligence causing injury to person or damage to property, of ultimate consumer or user." (excellent annotation discussing the concept of privity in tort cases as developed in England and in the United States)
- (iii) 11 A.L.R. (2d) 1028—"Liability of manufacturer or wholesaler for injury caused by third person's use of explosives or other dangerous article sold to retailer in violation of law" (discussion of explosives and inflammables)

c. Particular Types of Negligence

3. The violation of a statute which is designed to protect the public against the type of harm which has occurred may be negligence in itself.

Comment: Numerous statutes and regulatory controls of a penal nature regulate the manufacture and sale of chemical products at both the federal and state levels of government. Illustrative enactments at the federal level are the Federal Insecticide, Fungicide and Rodenticide Act, the Federal Food, Drug and Cosmetic Act, the Federal Caustic Poison Act, and the various regulations of the Interstate Commerce Commission regulating the transportation of explosives and inflammables. At the state level, there are the various economic poisons laws, food and drug laws, pharmacy and poisons laws, and laws regulating the sale of oil and other petroleum products. In general, these laws prescribe the information which must be placed on the labels of such products as agricultural economic poisons, food, drugs, cosmetics, industrial and household poisons and chemicals, and petroleum and, in some cases, prescribe standards of quality. The primary design of most of these laws is to afford protection to the general public, including transportation workers, middlemen, users and consumers, from the standpoint of safety.

The courts have frequently been called upon to decide the effect in civil proceedings of a violation of provisions of statutes of this nature and have generally held that such violations constitute negligence per se. Although the statute itself is penal in nature and does not provide for the award of civil damages in favor of a party injured by reason of its violation, the courts accomplish the same result by indirection. It is said that the legislature has established the standard of care for a particular situation and that the court has no alternative but to apply the statutory standard in civil negligence cases. A small minority of jurisdictions hold that such violations constitute evidence of negligence which is not conclusive. It may be noted that some jurisdictions adhere to the general view that the violation of a statute designed for the public protection is negligence as a matter of law but hold that the violation of a municipal ordinance is only evidence of negligence.

A particular act or omission such as the failure to label a product "poison" as required by law, may be the violation of both a common-law duty and a statutory duty. In such a case, a cause of action could rest on either or both grounds.

(a) Cases holding manufacturer liable for statutory violation:

- (1) *Wellington v Downer Kerosene Oil Co.*, 104 Mass. 64 (1870) (sale of naphtha as oil; statute created civil liability)
- (2) *Burk v Creamery Package Mfg. Co.*, 102 N.W. 793 (Iowa, 1905) (sulphuric acid not labeled "poison")
- (3) *Stowell v Standard Oil Co.*, 102 N.W. 227 (Mich., 1905) (sale of kerosene below statutory standard)
- (4) *Ellis v Republic Oil Co.*, 110 N.W. 20 (Iowa, 1906) (sale of kerosene and gasoline mixture as kerosene)
- (5) *Waters-Pierce Oil Co. v Deselms*, 212 U.S. 159 (1909) (sale of kerosene below statutory standard)
- (6) *Peterson v Standard Oil Co.*, 106 Pac. 337 (Ore., 1910) (gasoline not labeled with proper cautionary statement; dicta that violation of municipal ordinance would only be evidence of negligence)
- (7) *Gately v Taylor*, 97 N.E. 619 (Mass., 1912) (naphtha not labeled; not clear whether negligence per se or evidence of negligence)
- (8) *Ramsey v Standard Oil Co.*, 120 S.E. 331 (N.C., 1923) (sale of kerosene and gasoline mixture as kerosene)
- (9) *Gulf Refining Co., of La. v Jinright*, 10 F (2d) 306 (Ala., 1925) (sale of oil below statutory standard; not clear whether negligence per se or evidence of negligence)

- (10) Standard Oil Co. v Robb, 149 N.E. 567 (Ind., 1925) (sale of kerosene below statutory standard)
- (11) Getz v Standard Oil Co., 210 N.W. 78 (Minn., 1926) (sale of kerosene below statutory standard)
- (12) Olena v Standard Oil Co., 135 Atl. 27 (N.H., 1926) (sale of kerosene and gasoline mixture as kerosene)
- (13) Merchants' Bank v Sherman, 110 So. 805 (Ala., 1926) (sale of kerosene and gasoline mixture as kerosene)
- (14) Pine Grove Poultry Farm v Newtown By-Products Mfg. Co., 162 N.E. 84 (N.Y., 1928) (wire in animal feed violative of adulteration provision in commercial feeding stuffs statute)
- (15) Chapman v Deep Rock Oil Corp., 77 N.E. (2d) 883 (Ill., 1948) (oil untested and below statutory standard)
- (16) Sinclair Refining Co. v Piles, 221 S.W. (2d) 12 (Ark., 1949) (sale of oil below statutory standard; not clear whether negligence per se or only evidence of negligence)

Note: Refer to Section B, pp. 19-20 for further pertinent cases involving vendors other than manufacturers.

(b) Cases holding statutory violation only evidence of negligence:

- (1) Walter v Bowman Dairy Co., 47 N.E. (2d) 739 (Ill., 1943) (statute prohibiting sale of adulterated milk)
- See also, Gately v Taylor, 97 N.E. 619 (Mass., 1912) (decision not clear whether negligence per se or evidence of negligence)
- Sinclair Refining Co. v Piles, 221 S.W. (2d) 12 (Ark., 1949) (decision not clear whether negligence per se or evidence of negligence)

(c) Cases holding manufacturer not liable where statute was interpreted as inapplicable:

- (1) Boyd v Frenchee Chemical Corp., 37 F. Supp. 306 (N.Y., 1941) (shoe cleaner not a poison under poisons law)
- (2) McClaren v G. S. Robins & Co., 162 S.W. (2d) 856 (Mo., 1942) (carbon tetrachloride not a poison under poisons law)
- (3) Richardson v De Luca, 535 (2d) 199 (La., 1951) (benzol not a coal oil or fluid used for illuminating or burning purposes under statute regulating sale of certain petroleum products)

Note: Refer to Section B, p. 19 for further pertinent cases involving vendors other than manufacturers.

(d) Cases holding manufacturer not liable where violation of statute was not the proximate cause of the injury complained of:

- (1) Boyd v Frenchee Chemical Corp., 37 F. Supp. 306 (N.Y., 1941) (failure to label shoe cleaner "poison" not the cause of child's consuming it)

Note: Refer to Section B, pp. 19-20 for further pertinent cases involving vendors other than manufacturers.

(e) General References:

- (1) Texts and Encyclopedias
 - (i) Prosser, Torts, sec. 39 (1941)
 - (ii) Restatement, Torts, secs. 285-288
 - (iii) 38 Am. Jur., Negligence, secs. 158-170
- (2) Legal Periodicals
 - (i) Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914)
 - (ii) Green, Are There Dependable Rules of Causation, 77 U. Pa. L. Rev. 601 (1929)
 - (iii) Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361 (1932)
 - (iv) Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. 453 (1933)
 - (v) Gregory, Breach of Criminal Licensing Statutes in Civil Litigation, 36 Conn. L.Q. 622 (1951)
 - (vi) Notes: (1928) 13 Cornell L.Q. 634; (1932) 32 Col. L. Rev. 712; (1935) 19 Minn. L. Rev. 666.
- (3) Annotations:
 - (i) 12 A.L.R. 1309 - "Violation of statute or ordinance in relation to explosives as ground of action in favor of one injured in person or property by explosion."
 - (ii) 11 A.L.R. (2d) 1028 - "Liability of manufacturer or wholesaler for injury caused by third person's use of explosive or other dangerous article sold to retailer in violation of law."

4. A manufacturer may be negligent by failing to give an appropriate warning or caution of any danger incident to the normal use of his product which a user would not ordinarily discover.

Comment: The manufacturer may be held negligent where he knows or should know that his product is, or is likely to be, dangerous for the use for which it is supplied, and has no reason to believe that those, for whose use the product is supplied, will realize its dangerous condition, and yet fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so. The failure of a manufacturer in this duty of disclosure has been the most frequent basis for imposing tort liability in cases involving chemical products. Generally, the breach of duty occurs when the manufacturer fails to label his product with adequate cautionary statements or with adequate directions for use where the product is safe when used in one manner but unsafe when used in another. In the case of products which are usually marketed without accompanying labeling, the breach may arise by reason of failure to warn orally or by other extrinsic media.

Except in unusual situations, it is generally held that the manufacturer cannot defend a damage claim based on a breach of the duty of disclosure on the ground that he did not actually know of the dangerous properties in his product. The law usually holds that he "should have known." The manufacturer is not liable, however, where the product is not dangerous when put to its normal use but causes harm when used in a manner which was not reasonably foreseeable, or when the complaining party knew of the danger or could have easily discovered it in the exercise of due care, or when the breach of the duty of disclosure was not the proximate cause of the injury complained of. In determining the adequacy of a particular warning on a labeled product, courts will examine the entire labeling. A label or warning may be technically accurate and yet inadequate if adjudged not understandable by the ordinary user.

(a) Cases holding manufacturer liable for failure to label adequately:

- (1) Wellington v Downer Kerosene Oil Co., 104 Mass. 64 (1870) (mislabelled oil product)
- (2) Blood Balm Co. v Cooper, 10 S.E. 118 (Ga., 1889) (inadequate label on proprietary medicine showing presence of iodide of potash; question of dosage involved)
- (3) Standard Oil Co. v Tierney, 17 S.W. 1025 (Ky., 1891) (designation on bill of lading as "carbon oil" instead of naphtha)
- (4) Weiser v Holzman, 73 Pac. 797 (Wash., 1903) (no label showing explosive nature of "champagne cider")
- (5) Burk v Creamery Package Mfg. Co., 102 N.W. 793 (Iowa, 1905) (no poison label on jug of sulphuric acid)
- (6) Clement v Crosby & Co., 111 N.W. 745 (Mich., 1907) (no label showing inflammable nature of stove polish)

- (7) *Wolcho v Arthur J. Rosenbluth & Co.*, 71 Atl. 566 (Conn., 1908) (no label warning of explosive nature of stove-pipe enamel)
 - (8) *Thornhill v Carpenter-Morton Co.*, 108 N.E. 474 (Mass., 1915) (no warning of inflammable nature of oil stain)
 - (9) *West Disinfecting Co. v Plummer*, 44 App. D.C. 345 (1916) (failure to label insecticide and accompanying sprayer with warning)
 - (10) *Henry v Crook*, 195 N.Y.S. 642 (1922) (whether label on sparklers reading "do not touch glowing wire" was adequate warning to child whose dress set fire, held question for jury)
 - (11) *Genack v Gorman*, 194 N.W. 575 (Mich., 1923) (no label showing explosive ingredients in stove polish)
 - (12) *Hruska v Parke, Davis & Co.*, 6 F. (2d) 536 (Mo., 1925) (preparation advertised as "Camphor Solution Neutral" containing mineral oil technically accurate but insufficient)
 - (13) *Farley v Edward E. Tower & Co.*, 171 N.E. 639 (Mass., 1930) (failure to warn of inflammable nature of comb)
 - (14) *Fort Wayne Drug Co. v Flemion*, 175 N.E. 670 (Ind., 1931) (failure to label can of benzol)
 - (15) *Victory Sparkler & Specialty Co. v Latimer*, 53 F. (2d) 3 (Mo., 1931) (failure to label fireworks containing yellow phosphorus)
 - (16) *Genesee County Patrons Fire Relief Ass'n. v L. Sonneborn*, 189 N.E. 551 (N.Y., 1934) (inadequate warning of inflammable properties of waterproofing compound)
 - (17) *Halloran v Parke, Davis & Co.*, 280 N.Y.S. 58 (1935) (no warning or directions for use on pharmaceutical preparation; memo opinion)
 - (18) *Pease v Sinclair Refining Co.*, 104 F. (2d) 183 (N.Y., 1939) (no caution that bottle labeled kerosene contained water)
 - (19) *Standard Oil Co. v Lyons*, 130 F. (2d) 965 (Iowa, 1942) (no label showing inflammable nature of waterproofing compound)
 - (20) *Maize v Atlantic Refining Co.*, 41 A. (2d) 850 (Pa., 1945) (inadequately labeled cleaning solvent)
 - (21) *Tingey v E. F. Moughton & Co.*, 179 P. (2d) 807 (Cal., 1947) (no label showing explosive nature of liquid heat quench)
 - (22) *Gall v Union Ice Co.*, 239 P. (2d) 48 (Cal., 1951) (no label showing explosive nature of drum of sulphuric acid)
- (b) Cases holding manufacturer liable for failure to warn by means other than labels:
- (1) *Read Phosphate Co. v Vickers*, 11 Tenn. App. 146 (1930) (failure to warn of danger involved in pouring hot sulphuric acid in metal container)
 - (2) *Abbott Laboratories v Lapp*, 78 F. (2d) 170 (Ill., 1935) (failure to warn physician to refrain from administering product if it was coagulated)
 - (3) *Orr v Shell Oil Co.*, 177 S.W. (2d) 608 (Mo., 1943) (failure to warn of dangerous properties of insecticide)
 - (4) *Noone v Fred Perlberg, Inc.*, 49 N.Y.S. (2d) 460 (1944) (failure to warn of inflammable nature of wearing apparel)
 - (5) *E. I. DuPont de Nemours & Co. v Wright*, 146 F. (2d) 765 (Ky., 1944) (failure to warn of dangerous condition of drum)
- (c) Cases holding manufacturer not liable where warning was adequate:
- (1) *International Mercantile Marine Co. v Fels*, 170 Fed. 275 (C.C.A. 2, 1909) (verbal warning of explosive nature of soap when confined)
 - (2) *Brown v H. K. Mulford*, 199 S.W. 582 (Mo., 1917) (label on hog cholera virus and serum)
 - (3) *Cliff v California Spray-Chemical Corp.*, 257 Pac. 99 (Cal., 1927) (insecticide labeled with quality and ingredients)
 - (4) *Carmen v Eli Lilly & Co.*, 32 N.E. (2d) 729 (Ind., 1941) (pamphlet accompanying rabies vaccine)
 - (5) *McClaren v G. S. Robins & Co.*, 162 S.W. (2d) 856 (Mo., 1942) (label on carbon tetrachloride reading "Volatile Solvent, Use with Adequate Ventilation. Avoid Prolonged Ventilation" gave sufficient warning of danger of use in unventilated place)
 - (6) *Bender v William Cooper & Nephews*, 55 N.E. (2d) 94 (Ill., 1944) (disinfectant labeled "safe, non-irritating" with directions for use and statement of strength in undiluted state)
 - (7) *Walton v Sherwin-Williams Co.*, 191 F. (2d) 277 (Ark., 1951) (label on herbicide container)
 - (8) *Richardson v De Luca*, 53 S. (2d) 199 (La., 1951) (label on container of net preservative solution and oral warnings)
- (d) Cases holding manufacturer not liable where product was not dangerous when put to its intended use:
- (1) *Cliff v California Spray-Chemical Corp.*, 257 Pac. 99 (Cal., 1927) (insecticide)
 - (2) *Boyd v French Chemical Corp.*, 37 F. Supp. 306 (N.Y., 1941) (shoe cleaner consumed by child)
 - (3) *Bender v William Cooper & Nephews*, 55 N.E. (2d) 94 (Ill., 1944) (disinfectant labeled "safe" did not cover usage in undiluted state)
 - (4) *Lawson v The Benjamin Ansehl Co.*, 180 S.W. (2d) 751 (Mo., 1944) (finger-nail polish remover ignited by child)
 - (5) *Briggs v National Industries*, 207 P. (2d) 110 (Cal., 1949) (chemical toxic in cold wave preparation)
 - (6) *Pabellon v Grace Line, Inc.*, 94 F. Supp. 989 (N.Y., 1950), reversed 191 F. (2d) 169 (N.Y., 1951) (detergents and cleaners exploded when mixed)
- (e) Cases holding manufacturer not liable where user knew or could have discovered danger:
- (1) *Carmen v Eli Lilly & Co.*, 32 N.E. (2d) 729 (Ind., 1941) (patient told by physician of risk involved in use of rabies vaccine and advised by sales literature)
 - (2) *Bender v William Cooper & Nephews*, 55 N.E. (2d) 94 (Ill., 1944) (user should have known that disinfectant labeled "safe" was unsafe for the eyes in undiluted state)
 - (3) *Dempsey v Virginia Dare Stores*, 186 S.W. (2d) 217 (Mo., 1945) (purchaser must have known that rayon fuzzy lounging robe was inflammable)
 - (4) *Sawyer v Pine Oil Sales Co.*, 155 F. (2d) 855 (La., 1946) (no evidence that purchaser was unaware that cleansing agent was dangerous to the eyes)

- (5) *Gibson v California Spray-Chemical Corp.*, 188 P. (2d) 316 (Wash., 1948) (user knew or could have discovered that insecticide was in experimental stage)
- (6) *Marcus v Specific Pharmaceuticals, C.C.H.* 22133 (N.Y., 1948) (drug sold under physician's prescription and not to public generally)
- See also, *McCrossin v Noyes Bros. & Cutler*, 173 N.W. 566 (Minn., 1919) (name, "Roach Doom", suggested danger; vendor involved)
- (f) Cases holding manufacturer not liable where inadequate warning was not proximate cause of injury complained of:

- (1) *Kapp v E. I. DuPont de Nemours & Co.*, 57 F. Supp. 32 (Mich., 1944) (no label on drum of aqua ammonia; explosion occurred in rebottled container)

(g) General References:

(1) Texts and Encyclopedias

- (i) Restatement, Torts, sec. 388

(2) Legal Periodicals - (None)

(3) Annotations

- (i) 86 A.L.R. 947 - "Duty of manufacturer or seller to warn of latent dangers incident to article as a class, as distinguished from duty with respect to defects in particular article."
- (ii) 12 A.L.R. (2d) 436 - "Liability for injury consequent upon spraying or dusting of crop."

5. A manufacturer who undertakes to make claims for the safety of his product by label or otherwise may be negligent by failing to ascertain the truth and accuracy of such representations when they are in fact false or inaccurate.

Comment: The manufacturer may or may not have the positive duty to place cautionary statements, directions for use or other warnings and claims on the label of his product or in the labeling which accompanies it. However, once the manufacturer assumes this undertaking, he assumes the corollary duty to exercise due care that the statements, claims or representations made are truthful, accurate, and not misleading to the ordinary purchaser or user. The failure to discharge this duty of accurate disclosure is usually termed negligent misrepresentation. This tort, which has evolved from the ancient action of deceit, generally consists in the making of a false representation of material fact without sufficient knowledge as to whether the representation is true or not. Since the manufacturer is generally charged with the knowledge of the safety of his product, false representations of safety are likely to lead to liability. The representations may be made orally, by the label on the product itself, by trade circulars, advertisements or by any medium which is brought home by the manufacturer to the purchaser or user.

There is a separate tort of deceit which is closely related to the tort of negligent misrepresentation but is rarely involved in chemical-products liability cases. The gravamen of this action is the intentional making of a false representation with the intent to deceive. Whereas negligent misrepresentation may be based on innocent but careless conduct, deceit borders on fraud.

(a) Cases holding manufacturer liable for negligent misrepresentation:

- (1) *Darks v Scudders-Gale Grocer Co.*, 130 S.W. 430 (Mo., 1910) (oral claims for medicinal preparation)
- (2) *Marsh v Usk Hardware Co.*, 132 Pac. 241 (Wash., 1913) (claims made in trade circulars)
- (3) *West Disinfecting Co. v Plummer*, 44 App. D.C. 345 (1916) (oral claims for insecticide)
- (4) *Valmas Drug Co. v Smoots*, 269 Fed. 356 (C.C.A. 6th, 1920) (claims for medicinal preparation on label and in advertisements)
- (5) *Cahill v Inesto, Inc.*, 203 N.Y.S. 1 (1924) (hair dye represented as harmless in advertising pamphlets)
- (6) *Hruska v Parke, Davis & Co.*, 6 F. (2d) 536 (Mo., 1925) (character of medicinal drug in advertising)
- (7) *Kolberg v Sherwin-Williams Co.*, 269 Pac. 975 (Cal., 1928) (oral claims for insecticide)
- (8) *White v National Bank of Commerce*, 278 Pac. 915 (Cal., 1929) (oral claims for insecticide)
- (9) *Louisiana Oil Refining Corporation v Reed*, 38 F. (2d) 159 (La., 1930) (oral representation of safety of explosive)
- (10) *Wenherholm v Stanford University School of Medicine*, 128 P. (2d) 522 (Cal., 1942) (published claims for drugs fraud and deceit)
- (11) *Eberts v General Chemical Co.*, 17 N.W. (2d) 176 (Mich., 1945) (claims for insecticide in advertising pamphlet)
- (12) *Eades v Spencer-Adams Paint Co.*, 60 S.E. (2d) 543 (Ga., 1950) (paint represented as meeting certain specifications)
- (13) *Wechsler v Hoffman-La Roche, Inc.*, 99 N.Y.S. (2d) 588 (1950) (claims for drug made to medical profession)

(b) Cases holding manufacturer not liable where representations were not false or inaccurate:

- (1) *Carmen v Eli Lilly & Co.*, 32 N.E. (2d) 729 (Ind., 1941) (statements in pamphlet furnished by manufacturer of anti-rabies vaccine)
- (2) *Benjar v William Cooper & Nephews*, 55 N.E. (2d) 94 (Ill., 1944) (label claims for disinfectant)
- (3) *Gibson v California Spray-Chemical Corp.*, 188 P. (2d) 316 (Wash., 1948) (claims for insecticide in pamphlet)

(c) General References:

(1) Texts and Encyclopedias

- (i) Prosser, Torts, secs. 85-90 (1941)

- (ii) Cooley, Torts, secs. 346-366 (fraud and deception), sec. 497 (negligent misrepresentation) (1932)

- (iii) Restatement, Torts, secs. 525-552 (deceit), secs. 304-311 (negligent misrepresentation)

(2) Legal Periodicals:

- (i) Williston, Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415 (1911)

- (ii) Bohlen, Misrepresentation as Deceit, Negligence, or Warranty, 42 Harv. L. Rev. 733 (1929)

- (iii) Green, Deceit, 16 Va. L. Rev. 749 (1930)

- (iv) Weisiger, Basis of Liability for Misrepresentation, 24 Ill. L. Rev. 866 (1930)

- (v) Green, Innocent Misrepresentation, 19 Va. L. Rev. 242 (1933)

- (vi) Keeton, Fraud: Misrepresentation of Opinion, 21 Minn. L. Rev. 643 (1937)

- (vii) Harper & McNeely, A Synthesis of the Law of Misrepresentation, 22 Minn. L. Rev. 938 (1938)

(viii) Morison, Liability in Negligence for False Statements, 67 Law Q. Rev. 212 (1951)

(ix) Notes: (1951) 13 Ga. B. J. 343 (noting Eades v Spencer-Adams Paint Co., supra); 22 Wash. U.L.Q. 406 (1947) (effect of advertising)

(3) Annotations: (None)

6. A manufacturer may be negligent by failing to test his product adequately before placing it on the market to assure that it is safe for its intended use.

Comment: The manufacturer of chemical products owes a duty to the public to conduct such experiments and tests, as are reasonable under the circumstances, to ascertain the safety of his product for its intended use. This is another facet of the general principle that the manufacturer should know of the dangerous properties of the product which he markets and if he doesn't he must ascertain the unknown. It cannot be said that in all cases such pretesting is absolutely essential in the sense that a failure to do so would be negligent per se, although one decision has gone to this extent. Testing would seem to be required only in those cases where the product involved was one whose character and potential danger were not generally known and understood in ordinary commercial usage.

It will be noted in Section B, pp. 21-22 that vendors other than manufacturers do not as a rule have the duty to test the products which they sell. However, suppliers of basic ingredients or substances which are used in the manufacture of finished chemical products may owe a duty to test the material which they supply. In such a case, the manufacturer of the finished product would not have the duty to test the basic ingredients as such but would not be relieved of the duty to conduct reasonable tests on the finished products.

(a) Cases holding manufacturer liable for failure to conduct adequate tests on his product:

- (1) Stowell v Standard Oil Co., 102 N.W. 227 (Mich., 1905) (failure to test kerosene)
- (2) MacPherson v Buick Motor Co., 111 N.E. 1050 (N.Y., 1916) (failure of automobile manufacturer to test wheel manufactured by another)
- (3) Smith v Peerless Glass Co., 181 N.E. 576 (N.Y., 1932) (failure of bottle manufacturer to test bottle sold to manufacturer of bottled beverages)
- (4) Ebers v General Chemical Co., 17 N.W. (2d) 176 (Mich., 1945) (failure to test insecticide in area where sold for use)
- (5) Riggin v Federal Cartridge Corp., 204 S.W. (2d) 94 (Mo., 1947) (failure to test ammunition)
- (6) Chapman v Deep Rock Oil Corp., 77 N.E. (2d) 833 (Ill., 1948) (failure to test petroleum product as required by statute)
- (7) Chapman Chemical Co. v Taylor, 222 S.W. (2d) 820 (Ark., 1949) (failure to test herbicide for drifting propensities, held negligence per se)

(b) Cases holding manufacturer not liable where tests were held adequate or unnecessary:

- (1) Woschenko v Schmidt & Sons, Inc., 66 A (2d) 159 (N.J., 1949) (failure to conduct pressure tests on barrel heads, held insufficient to show cause of resulting explosion)
- (2) Walton v Sherwin-Williams Co., 191 F. (2d) 277 (Ark., 1951) (field tests on herbicide held adequate)

(c) General References:

- (1) Texts and Encyclopedias:
 - (i) Restatement, Torts, sec. 395, comments (a) and (f)
- (2) Legal Periodicals - (None)
- (3) Annotations
 - (i) 156 A.L.R. 479 - "Manufacturer's liability for injury or damage as affected by his test, or by his failure to test, for defects."

7. A manufacturer may be negligent in failing to use a formula for his product which will make it safe for its intended use.

Comment: The manufacturer has a duty to exercise reasonable care in the preparation of his product to the end that the product as placed on the market is safe for its intended use. Thus, he has a duty to test his product to ascertain its safety as well as the duty to adopt and follow a formula which is safe, or, if it is not safe for certain purposes or when used in a certain manner, to apprise the public of this fact. Although the duty to warn the public of risks incidental to the use of a particular product is generally the ultimate duty which the manufacturer owes since the discharge of this duty accomplishes what the duty to test and the duty to adopt and use a safe formula are designed to effect, the courts tend to discuss these responsibilities in terms of separate types of negligent conduct.

If the product which is ultimately placed on the market by the manufacturer contains any intentionally-added poisonous or deleterious substance or ingredient which renders the product harmful and which, in fact, causes harm, liability inevitably results. In food-products liability cases, the principle of res ipsa loquitur is frequently resorted to to impose liability on the food manufacturer irrespective of proof of negligence. The principles involved in the situation where a particular product is unsafe by reason of the presence of foreign matter rather than matter which is a part of the formula of the finished product are discussed p. 16 *infra*.

The formula of some products may be safe for most uses or when used by the majority of the public and yet unsafe for certain uses or when used by person with certain allergies. There are few decisive decisions on the mitigating effect which the allergy of a plaintiff may have on the liability of the manufacturer. The courts tend to speak of "foreseeability" and hold the manufacturer liable in such cases where the particular allergy involved is one frequently encountered.

(a) Cases holding manufacturer liable for harm caused by the presence of harmful substances in the formula of his product:

- (1) Blood Balm Co. v Cooper, 10 S.E. 118 (Ga., 1889) (drug containing iodide of potash; quantity recommended for use dangerous)
- (2) Armstrong Packing Co. v Clem, 151 S.W. 576 (Tex., 1912) (soap containing poisonous substance improperly neutralized)
- (3) Patterson v Orangeburg Fertilizer Co., 108 S.E. 401 (S.C., 1921) (excessive borax in fertilizer)
- (4) Cahill v Inecto, Inc., 203 N.Y.S. 1 (1924) (hair dye containing poisonous ingredient)
- (5) Hruska v Parke, Davis & Co., 6 F. (2d) 536 (Mo., 1925) (mineral oil in drug preparation)
- (6) Kolberg v Sherwin-Williams Co., 269 Pac. 975 (Cal., 1928) (excessive oil in insecticide)
- (7) Bundy v Ey-Teb, 289 N.Y.S. 905 (1935) (ingredient in hair dye)

- (8) *Petzold v Roux Laboratories, Inc.*, 11 N.Y.S. (2d) 565 (1939) (hair dye containing poisonous compound; no actual negligence proved)
- (9) *Ballard & Ballard Co., v Jones*, 21 S. (2d) 327 (Ala., 1945) (excessive calcium arsenate in flour)
- (10) *Carter v Yardley & Co.*, 64 N.E. (2d) 693 (Mass., 1946) (poisonous ingredient in perfume)
- (b) Cases holding manufacturer not liable where product was not dangerous when put to its intended use:
 - (1) *Cliff v California Spray-Chemical Corp.*, 257 Pac. 99 (Cal., 1927) (alleged dangerous substance in insecticide)
 - (2) *Karr v Inecto, Inc.*, 160 N.E. 398 (N.Y., 1928) (alleged dangerous substance in skin preparation)
 - (3) *Lenz v Standard Oil Co. of New York*, 186 Atl. 329 (N.H., 1936) (ethyl gasoline spilled on arm)
 - (4) *Elizabeth Arden, Inc. v Brown*, 107 F. (2d) 938 (Pa., 1939) (alleged harmful ingredient in toilet preparation)
 - (5) *Kohlman v Jefferson Bottling Co.*, 192 So. 113 (La., 1939) (caustic soda solution in bottled beverage)
 - (6) *Wise v Hiresta Laboratories*, 28 N.Y.S. (2d) 382 (1941) (cosmetic allegedly inherently dangerous)
 - (7) *Sawyer v Pine Oil Sales Co.*, 155 F. (2d) 855 (La., 1946) (alleged dangerous ingredient in cleansing agent)
 - (8) *Cooper v Kolar, C.C.H.* 22, 132 (Ill., 1948) (alleged dangerous ingredient in hair cream)
 - (9) *Singer v Oken*, 87 N.Y.S. (2d) 686 (N.Y., 1949) (phenol in calomine lotion; question of allergy)
 - (10) *Briggs v National Industries*, 207 P. (2d) 110 (Cal., 1949) (chemical toxic in cold wave preparation)
 - (11) *J. R. Watkins Co. v Raymond*, 184 F. (2d) 925 (Minn., 1950) (alleged poisonous chemical in hair shampoo)
 - (12) *Tuscany v U.S. Standard Products Co.*, 243 S.W. (2d) 207 (Tex., 1951) (alleged impurity in drug)

See also, *Bennett v Pilot Products Co.*, 235 P. (2d) 525 (Utah, 1951) (alleged dangerous ingredients in permanent wave solution; distributor involved)

(c) General References:

- (1) Texts and Encyclopedias:
 - (i) Restatement, Torts, sec. 397
- (2) Legal Periodicals:
 - (i) Peairs, *The God in the Machine*, 29 B.U.L. Rev. 37 (1949) (criticizing *Carter v Yardley*, *supra*)
- (3) Annotations:
 - (i) 121 A.L.R. 464 - "Seller's or manufacturer's liability for injuries as affected by peculiar or unusual susceptibility of buyer or user to injury from dye or other ingredient in article sold."

8. A manufacturer may be negligent in failing to take proper precautions against the contamination or adulteration of his product with foreign substances which will make the product unsafe for its intended use.

Comment: The manufacturer has a duty to exercise reasonable care during the processing and manufacturing of his products to prevent unintended contamination or adulteration. The methods employed in the manufacturing process, the conditions under which a product is manufactured and contained, and the adequacy of inspections during the manufacturing process and prior to distribution, are all relevant considerations upon the manufacturers' discharge of his duty, once harm has been caused by reason of a contaminated or adulterated product. In food-products liability cases, *res ipsa loquitur* is frequently relied upon to establish a cause of action in this type of claim.

The manufacturer has a valid defense in cases where the foreign substance was not in the product when the product left the hands of the manufacturer and the contamination or adulteration occurred in the line of distribution, or where the product was adulterated despite reasonable precautions and inspections on the part of the manufacturer, where the adulterant or contaminant did not render the product dangerous for its intended use.

(a) Cases holding manufacturer liable for harm caused by the presence of harmful foreign matter in his product:

- (1) *Pine Grove Poultry Farm v Newtown By-Products Mfg. Co.*, 162 N.E. 84 (N.Y., 1928) (wire in poultry feed)
- (2) *David v McKesson & Robbins, Inc.*, 300 N.Y.S. 635 (1937) (sodium fluoride in bicarbonate of soda; *memo opinion*)
- (3) *Gordy v Pan American Petroleum Corp.*, 193 So. 29 (Miss., 1940) (contaminated kerosene)
- (4) *Commissioners of State Insurance Fund v City Chemical Corporation*, 48 N.E. (2d) 262 (N.Y., 1943) (contaminated pyruvic acid)
- (5) *Tingey v E. F. Houghton & Co.*, 179 P. (2d) 807 (Cal., 1947) (liquid heat quench contaminated with foreign substance)
- (6) *Chapman v Deep Rock Oil Corp.*, 77 N.E. (2d) 883 (Ill., 1948) (contaminated kerosene)
- (7) *Sinclair Refining Co. v Piles*, 221 S.W. (2d) 12 (Ark., 1949) (contaminated kerosene)

(b) Cases holding manufacturer not liable where product was not dangerous when put to its intended use:

- (1) *Schiffrank v Benjamin Moore & Co.*, 54 F. (2d) 76 (N.Y., 1931) (glass in wallpaper powder)

(c) Cases holding manufacturer not liable where adulteration was not foreseeable:

- (1) *Hasbrouck v Armour & Co.*, 121 N.W. 157 (Wis., 1909) (needle embedded in soap)

(d) General References:

(No pertinent references)

9. A manufacturer who undertakes to package his product may be negligent in packing the contents in the container in a manner which is likely to cause an explosion when the container is opened or unpacked.

Comment: The manufacturer who packages, bottles, or otherwise contains his product in a closed container has the duty to exercise reasonable care in the packaging process to the end that the contents will not explode when the container is opened or unpacked under the normal conditions accompanying its use. This principle applies to defects in design where an explosion occurs solely because of forces generated within the sealed container. It arises most frequently in the case of chemical products where the slack in the container is insufficient. In numerous cases, principally involving bottled beverages, the courts have applied the doctrine of *res ipsa loquitur* in holding the manufacturer liable.

(a) Cases holding manufacturer liable for harm resulting from improper packaging:

- (1) *Hallenbeck v S. Wander & Sons Chemical Co.*, 189 N.Y.S. 334 (N.Y., 1921) (explosion of can containing chlorinated lime)

- (2) *W. I. Rawleigh Co. v Shoultz*, 56 F. (2d) 148 (Pa., 1932) (explosion of disinfectant caused by failure to exclude pent-up gas in bottle)
 - (3) *Alston v J. L. Prescott Co.*, 76 A. (2d) 686 (N.J., 1950) (sudden expulsion of sodium hypochlorite from bottle; *res ipsa loquitur* applied)
- See, *Mahoney v Shaker Square Beverages*, 102 N.E. (2d) 281 (Ohio, 1951) (explosion of bottle of ale; retailer involved)

(b) Cases holding manufacturer not liable where explosion was not caused by improper packaging:

- (1) *Kusick v Thorndike & Hix, Inc.*, 112 N.E. 1025 (Mass., 1916) (explosion of can containing lime; vendor involved)
- (2) *Kramer v R. M. Hollingshead Corp.*, 75 A. (2d) 861 (N.J., 1950) (explosion of solvent outside of container; *res ipsa loquitur* not applicable)

(c) General References:

- (1) Texts and Encyclopedias - (None)
- (2) Legal Periodicals - (None)
- (3) Annotations

- (i) 4 A.L.R. 1094 - "Liability for injuries by breaking or bursting of container in which goods are sold."

10. A manufacturer who undertakes to package his product may be negligent in using a defective container which may cause harm when it is handled.

Comment: The manufacturer who supplies his product in a closed container has the duty to exercise reasonable care that the container is not in a defective condition rendering it unsafe for handling in the course of distribution or incidental to the use of the product itself. In the discharge of this duty, the manufacturer may be required to inspect or test containers which may be supplied by others. It will be noted that this principle is confined to the situation where harm results from the state of the container and not from a chemical reaction within the product itself.

(a) Cases holding manufacturer liable for harm resulting from defective containers:

- (1) *Coakley v Prentiss-Wabers Stove Co.*, 195 N.W. 388 (Wis., 1923) (defective construction of gasoline stove)
- (2) *Smith v Peerless Glass Co.*, 181 N.E. 576 (N.Y., 1932) (defective bottle)
- (3) *Gulf Refining Co. v Williams*, 185 So. 234 (Mass., 1938) (defective drum containing gasoline; distributor involved)
- (4) *White v General Chemical Co.*, 135 S.W. (2d) 345 (Mo., 1940) (defective plug in bung hole of drum of acid)
- (5) *Sagandwich v Hachikian*, 35 A. (2d) 343 (Pa., 1944) (defective bung in drum containing gasoline)

(b) Cases holding manufacturer not liable:

- (1) *Marosi v J. W. Robinson Co.*, 238 P. (2d) 78 (Cal., 1951) (design of insecticide sprayer)

(c) General References:

- (1) Texts and Encyclopedias - (None)
- (2) Legal Periodicals - (None)
- (3) Annotations

- (i) 55 A.L.R. 194 - "Duty of seller of explosives to guard against improper condition of containers."

B. Liability of Vendors other than Manufacturers for Negligence
(Distributors, Wholesalers, Jobbers, Retail Dealers)

a. General Basis of Liability

1. A vendor is not an insurer of the safety of the product which he sells and is subject to liability in tort actions only where he has failed to exercise reasonable care in its sale.

Comment: The tort liability of the vendor of chemical products is based on the same principles of law as the liability of the vendor of less hazardous products. Liability depends upon the absence of due care on the part of the vendor in the selling of his products. As in the case of the manufacturer, the degree of care required of the vendor is that of the hypothetical "reasonable man" under the circumstances. The principle of absolute liability has not as yet been invoked against the vendor of chemical products.

There are essential differences in the principles governing the liability of the manufacturer and the liability of the vendor who is not a manufacturer which should be noted. It has been noted in Section A, p. 12 that the manufacturer may be held negligent where he knows or should know that his product is or is likely to be dangerous for the use for which it is supplied, and has no reason to believe that those for whose use the product is supplied will realize its dangerous condition, and yet fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so. Since the manufacturer is responsible for the preparation of his product, he should know the character of the product and the nature of its ingredients. Therefore, he has the duty to test his product before selling it to ascertain its properties if, in fact, he does not know them. On the other hand, the vendor of a product manufactured by a third party is responsible only for harm which is caused by a danger in the product of which he knew or from facts available to him had reason to know. The fact that the danger could have been discovered by the vendor or that a reasonable vendor would have discovered it is not in itself enough to impose liability. The distinction becomes important where the product involved is sold by the manufacturer to a vendor in a sealed container and the latter resells it in the same form to a purchaser. In such a case, the vendor is generally responsible only for patent defects in the product whereas the manufacturer may be responsible for latent defects as well.

(a) Cases asserting the general rule:

- (1) *Brown v Marshall*, 11 N.W. 392 (Mich., 1882) (mere sale of a wrong drug does not establish prima facie case)
- (2) *Spry v Kiser*, 102 S.E. 708 (N.C., 1920) (druggist not liable for death of child caused by sale of rancid sweet oil to child's parents, unless sale was negligent)

- (3) *Henderson v National Drug Co.*, 23 A. (2d) 743 (Pa., 1942) (sale of drug followed by injury does not establish negligence)
- (4) *Commissioners of the State Insurance Fund v City Chemical Corporation*, 48 N.E. (2d) 262 (N.Y., 1943) (dealer who vends a dangerous drug is not liable without proof of negligence)
- (5) *Parker v State*, 105 N.Y.S. (2d) 735 (1951) (municipality which distributes infected blood plasma not liable without proof of negligence)
- (b) Cases asserting the rule of strict liability:
 - (1) *Luthringer v Moore*, 190 P. (2d) 1 (Cal., 1948) (pest-control operator; vendor not involved)
 - (2) *Chapman Chemical Co. v Taylor*, 222 S.W. (2d) 820 (Ark., 1949) (herbicide distributor liable as manufacturer)
- (c) General References:
Refer to material cited in Section A. p. 8.

b. Extent of Responsibility

2. A vendor who has failed to exercise reasonable care in the sale of his product is subject to liability for harm resulting from such negligence to the person or property of any person who may be expected to use the product sold or be in the vicinity of its probable use.

Comment: The ambit of the vendor's responsibility to remote parties who may be harmed from the use of the product sold is coextensive with that of the manufacturer. The principles discussed in Section A. p. 9 are equally applicable here. Thus, a wholesaler, jobber or retail dealer may not only be subject to liability to immediate purchasers in the course of distribution, but also may be subject to liability to remote users, purchasers, their employees and members of the family.

- (a) Cases holding vendor liable for personal injury or property damage to remote parties:
 - (1) *Norton v Sewall*, 106 Mass. 143 (1870) (druggist liable for personal injury to employee of purchaser)
 - (2) *Cunningham v C. R. Pease House Furnishing Co.*, 69 Atl. 120 (N.H., 1908) (dealer liable for personal injury to member of purchaser's family)
 - (3) *Stone v Sinclair Refining Co.*, 196 N.W. 339 (Mich., 1923) (distributor liable for personal injury to purchaser from retailer)
 - (4) *Gordy v Pan American Petroleum Corp.*, 193 So. 29 (Miss., 1940) (distributor liable as manufacturer for personal injury to purchaser from retailer)
 - (5) *Commissioners of the State Insurance Fund v City Chemical Corporation*, 48 N.E. (2d) 262 (N.Y., 1943) (distributor liable as manufacturer for personal injury to employee of purchaser)
 - (6) *Saganowich v Hachikian*, 35 A. (2d) 343 (Pa., 1944) (chemical supplier liable for personal injury to employee of purchaser)
 - (7) *Green v Equitable Powder Mfg. Co.*, 94 F. Supp. 126 (Ark., 1950) (dealer-manufacturer liable for personal injury to employee of purchaser)
 - (8) *McAleavy v Lowe*, 49 N.W. (2d) 487 (Wis., 1951) (distributor liable for property damage to purchaser from retailer)
 - (9) *Gall v Union Ice Co.*, 239 P. (2d) 48 (Cal., 1951) (distributor liable for personal injury to bystander on premises of purchaser)
- (b) Cases holding vendor not liable to remote parties:
No cases)
- (c) General References:
 - (1) Texts and Encyclopedias:
 - (i) Prosser, Torts, sec. 83 (1941)
 - (ii) Restatement, Torts secs. 399, 401
 - (2) Legal Periodicals:
 - (i) Feezer, Tort Liability of Manufacturers and Vendors, 10 Minn. L. Rev. 1 (1925)
 - (ii) Eldridge, Vendor's Tort Liability, 89 U. Pa. L. Rev. 306 (1941)
 - (iii) Notes: (1933) 18 Minn. L. Rev. 91; (1938) 22 Minn. L. Rev. 743.
 - (3) Annotations: (None)

c. Liability as a Manufacturer

3. A vendor who puts out a product as his own product is subject to the liability of a manufacturer.

Comment: The duty of the vendor is frequently different from the duty of the manufacturer. However, where the vendor undertakes by oral representations, label representations, or advertising to assume the status of the manufacturer, he loses his protective cloak and assumes the correlative liability status of a manufacturer. The vendor may assume this status in a variety of ways, such as putting out the product under his own name or affixing to the product his trade name or trade-mark. He may be held to have assumed this status even though the label on the product describes him as the distributor. Ordinarily, he is not subject to this liability where the labeling of the product clearly and distinctly designates the real manufacturer.

- (a) Cases where this rule was applied:
 - (1) *Willson v Faxon*, Williams & Faxon, 101 N.E. 799 (N.Y., 1913) (oral representations by druggist)
 - (2) *Thornhill v Carpenter-Morton Co.*, 108 N.E. 474 (Mass., 1915) (dealer represented as manufacturer on label of product)
 - (3) *Tiedje v Haney*, 239 N.W. 611 (Minn., 1931) (druggist represented as manufacturer on label of harmful preparation)
 - (4) *Burkhardt v Armour & Co.*, 161 Atl. 385 (Conn., 1932) (distributor of canned beef prepared by foreign subsidiary)
 - (5) *Swift & Co. v Hawkins*, 164 So. 231 (Miss., 1935) (distributor of cheese packed in wrapper stamped with distributor's name and trade name)
 - (6) *Dow Drug Co. v Nieman*, 13 N.E. (2d) 130 (Ohio, 1936) (wholesaler marketing cigars as his own)

- (7) *Swift & Co. v Blackwell*, 84 F. (2d) 130 (Va., 1936) (wholesaler of canned milk liable although label bore word "distributor")
 - (8) *Slavin v Leggett & Co.*, 177 Atl. 120 (N.J., 1935), affirmed, 186 Atl. 832 (1936) (distributor of canned peas bearing corporation's name followed by word "distributor")
 - (9) *Gordy v Pan American Petroleum Corp.*, 193 So. 29 (Miss., 1940) (distributor of petroleum product manufactured by third party)
 - (10) *Armour & Co. v Leasure*, 9 A. (2d) 572 (Md., 1939) (distributor of canned beef prepared by foreign subsidiary)
 - (11) *Commissioners of the State Insurance Fund v City Chemical Corporation*, 48 N.E. (2d) 262 (N.Y., 1943) (distributor relabeled chemical product as his own)
 - (12) *Poplar v Bourjois, Inc.*, 69 N.Y.S. (2d) 252 (1947), affirmed 80 N.E. (2d) 334 (N.Y., 1948) (manufacturer of cosmetics)
 - (13) *Chapman Chemical Co. v Taylor*, 222 S.W. (2d) 820 (Ark., 1949) (oral representations by distributor of herbicide)
- (b) Cases holding vendor not liable as manufacturer:
- (1) *Fleetwood v Swift & Co.*, 108 S.E. 909 (Ga., 1921) (distributor of butter designated on label as distributor)
- (c) General References:
- (1) Texts and Encyclopediae:
 - (i) Prosser, Torts, sec. 83 pp. 681-682 (1941)
 - (ii) Restatement, Torts sec. 400
 - (iii) Eldridge, Modern Tort Problems, pp. 253-256
 - (2) Legal Periodicals:
 - (i) Notes: (1936) 20 Minn. L. Rev. 831; (1933) 31 Mich. L. Rev. 865
 - (3) Annotations: - None

d. Particular Types of Negligence

4. The violation of a statute which is designed to protect the public against the type of harm which has occurred may be negligence in itself.

Comment: The principles noted in Section A, p. 11 are equally applicable here. It was noted there that the violation of certain criminal statutes designed to protect the public, such as economic poisons laws, food and drug laws, and pharmacy and poisons laws, may constitute negligence per se in civil litigation. The pharmacy and poisons laws are particularly applicable to vendors other than manufacturers and are frequently applied in tort cases involving retail druggists.

(a) Cases holding vendor liable for statutory violation:

- (1) *Wohlfahrt v Beckert*, 92 N.Y. 490 (1883) (drug not labeled "poison")
- (2) *Osborne v McMasters*, 41 N.W. 543 (Minn., 1889) (drug not labeled "poison")
- (3) *Fisher v Golladay*, 38 Mo. App. 531 (1889) (sulphuric acid not labeled "poison")
- (4) *Mossrud v Lee*, 157 N.W. 758 (Wis., 1916) (chemical compound not labeled "poison")
- (5) *Hendry v Judge & Dolph Drug Co.*, 245 S.W. 358 (Mo., 1922) (drug not labeled "poison")
- (6) *Stone v Sinclair Refining Co.*, 196 N.W. 339 (Mich., 1923) (distributor poured gasoline into green can for dealer instead of red can as required by law)
- (7) *Campbell v Stamper Drug Co.*, 277 Pac. 770 (Colo., 1929) (sale of drug by druggist without satisfying himself that purchaser was aware of the poisonous character of the drug and that it was to be used for legitimate purposes)
- (8) *Stone v Shaw Supply Co.*, 36 P. (2d) 606 (Ore., 1934) (sale of poison by druggist to minor)
- (9) *Trumbaturi v Katz & Besthoff*, 158 So. 16 (La., 1934) (sale of poison to idiot)
- (10) *Marigny v Dejoie*, 172 So. 808 (La., 1937) (drug not labeled "poison")
- (11) *Manning Mfg. Co. v Hartol Products Corp.* 99 F. (2d) 813 (Vt., 1938) (sale of kerosene below statutory standard)
- (12) *Mautino v Piercedale Supply Co.*, 13 A. (2d) 51 (Pa., 1940) (sale of gun cartridge to minor)
- (13) *Bennett Drug Stores v Mosely*, 20 S.E. (2d) 208 (Ga., 1942) (sale of carbolic acid to intoxicated person)
- (14) *McAleavy v Lowe*, 49 N.W. (2d) 487 (Wis., 1951) (adulterated livestock feed)

(b) Cases holding vendor not liable where statute was interpreted as inapplicable:

- (1) *Stasek v Banner Coffee Co.*, 159 N.W. 945 (Wis., 1916) (phosphorus matches not a poisonous drug or chemical under poisons statute)
 - (2) *McClaren v G. S. Robins & Co.*, 162 S.W. (2d) 856 (Mo., 1942) (carbon tetrachloride not a poison under poisons statute)
 - (3) *Richardson v De Luca*, 53 S. (2d) 199 (La., 1951) (benzol not a coal oil or fluid used for illuminating or burning purposes under statute regulating sale of certain petroleum products)
- See, *Larrimore v American National Insurance Co.*, 89 P. (2d) 340 (Okla., 1939) (statute prohibiting laying out of poison in unsafe place did not cover explosion of rat poison)

(c) Cases holding vendor not liable where violation of statute was not the proximate cause of the injury complained of:

- (1) *McKibbin v F. E. Bax & Co.*, 113 N.W. 158 (Neb., 1907) (sale by druggist to minor of poison which was administered to third party)
- (2) *Martin v Jonesboro Drug Co.*, 7 La. App. 262 (1928) (failure to label poison not the cause of child's consuming it)
- (3) *People's Service Drug Stores v Somerville*, 158 Atl. 12 (Md., 1932) (no causal connection between failure to label and injury)
- (4) *Eckerd's Inc. v McGhee*, 86 S.W. (2d) 570 (Tenn., 1935) (causal connection between failure to label and injury broken by intervening act of plaintiff in attempting suicide)

- (5) Paull v McBride, 263 N.W. 877 (Mich., 1935) (responsibility for explosion conjectural)
- (6) Richman v Follman, 23 N.Y.S. (2d) 917 (1940) affirmed, 36 N.E. (2d) 908 (N.Y., 1941) (no causal connection between failure to label and injury)

(d) General References:

Refer to material cited in Section A, p. 12.

5. A vendor may be negligent by failing to give an appropriate warning or caution of any danger incident to the normal use of the product sold which a user would not ordinarily discover, where the vendor knows or has reason to know of the danger.

Comment: It has been noted in Section A, p. 12 that the manufacturer is frequently held liable for failure to warn the public of latent dangers in the products which he manufactures. Vendors who are not manufacturers have generally escaped this particular type of liability by reason of the difference in the legal duty involved. In the case of the manufacturer, the duty extends to a warning of all danger which the manufacturer actually knows or should know. Since the manufacturer should know the composition and formulation of the products which he manufactures, in the ordinary case he is held to have knowledge of the risks involved in the use of his products. It is his duty to ascertain unknown facts concerning his product, by tests or otherwise where a reasonable person would do so. In the case of the ordinary vendor, the duty extends to a warning of any danger which the vendor actually knows or has reason to know from the facts which are apparent to him. It is not his duty to ascertain unknown facts about the product which he sells. The important question is what he actually knows and what would a reasonable person conclude from the knowledge.

(a) Cases holding vendor liable for failure to warn of dangers in the use of products sold:

- (1) Fisher v Golladay, 38 Mo. App. 531 (1899) (druggist failed to label sulphuric acid)
- (2) Tucker v Graves, 88 So. 40 (Ala., 1920) (druggist failed to label arsenical compound "poison")
- (3) Farley v Edward E. Tower & Co., 171 N.E. 639 (Mass., 1930) (dealer failed to warn of inflammable nature of combs)
- (4) Ft. Wayne Drug Co. v Flemion, 175 N.E. 670 (Ind., 1931) (dealer failed to warn of inflammable nature of benzol)
- (5) Rasmussen v Benson, 280 N.W. 890 (Neb., 1938) (seller failed to label poisoned bran "poison")
- (6) Treacy v F. W. Woolworth Co., 1 N.Y.S. (2d) 919 (1938) (memorandum opinion; ground of decision not clear)
- (7) Gall v Union Ice Co., 239 P. (2d) 48 (Cal., 1951) (no label on drum of sulphuric acid)

(b) Cases holding vendor not liable where he did not know or have reason to know of danger in the use of products sold:

- (1) Gibson v Torbert, 88 N.W. 443 (Iowa, 1901) (druggist did not know of dangerous nature of phosphorus)
- (2) Peaslee-Gaulbert Co. v McMath's Adm'r., 146 S.W. 770 (Ky., 1912) (wholesaler did not know of inflammable nature of paint dryer)
- (3) McCrossin v Noyes Bros. & Cutler, 173 N.W. 566 (Minn., 1919) (wholesaler did not know of poisonous ingredients in insecticide)
- (4) Smith v S. S. Kresge Co., 79 F. (2d) 361 (Mo., 1935) (dealer did not know of inflammable nature of combs)
- (5) Guyton v S. H. Kress & Co., 5 S.E. (2d) 295 (S.C., 1939) (dealer did not have reason to know of inflammable nature of fingernail polish)
- (6) Bell v Adler, 11 S.E. (2d) 495 (Ga., 1940) (dealer did not know of dangerous properties of cosmetic)
- (7) Kratz v American Stores Co., 59 A (2d) 138 (Pa., 1948) (dealer did not know of inflammable nature of stove polish)
- (8) Singer v Oken, 87 N.Y.S. (2d) 686 (N.Y., 1949) (druggist did not have reason to know of danger in calomine lotion containing phenol)
- (9) Bennett v Pilot Products Co., 235 P. (2d) 525 (Utah, 1951) (distributor of permanent wave solution did not know of dangerous nature of any ingredient in product)
- (10) Ringstad v I. Magnin & Co., 239 P. (2d) 848 (Wash., 1952) (dealer did not know of inflammable nature of cocktail robe)

(c) Cases holding vendor not liable where user knew or could have discovered danger:

- (1) Ankenbrandt v Joachim, 177 Ill. App. 158 (1912) (no label on drug; jury found that user knew of danger)
- (2) McCrossin v Noyes Bros. & Cutler, 173 N.W. 566 (Minn., 1919) (name "Roach Doom" suggested danger)
- (3) Folley v Sears, 280 Pac. 56 (Wash., 1929) (properly labeled sodium fluoride mistaken for salt)

(d) Cases holding vendor not liable where inadequate warning was not proximate cause of injury complained of:

- (1) Levin v Musser, 194 N.W. 672 (Neb., 1923) (no poison label on oil of mirbane used as throat gargle)

(e) Cases holding vendor not liable where the danger was known by the particular profession using the product:

- (1) Parker v State, 105 N.Y.S. (2d) 735 (1951) (no label on blood plasma administered by physician)

(f) General References:

- (1) Treatises and Encyclopediae:
(1) Restatement, Torts secs. 399-402
- (2) Legal Periodicals: - (None)
- (3) Annotations:

(1) 86 A.L.R. 947 - "Duty of manufacturer or seller to warn of latent dangers incident to article as a class, as distinguished from duty with respect to defects in particular article."

6. A vendor who undertakes to make claims for the safety of a product which he sells may be negligent by failing to ascertain the truth and accuracy of such representations when they are in fact false or inaccurate.

Comment: The vendor may or may not have the duty to warn of dangers incident to the use of the products which he sells, under the principle noted at p. 17. However, as in the case of the manufacturer, once the vendor assumes make representations as to the safety of a product, he assumes the corollary duty to exercise due care that the presentations are truthful, accurate, and not misleading. In cases where the manufacturer is involved, label statements ordinarily constitute the character of the misrepresentation. In cases where the vendor is involved, all misrepresentations are generally in issue although liability may accrue by indorsement of label claims made by a manufacturer, by advertising, or through provisions in written contracts.

(a) Cases holding vendor liable for negligent misrepresentation:

- (1) Darks v Scudders-Gale Grocer Co., 130 S.W. 430 (Mo., 1910) (oral representation by wholesaler to dealer of safety of medicinal preparation)
- (2) Marsh v Usk Hardware Co., 132 Pac. 241 (Wash., 1913) (oral representation by dealer of manner in which explosive could be safely used)
- (3) Hoar v Rasmussen, 282 N. W. 652 (Wis., 1938) (oral representation by druggist of ingredients in drug compound)

(b) Cases holding vendor not liable:

(No cases)

(c) General References:

(No pertinent references)

7. A vendor may be negligent in selling a dangerous product where a harmless one is requested where a user would not ordinarily discover the mistake.

Comment: This principle is generally invoked in the sale of drugs by retail druggists, although it has applicability to the sales of all classes of chemical products. The gravamen of this form of negligence is the fact that the buyer or user of the product is misled into the belief that the product supplied is safe for the use for which the real product would be. It is another facet of the duty to warn of risks which are not apparent or easily discoverable.

The vendor may always show in defense of a claim based on this type of negligence that the mistake was not negligent, as, for example, where the mistake was caused by the prior negligence of the manufacturer in mislabeling the product. However, it should be noted that in many cases the courts apply the doctrine of res ipsa loquitur or hold that real negligence is not essential where a dangerous drug is supplied in place of an innocent one.

(a) Cases holding vendor liable under this principle:

- (1) Thomas v Winchester, 6 N.Y. 397 (1852) (manufacturing druggist sold extract of belladonna for extract of dandelion)
- (2) Norton v Sewall, 106 Mass. 143 (1870) (druggist sold laudanum for tincture of rhubarb)
- (3) Hanesford's Adm'x. v Payne & Co., 74 Ky. 380 (1875) (druggist sold croton oil for linseed oil)
- (4) Walton v Booth, 34 La. Ann. 913 (1882) (druggist sold sulphate of zinc for Epsom salts)
- (5) Davis v Guarnieri, 15 N.E. 350 (Ohio, 1887) (druggist sold oil of bitter almonds for oil of sweet almonds)
- (6) Smith v Hays, 23 Ill. App. 244 * (1887) (druggist sold extract of belladonna for extract of dandelion)
- (7) Brunswig v White, 8 S.W. 85 (Tex., 1888) (druggist sold morphine for quinine)
- (8) Kennedy v Plank, 97 N.W. 985 (Wis., 1904) (druggist sold copperas instead of Glauber's salt)
- (9) Knoefel v Atkins, 81 N.E. 600 (Ind., 1907) (druggist sold acetanilide for phosphate of soda)
- (10) Tremblay v Kimball, 77 Atl. 504 (Me., 1910) (druggist sold corrosive sublimate tablets for chlorodyne tablets)
- (11) Moran v Dake Drug Co., 134 N.Y.S. 995 (1912) (druggist sold bichloride of mercury for triple bromide)
- (12) Wright v Howe, 150 Pac. 956 (Utah, 1915) (dealer sold boiled linseed oil for raw linseed oil)
- (13) Tucker v Graves, 88 So. 40 (Ala., 1920) (druggist sold poisonous arsenical compound for paregoric)
- (14) Edelstein v Cook, 140 N.E. 765 (Ohio, 1923) (druggist sold citric acid for Epsom salts)
- (15) Corzina Coal Co. v Sexton, 105 So. 716 (Ala., 1925) (druggist sold tablets containing poison in place of calomel tablets)
- (16) Model Drug Co. v Patton, 270 S.W. 998 (Ky., 1925) (druggist placed wrong label on poisonous medicine)
- (17) Ellis v Lindmark, 225 N.W. 395 (Minn., 1929) (druggist sold raw linseed oil for cotton seed oil; retailer and wholesaler jointly liable)
- (18) Campbell v Stamper Drug Co., 277 Pac. 770 (Colo., 1929) (druggist sold strychnine instead of quinine)
- (19) Bosck v Katz Drug Co., 127 P. (2d) 506 (Ka., 1942) (druggist sold atropine for eserine)
- (20) Phillips v Doyle, 207 P. (2d) 465 (Ka., 1949) (delivery by dealer of kerosene and gasoline mixture for kerosene)
- (21) Green v Equitable Powder Mfg. Co., 94 F. Supp. 126 (Ark., 1950) (dealer-manufacturer sold delayed action caps for instantaneous caps)

(b) Cases holding vendor not liable under this principle:

- (1) Brown v Marshall, 11 N.W. 392 (Mich., 1882) (druggist sold sulphate of zinc for Epsom salts; negligence not proved)
- (2) Howes v Rose, 42 N.E. 303 (Ind., 1895) (druggist sold Tartaric acid for Rochelle Salts)

(c) General References:

(1) Texts and Encyclopedias:

- (i) Arthur, "Law of Drug and Druggists" (1935)

(2) Legal Periodicals:

- (i) Arthur, Some Liabilities of the Physician in the Use of Drugs, 17 Rocky Mt. L. Rev. 131 (1945)

(3) Annotations:

- (i) 31 A.L.R. 1336; 44 A.L.R. 1482 - "Liability of druggist for injury in consequence of mistake."
- (ii) 123 A.L.R. 939 - "Mistake as to chemical or product furnished, or misdescription thereof by label or otherwise, as basis for liability for personal injury or death resulting from combination with other chemical."

8. A vendor may be negligent by selling a product which he knows or has reason to know to be unsafe for its intended use.

Comment: Section A, p. 15 sets forth the principle that the manufacturer may have a duty to test and inspect his product before placing it on the market. Conversely, the vendor of a product which is manufactured by another is not generally required to test and inspect, and must only exercise the care and competence of a reasonable vendor as to dangers or defects which he has an opportunity to discover. Where the product sold is purchased by the vendor and resold by him in the manufacturer's original package or closed container, the vendor is not generally responsible for harm resulting from dangers in the product since he has no duty to open the package or container to inspect the

contents. Therefore, the vendor is rarely held liable in such cases where the product is dangerous by reason of poisonous or harmful substances in it whether the substances are part of the formula of the product or are foreign substances which have entered the product during the course of manufacture. Where the product sold is purchased by the vendor in bulk or unpackaged form, the vendor is generally not liable for harm attributable to a dangerous formula unless he knew or had reason to know of the risk. However, he may be held liable for selling a product purchased in bulk or unpackaged form containing harmful foreign matter where the adulteration or contamination is traced to the vendor and where the vendor did not take proper precautions against this.

Section A, p. 16 sets forth the principle that the manufacturer who undertakes to package his product may be negligent in packing the contents in the container in a manner which is likely to cause an explosion when the container is opened or unpacked. Section A, p. 17 sets forth the principle that the manufacturer who undertakes to package his product may be negligent in using a defective container which may cause harm when it is handled. These principles are equally applicable to the vendor who is not a manufacturer but who undertakes to package the product himself. In the absence of this undertaking, the vendor is subject to liability only where he knows or has reason to know that the contents of the container have been so packed or contained as to render the product likely to explode or where the container is patently defective.

(a) Cases holding vendor liable under this principle:

- (1) *Newell v Reid*, 155 N.W. 352 (Mich., 1915) (sale by dealer of unpackaged bran contaminated with arsenic)
- (2) *Heinemann v Barfield*, 207 S.W. 58 (Ark., 1918) (sale by dealer of flour contaminated with arsenic)
- (3) *Hallenbeck v S. Wanda & Sons Chemical Co.*, 189 N.Y.S. 334 (N.Y., 1921) (packer and distributor liable for explosion of can containing chlorinated lime)
- (4) *Rasmussen v Benson*, 280 N.W. 890 (Neb., 1938) (sale by dealer of unpackaged bran contaminated with arsenic)
- (5) *Saganowich v Hachikian*, 35 A. (2d) 343 (Pa., 1944) (supplier liable who placed chemical liquid in defective container and sold it)

(b) Cases holding vendor not liable under this principle:

- (1) *Hasbrouck v Armour & Co.*, 121 N.W. 157 (Wis., 1909) (sale by dealer of soap containing embedded needle)
- (2) *Kusick v Thorndike & Hix, Inc.*, 112 N.E. 1025 (Mass., 1916) (can of lime packed and sold by dealer)
- (3) *Barrango v Hinckley Rendering Co.*, 119 N.E. 746 (Mass., 1918) (sale by dealer of soap containing embedded needle)
- (4) *Blanchard v Kronick*, 169 N.E. 438 (Mass., 1929) (sale by dealer of feed containing Paris Green; liability in warranty, however)
- (5) *Howard v Jacobs' Pharmacy Co.*, 189 S.E. 373 (Ga., 1937) (sale by druggist of deleterious proprietary medicine)
- (6) *Cundiff v F. W. Woolworth Co.*, 290 Ohio Law Abstract 123 (1938) (sale by dealer of trade-marked cosmetic product containing poisonous substance)
- (7) *Elizabeth Arden, Inc. v Brown*, 107 F. (2d) 938 (Pa., 1939) (sale by dealer of patent toilet preparation containing poisonous substance)
- (8) *Marler v Pearlman's R.R. Salvage Co.*, 52 S.E. (2d) 3 (N.C., 1949) (sale by dealer of can of glue)
- (9) *Ringstad v I. Magnin & Co.*, 239 P. (2d) 848 (Wash., 1952) (sale by dealer of cocktail robe)

(c) General References:

- (1) Texts and Encyclopedias:
 - (i) *Prosser, Torts*, sec. 83, p. 681 (1941)
 - (ii) *Restatement, Torts* secs. 399-402
- (2) Legal Periodicals: - (None)
- (3) Annotations: - (None)

C. Special Problems in Negligence Cases Involving Vendors in General

a. Damages

Note: The amount of damages awarded in tort actions for personal injuries or property damage depends upon the facts and circumstances in each case. As a general rule, awards are not set aside as excessive unless they do not bear some reasonable proportion to the injury or loss sustained by the plaintiff. In determining whether or not damages allowed in a personal injury case are excessive, the courts consider relevant such facts as the age and health of the injured party, his earning power prior and subsequent to injury, any disability left as a result of the injury, the amount of money expended for care, and the physical pain suffered. Punitive damages may be allowed where the tortfeasor's conduct is malicious or wanton. In cases involving property damage, the measure of damages is usually the difference in market value of the property immediately before and immediately after damage.

The cases which are noted below are illustrative of awards in chemical-products liability cases involving negligence.

(a) Cases where damage awards were not set aside as excessive:

- (1) *Marsh v Usk Hardware Co.*, 132 Pac. 241 (Wash., 1913) (\$20,000 for loss of sight)
- (2) *West Disinfecting Co. v Plummer*, 44 App. D.C. 345 (1916) (\$2,000 for injury to eyes)
- (3) *Mossrud v Lee*, 157 N.W. 758 (Wis., 1916) (\$450 for loss of eight cows)
- (4) *Kolberg v Sherwin-Williams Co.*, 269 Pac. 975 (Cal., 1928) (\$6,100 for damage to orchard and loss of large portion of orange crop)
- (5) *White v National Bank of Commerce*, 278 Pac. 915 (Cal., 1929) (\$2,300 for damage to fruit in orchard)
- (6) *Read Phosphate Co. v Vickers*, 11 Tenn. App. 146 (1930) (\$4,500 for acid burns)
- (7) *Rasmussen v Benson*, 280 N.W. 890 (Neb., 1938) (\$3,500 for loss of cows, dairy business, mental shock and death of owner)
- (8) *Sinclair Refining Co. v Henderson*, 122 S.W. (2d) 580 (Ark., 1938) (\$19,000 in wrongful death action)
- (9) *Pease v Sinclair Refining Co.*, 104 F. (2d) 183 (N.Y., 1939) (\$2,400 for severe burns and loss of one eye)

- (10) White v General Chemical Co., 136 S.W. (2d) 345 (Mo., 1940) (\$1,500 for severe burns)
 - (11) Orr v Shell Oil Co., 177 S.W. (2d) 608 (Mo., 1943) (\$40,000 reduced by remittitur to \$20,000 for skin irritations and chronic nephritis)
 - (12) Saganowich v Hachikian, 35 A. (2d) 343 (Pa., 1944) (\$12,000 for loss of one eye)
 - (13) Luthringer v Moore, 190 P (2d) 1 (Cal., 1943) (\$10,000 for personal injuries and economic loss)
 - (14) Alston v J. L. Prescott Co., 76 A. (2d) 686 (N.J., 1950) (\$1,500 for injury to eye)
 - (15) Kennedy v Clayton, 227 S.W. (2d) 934 (Ark., 1950) (\$4,460.78 for damage to growing cotton)
 - (16) McKennon v Jones, 244 S.W. (2d) 138 (Ark., 1951) (\$1,500 for loss of honey bees and honey)
 - (17) Gall v Union Ice Co., 239 P. (2d) 48 (Cal., 1951) (\$100,000 for personal injury resulting in death)
- See, Litton v Travelers Ins. Co., 88 F. Supp. 76 (La., 1950) (\$17,500 for personal injuries and loss of past and future earnings resulting from chlorine poisoning)
- See also, W. B. Bynum Cooperage Co. v Coulter, 244 S.W. (2d) 955 (Ark., 1952) (measure of damages for crop loss)

(b) Cases where damage rewards were reversed on other grounds:

- (1) E. I. DuPont de Nemours and Co., v Baridon, 73 F. (2d) 26 (Iowa, 1934) (\$7,500 for damage to gladiolus bulbs)
- (2) J. R. Watkins Co. v Raymond, 184 F. (2d) 925 (Minn., 1950) (\$27,000 for loss of hair, eyebrows and eyelashes)
- (3) Marosi v J. W. Robinson Co., 238 P. (2d) 78 (Cal., 1951) (\$11,721 for personal injuries)

(c) Cases where damage awards were set aside as excessive:

- (1) Standard Oil Co. v Tierney, 17 S.W. 1025 (Ky., 1891) (\$25,000 for loss of use of one arm, permanent facial disfigurement and other injuries)
- (2) Noonan v Great Atlantic & Pacific Tea Co., 135 Atl. 822 (N.J., 1927) (\$5,000 for nose injury reduced to \$3,500)
- (3) Grinnell v Carbide & Carbon Chemicals Corp., 276 N.W. 535 (Mich., 1937) (total verdict of \$148,500 for multiple personal injuries and deaths reduced to \$101,500)
- (4) Mondine v Sarlin, 81 P. (2d) 903 (Cal., 1938) (verdict of \$20,000 for extensive burns reduced to \$10,000)
- (5) Sinclair Refining Co. v Tompkins, 117 F. (2d) 596 (Miss., 1941) (verdict of \$7,500 set aside as including loss of earnings not proved)

(d) General References:

- (1) Texts and Encyclopedias:
- (2) Legal Periodicals:
 - (i) Bauer, Fundamental Principles of The Law of Damages in Medico-Legal Cases, 19 Tenn. L. Rev. 255 (1946)
 - (ii) Developments in the Law-Damages - 1935-1947, 61 Harv. L. Rev. 113 (1947)
- (3) Annotations:
 - (i) 14 A.L.R. (2d) 550 - "Inadequacy of damages for personal injuries resulting in death of infant."
 - (ii) 16 A.L.R. (2d) 393 - "Adequacy of damages in action by person injured for personal injuries not resulting in death."
 - (iii) 17 A.L.R. (2d) 872 - "Adequacy of damages for personal injuries resulting in death of adult."

b. Contributory Negligence

Note: The two most common affirmative defenses in negligence actions are assumption of risk and contributory negligence. In most jurisdictions, either defense completely bars a plaintiff from recovery, although there are a few jurisdictions having "comparative negligence" statutes which authorize the allocation of damages according to the degree of fault of the parties. The defense of assumption of a risk rests upon the plaintiff's consent to relieve the defendant of a legal duty toward him, and to take his chances of harm from a particular risk. The consent may be found from either express agreement or by implication from the conduct of the parties. The defense of contributory negligence is premised upon negligent conduct of the plaintiff which contributes as a legal cause to his damage. Frequently, the two defenses overlap. In chemical-products liability cases, contributory negligence is more frequently encountered than assumption of the risk. The cases which are listed below involve contributory negligence.

A question which is likely to arise in chemical-products liability cases is the effect of contributory negligence upon liability based on the violation of a statute. Unless the statute is intended to protect particular classes of persons against their own recognized inability to protect themselves, contributory negligence is generally regarded as a valid defense.

(a) Cases where contributory negligence was found:

- (1) Hackett v Pratt, 52 Ill. App. 346 (1893) (action against druggist for sale of poison barred where injured party pointed out wrapped bottle of poison as his own)
- (2) Ankenbrandt v Joachim, 173 Ill. App. 158 (1912) (user negligent in using drug although not labeled with caution)
- (3) Huckleberry v Missouri Pac. Ry. Co., 26 S.W. (2d) 980 (Mo., 1930) (violation of ICC regulations for transportation of explosives, negligence per se but subject to defense of contributory negligence)
- (4) Eckerd's Inc. v McGhee, 86 S.W. (2d) 570 (Tenn., 1935) (attempted suicide by minor in taking drug)
- (5) Gaw v Lake Erie Chemical Co., 11 N.E. (2d) 982 (Ill., 1937) (negligent handling of tear gas fountain pen gun)
- (6) Parton v Phillips Petroleum Co., 107 S.W. (2d) 167 (Mo., 1937) (pouring kerosene on newly kindled fire, held negligence as a matter of law)
- (7) Ellis v Orkin Exterminating Co., 143 S.W. (2d) 108 (Tenn., 1939) (trespasser sustained injury)
- (8) Sinclair Refining Co. v Tompkins, 117 F. (2d) 596 (Miss., 1941) (pouring kerosene mixture into cook-stove, held negligence as a matter of law)

- (9) Harder v Maloney, 26 N.W. (2d) 830 (Wis., 1947) (injury sustained while attempting a criminal act)
- (10) Dart v Pure Oil Co., 27 N.W. (2d) 555 (Minn., 1947) (pouring kerosene on warm stove could bar recovery although defendant violated statute)
- (11) Richardson v De Luca, 53 S. (2d) 199 (La., 1951) (use of benzol near heat despite warning)
- (b) Cases where contributory negligence was not found:
 - (1) Gately v Taylor, 97 N.E. 619 (Mass., 1912) (using stove polish on heated stove not negligence as a matter of law)
 - (2) Armstrong Packing Co. v Clem, 151 S.W. 576 (Tex., 1912) (failure to test soap before using it not negligence)
 - (3) Mossrud v Lee, 157 N.W. 758 (Wis., 1916) (negligence in using "Quack Grass Destroyer" a question for jury)
 - (4) Hendry v Judge & Dolph Drug Co., 245 S.W. 358 (Mo., 1922) (failure to examine label on box of drugs not negligence)
 - (5) Campbell v Stamper Drug Co., 277 Pac. 770 (Colo., 1929) (failure to determine whether bottle contained strychnine or quinine not negligence as a matter of law).
 - (6) Read Phosphate Co. v Vickers, 11 Tenn. App. 146 (1930) (inexperienced handler of drum of sulphuric acid)
 - (7) Marigny v Dejoie, 172 So. 808 (La., 1937) (failure to observe word "poison" and skull and crossbones on small pills)
 - (8) Pease v Sinclair Refining Co., 104 F. (2d) 183 (N.Y., 1939) (failure to test chemical before using it not negligence as a matter of law)
 - (9) Bennett Drug Stores v Mosely, 20 S.E. (2d) 208 (Ga., 1942) (poison sold to intoxicated person, plaintiff held negligent but recovery allowed under last clear chance doctrine)
 - (10) Maize v Atlantic Refining Co., 41 A (2d) 850 (Pa., 1945) (failure to heed warning on label, held question for the jury)

(c) General References:

- (1) Texts and Encyclopedias:
 - (i) Prosser, Torts, sec. 52 (1941)
 - (ii) Cooley, Torts, secs. 484-489 (1932)
 - (iii) Restatement, Torts, sec. 463
 - (iv) 38 Am. Jur., Negligence, secs. 174-233
- (2) Legal Periodicals:
 - (i) Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233 (1908)
 - (ii) Green, Contributory Negligence and Proximate Cause, 6 N.C.L. Rev. 3 (1927)
 - (iii) Padway, Comparative Negligence, 16 Marq. L. Rev. 3 (1931)
 - (iv) Mole and Wilson, A Study of Comparative Negligence, 17 Cornell L.Q. 333, 604 (1932)
 - (v) Campbell, Wisconsin's Comparative Negligence Law, 7 Wis. L. Rev. 222 (1932)
 - (vi) Lowndes, Contributory Negligence, 22 Geo. L.J. 674 (1934)
 - (vii) Demuth, Derogation of the Common Law Rule of Contributory Negligence, 7 Rocky Mt. L. Rev. 161 (1935)
 - (viii) Wilderman, Contributory Negligence of Infants, 10 Ind. L.J. 427 (1935)
 - (ix) Gregory, Loss Distribution by Comparative Negligence, 21 Minn. L. Rev. 1 (1936)
 - (x) James, Last Clear Chance: A Transitional Doctrine, 47 Yale L.J. 704 (1938)
 - (xi) Prosser, Contributory Negligence as Defense to Violation of Statute, 32 Minn. L. Rev. 105 (1948) (discussing Dart v Pure Oil Co., supra)
- (3) Annotations:
 - (i) 50 A.L.R. 1462 - "Poison in article not intended to be eaten or tasted, liability for injury or death in swallowing."
 - (ii) 151 A.L.R. 1261 - "Petroleum products, contributory negligence in respect of delivery of, resulting in explosion."
 - (iii) 171 A.L.R. 894; 10 A.L.R. (2d) 853 - "Contributory negligence as a defense to cause of action based upon violation of statute relating to explosives or volatile oils."

c. Intervening Negligence

Note: Frequently, the manufacturer or other vendor defends a damage suit in product liability cases with the contention that some one else in the line of distribution of his products was negligent and that this subsequent negligence was the proximate cause of the injury complained of and therefore operated to relieve the manufacturer or other vendor of responsibility. However, in the absence of willful negligence, the courts generally hold that intervening negligence is a foreseeable risk and therefore does not relieve the first negligent party of liability. The manufacturer and subsequent tortfeasor are generally jointly liable in such a case. The problem most frequently arises in chemical-products liability cases where the retailer has actual knowledge or imputed knowledge of the prior negligence of the distributor or manufacturer.

(a) Cases holding intervening negligence no defense:

- (1) Burk v Creamery Package Mfg. Co., 102 N.W. 793 (Iowa, 1905) (purchaser carelessly left unlabeled sulphuric acid unguarded, supplier held liable)
- (2) Moehlenbrock v Parke, Davis & Co., 169 N.W. 541 (Minn., 1918) (negligence in selling impure ether not relieved by subsequent negligence of physician in administering it)
- (3) Kentucky Independent Oil Co. v Schnitzler, 271 S.W. 570 (Ky., 1925) (explosion of gasoline and kerosene mixture; manufacturer liable although retailer was also negligent)
- (4) Ellis v Lindmark, 225 N.W. 395 (Minn., 1929) (wholesaler and retailer jointly liable for sale of dangerous drug)
- (5) Farley v Edward E. Tower & Co., 171 N.E. 639 (Mass., 1930) (manufacturer and dealer jointly liable for failure to warn of inflammable nature of combs)

- (6) *American Oil Co. v Nicholas*, 157 S.E. 754 (Va., 1931) (negligence of wholesale distributor in selling gasoline and kerosene mixture as kerosene not relieved by subsequent negligence of retailer)
- (7) *Frazier v Ayres*, 20 S. (2d) 754 (La., 1945) (jobber selling kerosene liable although retailer also negligent)
- (8) *Gall v Union Ice Co.*, 239 P. (2d) 48 (Cal., 1951) (negligence of manufacturer and distributor not relieved by negligence of buyer)
- (b) Cases where intervening negligence was a defense:
 - (1) *Catlin v Union Oil Co.*, 161 Pac. 29 (Cal., 1916) (dealer sold gasoline and kerosene mixture as kerosene after notice by manufacturer of mistake; held, resale was culpable and relieved manufacturer)
 - (2) *Walton v Sherwin-Williams Co.*, 191 F. (2d) 277 (Ark., 1951) (dicta that negligence of farmers or airplane pilot in application of herbicide would afford a complete defense to manufacturer of the herbicide)
- (c) General References:
 - (1) Texts and Encyclopedias:
 - (i) Prosser, Torts, sec. 49 (1941)
 - (ii) 35 C.J.S., Explosives, p. 235 sec. 6 subsec. d.
 - (iii) 22 Am. Jur. 195, Explosions and Explosives, sec. 71
 - (2) Legal Periodicals: - (None)
 - (3) Annotations:
 - (i) 164 A.L.R. 371 - "Intervening purchaser's knowledge of defects in or danger of article, or failure to inspect therefor, as affecting liability of manufacturer or dealer for personal injury or property damage to subsequent purchaser or other third person."

d. Allergies

Refer to Section 3, p. 33 "Allergies (Negligence and Warranty Actions)" where the annotation combines negligence and warranty cases involving the subject of the allergic plaintiff.

e. Disclaimers of Liability for Negligence

Note: The general rule is that a manufacturer or other vendor may effectively disclaim by contract or by labeling liability arising from the use of a product which he manufactures or sells where it appears that the terms of the disclaimer were brought home to the plaintiff and that the express terms of the disclaimer cover and apply to the particular negligence involved. However, the general rule rarely results in absolving responsibility where dangerous products are concerned. Courts either hold that, as a matter of public policy, a disclaimer of liability arising from harm caused by the use of dangerous products is void and inoperative or hold that, as a matter of construction, the risk created and the harm resulting do not fall within the scope of the terms of the disclaimer. Disclaimers are generally more effective in claims based on breach of warranty, however.

It may be noted that where disclaimers are employed by labeling or otherwise and brought home to the complaining party, the latter would ordinarily be apprised of the risk and barred from recovery under the doctrine of assumption of risk. However, this aspect has not been fully developed in chemical-products liability cases.

- (a) Cases holding a disclaimer effective:
 - (1) *Charles Lachman Co. v Hercules Powder Co.*, 79 F. Supp. 206 (Pa., 1948) ("....Buyer assumes all risk and liability whatsoever resulting from the use of such materials....")
 - (2) *Gibson v California Spray-Chemical Corp.*, 188 P. (2d) 316 (Wash., 1948) (disclaimer effective as to warranty; not clear as to effect on negligence)

See also, *Fairbanks, Morse & Co. v Consolidated Fisheries Co.*, 190 F. (2d) 817 (Del., 1951) (disclaimer effective as to negligence; not effective as to warranty due to conflict with express warranty)
- (b) Cases holding disclaimer ineffective:
 - (1) *E. I. DuPont de Nemours & Co. v Baridon*, 73 F. (2d) 26 (Iowa, 1934) (disclaimer effective as to warranty but not as to negligence)
 - (2) See, *Ebers v General Chemical Co.*, 17 N.W. (2d) 176 (Mich., 1945) (express representation superseded disclaimer of warranty)
 - (3) *Gall v Union Ice Co.*, 239 P. (2d) 48 (Cal., 1951) (disclaimer in contract between buyer and seller ineffective as to third parties)
- (c) General References:
 - (1) Texts and Encyclopedias:
 - (i) Prosser, Torts, sec. 51, pp. 380-385 (1941)
 - (ii) General Digest, Contracts, key no. 114.
 - (2) Legal Periodicals: - (None)
 - (3) Annotations: - (None)

f. Res Ipsa Loquitur

Note: A manufacturer or other vendor may be held liable for harm resulting from the use of a product supplied without actual proof of negligence where the doctrine of *res ipsa loquitur* is applicable. This doctrine is usually applicable where (1) the accident which has occurred is of the type which is usually caused by someone's negligence, (2) the instrumentality causing the accident was within the exclusive control of the defendant, and (3) the possibility of contributory negligence on the part of the plaintiff is eliminated. There have been few claims in chemical-products liability cases which have been brought under the theory of *res ipsa loquitur*. The principle does find common application in cases involving explosion of bottles of carbonated beverages and contaminated food in sealed containers.

Procedurally, the doctrine when it is applied may operate in two ways, depending on the law of the particular jurisdiction involved. Under the majority view, *res ipsa loquitur* is but a form of circumstantial evidence which

establishes a prima facie case for the plaintiff invoking it. The doctrine operates to avoid a directed verdict for defendant at the conclusion of plaintiff's proof, but does not operate to compel the introduction of rebutting evidence by the defendant at the risk of a directed verdict for plaintiff. Under the minority view, however, res ipsa loquitur is given the effect of a presumption of law which compels the defendant to rebut the inference of negligence established by res ipsa loquitur or suffer an adverse judgment as a matter of law. Under either theory, the quantum of evidence required to rebut the inference of res ipsa loquitur varies with the factual circumstances of each case. Evidence by the defendant showing that the case is not one in which the doctrine is applicable may result in a verdict directed for the defendant since the inference of negligence has been rebutted. However, evidence admitting the applicability of the doctrine but tending to establish due care on the part of the defendant, usually frames a proper question of negligence for the jury.

(a) Cases invoking the rule of res ipsa loquitur:

- (1) Edelman v Cook, 140 N.E. 765 (Ohio, 1923) (sale of wrong drug)
- (2) Hertzler v Mansum, 200 N.W. 155 (Mich., 1924) (flour contaminated with arsenate of lead)
- (3) Alston v J. L. Prescott Co., 76 A. (2d) 686 (N.J., 1950) (explosion of bottle of laundry fluid)
- See also, Litton v Travelers Ins. Co., 88 F. Supp. 76 (La., 1950) (escaping chlorine; non-product liability case)

(b) Cases holding the rule inapplicable:

- (1) Kusick v Thorndike & Hix, Inc., 112 N.E. 1025 (Mass., 1916) (explosion of can of lime could have occurred without fault of defendant packer who was not the manufacturer)
- (2) Blanchard v Kronick, 169 N.E. 438 (Mass., 1929) (feed containing Paris Green)
- (3) Sierocinski v E. I. DuPont de Nemours and Co., 25 F. Supp. 706 (Pa., 1938) (explosion of dynamite cap)
- (4) Henderson v National Drug Co., 23 A. (2d) 743 (Pa., 1942) (injection of drug)
- (5) Kramer v R. M. Hollingshead Corp., 75 A. (2d) 861 (N.J., 1950) (solvent exploded outside of container)
- (6) Tuscany v U.S. Standard Products Co., 243 S.W. (2d) 207 (Tex., 1951) (self-injection of drug)

(c) General References:

- (1) Texts and Encyclopedias:
 - (i) Prosser, Torts, secs. 43-44 (1941)
 - (ii) 5 Wigmore on Evidence, sec. 2509 (1923)
 - (iii) 38 Am. Jur., Negligence, secs. 295-311
- (2) Legal Periodicals:
 - (i) Bohlen, The Effect of Rebuttable Presumptions of Law upon the Burden of Proof, 68 U. Pa. L. Rev. 307 (1920)
 - (ii) McCormick, Charges on Presumptions and Burden of Proof, 5 N.C.L. Rev. 291 (1927)
 - (iii) Heckel & Harper, Effect of the Doctrine of Res Ipsa Loquitur, 22 Ill. L. Rev. 724 (1928)
 - (iv) Niles, Pleading Res Ipsa Loquitur, 7 N.Y.U. L.Q. Rev. 415 (1930)
 - (v) Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 906 (1931)
 - (vi) Carpenter, The Doctrine of Res Ipsa Loquitur, 1 U. Chi. L. Rev. 519 (1934)
 - (vii) Rosenthal, The Procedural Effects of Res Ipsa Loquitur in New York, 22 Cornell L.Q. 39 (1936)
 - (viii) Prosser, The Procedural Effect of Res Ipsa Loquitur, 20 Minn. L. Rev. 241 (1936)
 - (ix) Carpenter, The Doctrine of Res Ipsa Loquitur in California, 10 So. Cal. L. Rev. 166 (1937)
 - (x) Jeanblanc, Manufacturers' Liability to Persons Other Than Their Immediate Vendors, 24 Va. L. Rev. 134 (1937)
 - (xi) McBaine, Presumptions; Are They Evidence?, 26 Cal. L. Rev. 519 (1938)
 - (xii) Prosser, Res Ipsa Loquitur in California, 37 Cal. L. Rev. 183 (1949)
 - (xiii) Seavey, Res Ipsa Loquitur: Tabula in Naufragio, 63 Harv. L. Rev. 643 (1950)
- (3) Annotations:
 - (i) 56 A.L.R. 593 - "Applicability of 'res ipsa loquitur' to explosion of gases or chemicals"
 - (ii) 167 A.L.R. 658 - "Res Ipsa Loquitur" as a presumption or a mere permissible inference."
 - (iii) 4 A.L.R. (2d) 466 - "Res ipsa loquitur as applied to bursting of bottled beverages, food containers, etc."

9. Miscellaneous Points of Evidence

Note: The general rules of evidence are applicable in negligence actions involving chemical products. The citations cited below are illustrative.

1. The custom of other manufacturers similarly situated is admissible to show due care on the part of a defendant manufacturer, although courts differ as to the weight which should be attached to this.

(a) Leading cases in accord with this rule:

- (1) Collins Baking Co. v Savage, 150 So. 336 (Ala., 1933)
- (2) McClaren v G. S. Robins & Co., 162 S.W. (2d) 856 (Mo., 1942)
- (3) Medeiros v Coca-Cola Bottling Co. of Turlock, 135 P. (2d) 676 (Cal., 1943)
- (4) Maize v Atlantic Refining Co., 41 A. (2d) 850 (Pa., 1945)

2. Evidence of compliance with governmental regulations, recommendations, or inspections is generally admissible to show due care, although it is not decisive of the issue.

(a) Leading cases in accord with this rule:

- (1) Howson v Foster Beef Co., 177 Atl. 656 (N.H., 1935) (federally inspected meat)
- (2) Boylston v Armour & Co., 12 S.E. (2d) 34 (S.C., 1940) (federally inspected meat)
- (3) McClaren v G. S. Robins & Co., 162 S.W. (2d) 856 (Mo., 1942) (weight given to label approval by Surgeon General of the United States)
- (4) Paolinelli v Dainty Foods Manufacturers Inc., 54 N.E. (2d) 759 (Ill., 1944) (government inspected chicken oil)
- (5) Maize v Atlantic Refining Co., 41 A. (2d) 850 (Pa., 1945) (label approval by Surgeon General of the United States not determinative in Pennsylvania)

- (6) *Ebers v General Chemical Co.*, 17 N.W. (2d) 176 (Mich., 1945) (recommendations of United States Department of Agriculture not determinative in Michigan)
3. Evidence that third parties received similar injuries from same product is admissible to establish the dangerous nature of the product or to negate the probability of causation through a particular allergy.
- (a) Leading cases in accord with this rule:
- (1) *Henderson v National Drug Co.*, 23 A. (2d) 743 (Pa., 1942)
 - (2) *Carter v Yardley*, 64 N.E. (2d) 693 (Mass., 1946)
- See, *Morris*, Proof of Safety History in Negligence Cases, 61 Harv. L. Rev. 205 (1948)
4. Questions to witnesses as to whether a particular label should convey adequate warning of dangers of improper use to those who would use it commercially may be excluded as invasion of jury's province.
- (a) Cases in accord with this rule:
- (1) *Walton v Sherwin-Williams Co.*, 191 F. (2d) 277 (Ark., 1951) (questions to plaintiff's witnesses who were experts in botany and plant pathology as to whether the label on container of weed killer conveyed adequate warning)

h. Miscellaneous Points of Procedure

Note: The general rules of procedure are applicable in negligence actions involving chemical products. The decisions cited below are illustrative.

1. Subject to certain modifications, it is improper for a court to require a defendant to reveal any secret formulas or trade secrets although it is proper for a court to require a party to allow an examination of ingredients of a product which has caused harm.

(a) Cases in which this principle was involved:

- (1) *Wiggins Chemical Co. v Berry*, 46 F. (2d) 622 (Ill., 1931) (satisfactory for defendant to submit formula to court for its confidential examination and inspection)
- (2) *Reiss v Kirkman & Son*, 273 N.Y.S. 7 (1934) (manufacturer can obtain portion of product causing injury from plaintiff for chemical analysis)
- (3) *Lenerts v Rapidol Distributing Corp.*, 3 F.R.D. 42 (N.Y., 1942) (motion by defendant manufacturer under Federal Rule 30 (b) to limit scope of depositions and interrogatories, held that defendant was required to reveal ingredients of hair dye and to detail manner in which product should be used)
- (4) *Hyman v Revlon Products Corp.*, 100 N.Y.S. (2d) 937 (N.Y., 1950) (order granting examination of manufacturer limited to ingredients of cosmetic and not to include formula disclosure; dicta that proportion of poisonous ingredients could be obtained if analysis were unavailable or inadequate)
- (5) *Putney v Du Bois Co.*, C.C.H. 22, 198 (Mo., 1950) (defendant manufacturer required to answer interrogatories as to ingredients and proportions thereof of detergent despite contention that this would divulge trade secret)
- (6) *Glick v McKesson & Robbins*, 10 F.R.D. 477 (Mo., 1950) (manufacturer of sun tan lotion required to answer interrogatories as to ingredients but not as to the proportion of the ingredients)
- (7) *Pierson v Roux Laboratories*, C.C.H. 22, 242 (N.Y., 1951) (manufacturer required to divulge poisonous ingredients and proportionate quantity in hair dye by deposition where chemical analysis by plaintiff was inadequate but not to divulge non-poisonous ingredients)
- (8) *Levy v Roux Laboratories*, 107 N.Y.S. (2d) 585 (1951) (manufacturer required to submit written statement of ingredients of product and samples)

See also: *Lever Bros. Co. v Proctor & Gamble Mfg. Co.*, 38 F. Supp. 680, 683 (Md., 1941) and cases cited therein.

4 Moore, Federal Practice 2468 (2d ed. 1950) -- Professor Moore states: "There is no true privilege against discovery of trade secrets or other 'confidential' business information, but the courts nevertheless will exercise their discretion to avoid unnecessary disclosure of such information, particularly where the action is between competitors."

2. Joinder of parties.

See, 119 A.L.R. 1356 - "Joinder of manufacturer or packer and retailer or other middleman as defendants in action for injury to person or damage to property of purchaser or consumer of defective article."

See, *O'Neal v Tester*, 11 F.R.D. 180 (Ill., 1951) (action against manufacturer of oxygen gas pressure regulator and dealers from whom regulator was purchased by plaintiffs for damages sustained in fire and explosion resulting from use of regulator, held, the tort liability of the manufacturer and dealer were several and not joint and hence under Federal Rules of Civil Procedure, plaintiffs were entitled to dismiss action as to dealers in order to establish the requisite diversity of citizenship as basis for federal jurisdiction)

Section 3. Liability of Vendors of Chemical Products for Breach of Warranty

A. Liability of Manufacturers for Breach of Warranty

B. Liability of Vendors other than Manufacturers for Breach of Warranty

C. Special Problems in Warranty Cases Involving Vendors in General

A. Liability of Manufacturers for Breach of Warranty

a. General Basis of Liability

1. A manufacturer is subject to liability for breach of either an express warranty or a warranty implied by law without regard to the question of negligence.

Comment: The general basis of liability in warranty actions differs essentially from that in tort actions in that tort liability is based on the absence of due care on the part of the manufacturer in making his product safe for

its intended use, whereas warranty liability is based on a violation of a contractual duty expressly assumed or implied by law. It is always open for the manufacturer to show, however, that his product was put to an unintended use and that this was the proximate cause of the harm complained of. Conduct on the part of the plaintiff, similar to contributory negligence, may also bar recovery in warranty actions.

b. Extent of Liability

2. A manufacturer is generally subject to liability in warranty actions for harm resulting from a breach of warranty to the person or property of any person who is in privity with him.

Comment: It has been noted in Part I, Section 2 that the manufacturer is subject to liability in tort cases to the person or property of any person who may be expected to use his product or be in the vicinity of his product's probable use. Liability extends in favor of remote vendees and users as well as parties with whom the manufacturer has dealt with directly. On the other hand, the manufacturer's liability in warranty actions is limited to those persons with whom the manufacturer has dealt with directly or has assumed to deal with by means of labeling representations. This is the rule in the majority of jurisdictions. However, a minority of jurisdictions have broken away from this view and hold the manufacturer liable to remote parties irrespective of contractual privity. These jurisdictions enlarge the ambit of liability on the ground of public policy and social justice. The trend of the law, principally in food-products liability cases, is in the direction of this minority approach. The Uniform Sales Act does not change the traditional concept of privity.

It may be noted that in the case of most chemical products, which leave the manufacturer in packaged form with a label on the container or labeling accompanying the product, requisite privity between the manufacturer and a remote party may be found on the basis that the manufacturer has by labels or labeling assumed to deal directly with whoever purchased or used the product.

(a) Cases holding manufacturer liable for personal injuries or property damage to remote parties:

- (1) *Simpson v American Oil Co.*, 14 S.E. (2d) 638 (N.C., 1941) (manufacturer of insecticide liable for personal injury to purchaser from dealer where warranty was made on label)
- (2) *Ebers v General Chemical Co.*, 17 N.W. (2d) 176 (Mich., 1945) (manufacturer of insecticide liable to purchaser from dealer for property damage where express warranty was made in advertising pamphlet; decided on merged principles of tort and warranty)
- (3) *Free v Sluss*, 197 P. (2d) 854 (Cal., 1948) (soap manufacturer liable to retail purchaser from wholesaler where express warranty was made on label)
- (4) *North American Fertilizer Co. v Combs*, 212 S.W. (2d) 536 (Ky., 1948) (dicta that fertilizer manufacturer would be liable to purchaser from dealer on implied warranty)

(b) Cases holding manufacturer not liable to remote parties on the ground of lack of privity:

- (1) *Cliff v California Spray-Chemical Corp.*, 257 Pac. 99 (Cal., 1927) (dicta that manufacturer of insecticide would not be liable for personal injury to purchaser from retailer)
- (2) *Sierocinski v E. I. DuPont de Nemours and Co.*, 25 F. Supp. 706 (Pa., 1938) (implied warranty of fitness does not arise between manufacturer and third party)
- (3) *Carter v Yardley & Co.*, 64 N.E. (2d) 693 (Mass., 1946) (dicta that perfume manufacturer would not be liable for personal injury to purchaser from retailer)
- (4) *Campo v Scofield*, 95 N.Y.S. (2d) 610 (1950) (manufacturer of onion topping machine not liable for personal injury to purchaser from retailer)
- (5) *Green v Equitable Powder Mfg. Co.*, 94 F. Supp. 126 (Ark., 1950), affirmed, 95 F. Supp. 127 (Ark., 1951) (explosives manufacturer not liable for personal injury to employee of purchaser)
- (6) *Wechsler v Hoffman-La Roche, Inc.*, 99 N.Y.S. (2d) 588 (N.Y., 1950) (drug manufacturer not liable for personal injury to patient of physician)

Note: Other illustrative cases in accord with rule, but involving products other than chemical products are noted in the footnote. These cases principally involve food products.²⁶

(c) General References:

- (1) Texts and Encyclopedias
 - (i) *Dickerson, Products Liability and the Food Consumer*, pp. 93-109
 - (ii) 46 Am. Jur., Sales, secs. 299-331
- (2) Legal Periodicals
 - (i) Spruill, Privity of Contract as a Requisite for Recovery on Warranty, 19 N. C. L. Rev. 551 (1941)
 - (ii) Note: (1949) 29 B.U.L. Rev. 107 (1949)
- (3) Annotations: - (None)

26. *Smith v Williams*, 45 S.E. 394 (Ga., 1903); *Nelson v Armour Packing Co.*, 90 S.W. 288 (Ark., 1905); *Roberts v Anheuser-Busch Brewing Ass'n.*, 98 N.E. 95 (Mass., 1912); *S. H. Kress & Co. v Lindsey*, 262 Fed. 331 (C.C.A. 5th, 1919); *Young v Certainseed Products Corp.*, 133 S.E. 279 (Ga., 1926); *J. I. Case Threshing Machine Co. v Dulworth*, 287 S.W. 994 (Ky., 1926); *Prinsen v Russos*, 215 N.W. 905 (Wis., 1927); *Turner v Edison Storage Battery Co.*, 161 N.E. 423 (N.Y., 1928); *Minutilla v Providence Ice Cream Co.*, 144 Atl. 884 (R. I., 1929); *Wood v Advance Rumely Thresher Co.*, 234 N.W. 517 (N.D., 1931); *Collins Baking Co. v Savage*, 150 So. 336 (Ala., 1933); *Burns v Baldwin-Doherty Co.*, 170 Atl. 511 (Me., 1934); *Colonna v Rosedale Dairy Co.*, 186 S.E. 94 (Va., 1936); *Chanin v Chevrolet Motor Co.*, 89 F. (2d) 889 (Ill., 1937); *Rachlin v Libby-Owens-Ford Glass Co.*, 96 F. (2d) 597 (N.Y., 1938); *Square Model Farm Dairies*, 55 T.L.R. 384 (Eng., 1939); *Finks v Viking Refrigerators*, 147 S.W. (2d) 124 (Mo., 1940); *Poplar v Hochschild, Kohn & Co.*, 24 A (2d) 783 (Md., 1942); *Massey v Borden Co.*, 37 N.Y.S. (2d) 571 (1942); *Strother v Villere Coal Co.*, 15 S. (2d) 383 (La., 1943); *Pearl v William Filene's Sons Co.*, 58 N.E. (2d) 825 (Mass., 1945); *Barni v Kutner*, 76 A. (2d) 801 (Del., 1950); *Studebaker Corp. v Nail*, 62 S.E. (2d) 198 (Ga., 1950) (decided on other grounds)

c. Express Warranties

3. A manufacturer who undertakes to make representations regarding his product upon which a purchaser justifiably relies as an inducement to the purchase of the product is under the obligation to make such representations good.

Comment: Where the manufacturer induces the purchase of his product by positive representations that it is safe for use or efficacious for its intended purpose, he subjects himself to liability in warranty if the representations are false, inaccurate, or misleading. The representations may be oral, or may be made on the label of the product itself, or by advertising or other means of labeling. It is not a prerequisite to liability that the manufacturer did not know that the representations were false, since he is in the position of a guarantor in a warranty action.

An express warranty is defined in the uniform sales law as follows:

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." (Section 12)

(a) Cases holding manufacturer liable for breach of express warranty:

- (1) *Ingraham v Associated Oil Co.*, 6 P. (2d) 645 (Wash., 1932) (manufacturer of insecticide liable to purchaser on basis of oral claims for safety made at the time of sale)
- (2) *Simpson v American Oil Co.*, 14 S.E. (2d) 638 (N.C., 1941) (earlier opinion in 8 S.E. (2d) 813 (N.C., 1940) (manufacturer of insecticide liable to remote purchaser on basis of safety claims made on the label of the product)
- (3) *Ebers v General Chemical Co.*, 17 N.W. (2d) 176 (Mich., 1945) (manufacturer of insecticide liable to remote user on basis of safety claims made in advertising pamphlet distributed to the public; principle of negligent misrepresentation involved)
- (4) *Free v Sluss*, 197 P. (2d) 854 (Cal., 1948) (manufacturer of soap product liable to remote user on basis of guarantee of quality made on the label of the product)
- (5) *Lindroth v Walgreen Co.*, 87 N.E. (2d) 307 (Ill., 1949), affirmed 94 N.E. (2d) 847 (Ill., 1950) (manufacturer of vaporizer liable to remote user partially on basis of safety claims made on the label of the product and in pamphlet accompanying the product)

(b) Cases holding manufacturer not liable for breach of express warranty:

- (1) *Farrow v Andrews & Co.*, 69 Ala. 96 (1881) (statement that "fertilizer is good," held mere expression of opinion)
- (2) *Hubbard Fertilizer Co. of Baltimore City v American Irona Corp.*, 120 Atl. 522 (Md., 1923) (no evidence of breach of express warranty of borax content in fertilizer)
- (3) *Sawyer v Pine Oil Sales Co.*, 155 F. (2d) 855 (La., 1946) (statement on label of cleansing product that "It will not injure the skin..." was not a warranty against non-injury to the eye)
- (4) *North American Fertilizer Co. v Combs*, 212 S.W. (2d) 526 (Ky., 1948) (designation of fertilizer as "6-8-6" constituted express warranty that product had specified formulation, but theory of action was not that this warranty was breached)
- (5) *Gibson v California Spray-Chemical Corp.*, 188 F. (2d) 316 (Wash., 1948) (no evidence of express warranty of safety of insecticide)
- (6) *Murphy Laboratories v Emery Industries*, 95 F. Supp. 651 (Pa., 1951) (no evidence of warranty of soap product)

(c) General References:

- (1) Texts and Encyclopediae:
 - (i) *Void*, Sales, sec. 142 (1931)
 - (ii) *Williston*, Contracts, secs. 673, 712, 970-971, 1075, 1492, 1505 (1938)
- (2) Legal Periodicals:
 - (i) *Williston*, What Constitutes an Express Warranty in the Law of Sales, 21 Harv. L. Rev. 555 (1908)
 - (ii) *Williston*, Representation and Warranty in Sales, 27 Harv. L. Rev. 1 (1913)
 - (iii) *Edgert*, Express Warranties in Sales of Goods, 33 Yale L. J. 14 (1923)
 - (iv) *Edgert & Fink*, Business Practices Regarding Warranties in the Sale of Goods, 25 Ill. L. Rev. 400 (1930)
 - (v) *Notes*: (1932) 46 Harv. L. Rev. 161; (1932) 81 U. Pa. L. Rev. 94; (1927) 36 Yale L. J. 1155; (1932) 7 Wash. L. Rev. 351; (1933) 18 Cornell L. Q. 445
- (3) Annotations:
 - (i) 15 A.L.R. 856 - "Warranties and conditions upon sale of seed, nursery stock, etc."
 - (ii) 28 A.L.R. 991; 158 A.L.R. 1413 - "Advertisements of seller as affecting rights of parties to sale of personal property."
 - (iii) 13 A.L.R. 1182; 74 A.L.R. 346; 168 A.L.R. 1062 - "Personal injuries to buyer, due to defective or dangerous condition of article, effect of express warranty on liability of seller of article not inherently dangerous."
 - (iv) 42 A.L.R. 1255; 60 A.L.R. 371 - "Personal injury to or death of, third person due to dangerous condition of article sold, effect of express warranty on liability of seller for."

d. Warranties Imposed by Law

4. A manufacturer has under certain conditions an obligation imposed by law to make his product of a merchantable quality and reasonably fit for the particular purpose for which it is bought.

Comment: The manufacturer may be subject to liability in warranty actions although he has made no express representations concerning the safety or efficaciousness of his product. The law imposes the duty under certain con-

ditions to supply a product which is merchantable and the duty under certain other conditions to supply a product which is suitable for a particular purpose.

The conditions under which the law imposes the warranty of merchantability and the warranty of suitability are set forth in the uniform sales law²⁷ as follows:

"....there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

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

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of a merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.²⁸

(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negate a warranty or condition implied under this act unless inconsistent therewith." (Section 15)

(a) Cases holding manufacturer liable for breach of implied warranty:

- (1) Swain v Schieffelin, 12 N.Y.S. 155 (1890) (manufacturer of chemical ingredient incorporated in food product)
- (2) Patterson v Orangeburg Fertilizer Co., 108 S.E. 401 (S.C., 1921) (manufacturer of fertilizer)
- (3) Willcox, Ives & Co. v Brazzell, 117 S.E. 203 (S.C., 1923) (manufacturer of fertilizer)
- (4) Sherwin-Williams Co. of Texas v Offenhauser, 42 S.W. (2d) 859 (Tex., 1931) (manufacturer of insecticide)
- (5) Bianchi v Denholm & McKay Co., 19 N.E. (2d) 697 (Mass., 1939) (manufacturer of face powder; question of allergy involved)
- (6) Pietrus v J. R. Watkins Co., 38 N.W. (2d) 799 (Minn., 1949) (manufacturer of hair shampoo)
- (7) Pabellon v Grace Line, Inc., 191 F. (2d) 169 (N.Y., 1951) (reversing 94 F. Supp. 989 (N.Y., 1950) (cleaning compounds sold under trade names)

(b) Cases holding manufacturer not liable for alleged breach of implied warranty:

- (1) Philbrick v Kendall, 88 Atl. 540 (Me., 1913) (fertilizer ordered by brand name - no warranty of fitness)
- (2) Hubbard Fertilizer Co. of Baltimore City v American Irona Corp., 120 Atl. 522 (Md., 1923) (fertilizer sold under trade name)
- (3) F. E. Attiaux & Co. v Pancreon Mfg. Corp., 22 F. (2d) 749 (Mass., 1927) (chemical compound sold under trade name)
- (4) Sawyer v Pine Oil Sales Co., 155 F. (2d) 855 (La., 1946) (no implied warranty that soap product would not splash into eyes and cause injury)
- (5) Carter v Yardley & Co., 64 N.E. (2d) 693 (Mass., 1946) (dicta that no implied warranty of cosmetic in absence of privity)
- (6) North American Fertilizer Co. v Combs, 212 S.W. (2d) 526 (Ky., 1948) (fertilizer put to unintended use)
- (7) Gibson v California Spray-Chemical Corp., 188 P. (2d) 316 (Wash., 1948) (disclaimer in sale of insecticide precluded implied warranty)
- (8) Campo v Scofield, 95 N.Y.S. (2d) 610 (1950) (no implied warranty of machinery in absence of privity)
- (9) Green v Equitable Powder Mfg. Co., 94 F. Supp. 126 (Ark., 1950) (no implied warranty of explosives in absence of privity)
- (10) Murphy Laboratories v Emery Industries, 95 F. Supp. 651 (Pa., 1951) (no evidence of warranty of soap product)
- (11) Tuscany v U. S. Standard Products Co., 243 S.W. (2d) 207 (Tex., 1951) (no evidence that drug was unsafe)

(c) General References:

- (1) Texts and Encyclopedias:
 - (i) 46 Am. Jur., Sales, secs. 332-361

27. The uniform sales law is in effect in the large majority of jurisdictions. Since it is essentially a codification of the common law, its principles are equally applied in those jurisdictions which have not enacted sales laws. There are other warranties imposed by law, other than merchantability and fitness for a particular purpose, but they are rarely encountered in chemical-products liability cases. These warranties, as considered in the uniform sales law, include warranties of title (Section 13), warranties in sales by description (Section 14), and warranties in sales by sample (Section 16).

28. It should be noted that the mere fact that the article happens to have a trade name and is so designated in the contract does not automatically bring the contract within the provisions of this subsection. An implied warranty of fitness is not excluded if the buyer, when he discloses to the seller a particular purpose, relies on the seller's skill and judgment to furnish the appropriate article and the seller then selects an article which has a patent or trade name. See, Buchanan v Dugan, 82 A. (2d) 911 (D.C., 1951) and cases cited therein.

(2) Legal Periodicals:

- (i) Gose, Implied Warranty of Quality under the Uniform Sales Act, 4 Wash. L. Rev. 15 (1929)
- (ii) Llewellyn, On Warranty of Quality and Society, 36 Col. L. Rev. 699 (1936)
- (iii) Morrow, Warranty of Quality: A Comparative Survey, 14 Tulane L. Rev. 327 (1940)
- (iv) Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117 (1943)
- (v) Notes: (1944) 22 Tex. L. Rev. 243 (implied warranties in sale of animal feed); (1948) 23 Tulane L. Rev. 96 (nature and proof of implied warranties)

(3) Annotations:

- (i) 62 A.L.R. 1510 - "Construction and effect of express or implied warranty on sale of article intended for use as an explosive."
- (ii) 131 A.L.R. 123 - "Cosmetics, implied warranty by retailer of."
- (iii) 168 A.L.R. 389 - "Implied warranty of quality, fitness, or condition as affected by buyer's inspection of, or opportunity to inspect, goods."

B. Liability of Vendors other than Manufacturers for Breach of Warranty

a. General Basis of Liability

1. A vendor is subject to liability in warranty actions for breach of an express or implied warranty of a product which he sells irrespective of whether he has exercised reasonable care in the sale of the product.

Comment: The vendor who is not a manufacturer is subject to liability in warranty actions in accordance with the principles applicable to the manufacturer. The comment in Section A, pp. 27-28 is equally applicable here. The insurer's liability of the vendor is strikingly illustrated in cases where the vendor of sealed-packaged products is held liable for breach of warranty, although he had no means of ascertaining the dangerous nature of the contents within the package.

b. Extent of Liability

2. A vendor is generally subject to liability in warranty actions for harm resulting from a breach of warranty to the person or property of any person who is in privity with him.

Comment: The comment in Section A, p. 28 is equally applicable here. The vendor is under the general rule liable in warranty actions only to those persons who directly deal with him in the sale of a product. Because of the similar requirement of privity in warranty actions against the manufacturer, remote users or vendees frequently bring an original suit against their immediate vendors, such as retailers. The latter may then, in appropriate cases, join the manufacturer as a party-defendant or bring a separate recovery-over action against the manufacturer or wholesaler.

(a) Cases holding vendor liable for personal injuries or property damage to remote parties:

- (1) Davis v Radford, 63 S.E. (2d) 822 (N.C., 1951) (wholesale druggist liable for personal injury to purchaser from retailer; theory of Simpson v American Oil Co., *supra*, followed)

(b) Cases holding vendor not liable to remote parties on the ground of lack of privity:

- (1) Binion v Sasaki, 41 P. (2d) 585 (Cal., 1935) (seller of food contaminated with arsenic not liable for personal injury to member of purchaser's family)
- (2) Dumbrow v Ettinger, 44 F. Supp. 763 (N.Y., 1942) (retail druggist not liable for personal injury to member of purchaser's family)

See also, cases cited in Section A, footnote 26, p. 28.

(c) General References:

Refer to material cited in Section A, p. 28.

c. Express Warranties

3. A vendor who undertakes to make representations regarding a product sold upon which a purchaser justifiably relies as an inducement to the purchase of the product is under the obligation to make such representations good.

Comment: The comment noted in Section A, p. 29 is equally applicable here.

(a) Cases holding vendor liable for breach of express warranty:

- (1) Hawkins v Pemberton, 51 N. Y. 198 (1872) (oral representation that product sold was blue vitriol, held an express warranty)
- (2) Leonard v Carleton & Hovey Co., 119 N.E. 674 (Mass., 1918) (terms "cold pressed provincial medicine oil" and "pure medicine cod liver oil" used in contract for sale of such oil, constituted express warranty)
- (3) Swift & Co. v Meekins, 102 S.E. 138 (N.C., 1920) (oral statement that product sold was "as good fertilizer as there is on the market", held an express warranty as a matter of law)
- (4) City of Chicago v Proctor & Gamble Co., 9 F. (2d) 286 (Ohio, 1925) (provision in contract for sale of soap "in no case shall the maximum amount of hydrocarbons exceed 3 per centum," held an express warranty)
- (5) Stevenson v B. B. Kirkland Seed Co., 180 S.E. 197 (S.C., 1935) (oral representation that seed sold was of a certain name and variety, held an express warranty)
- (6) Miller v Economy Hog & Cattle Powder Co., 293 N.W. 4 (Iowa, 1940) (oral representation that stock powder was "all right" for sheep, held an express warranty)
- (7) Graham v Jordan Marsh Co., 67 N.E. (2d) 404 (Mass., 1946) (oral representation that cosmetic would be beneficial to purchaser's skin, held an express warranty)
- (8) Free v Sluss, 197 P. (2d) 854 (Cal., 1948) (oral statement that soap product was the same as product previously purchased)

(b) Cases holding vendor not liable for alleged breach of express warranty:

- (1) *Mason v Chappell*, 15 Grat. 572 (Va., 1860) (statement that "fertilizer is good," held mere expression of opinion)
- (2) *Dent v Murphy*, 13 Ky. Law Rep. 46 (1891) (no evidence of warranty of fertilizer, abstract opinion)
- (3) *DeZeeuw v Fox Chemical Co.*, 179 N.W. 605 (Iowa, 1920) (statement that hog remedy would improve growth and condition of hogs, held mere expression of opinion)
- (4) *Blumer v Rauer*, 230 Pac. 964 (Cal., 1924) (statement that fertilizer would increase the productivity of purchaser's vineyard and enrich the soil, held mere expression of opinion)
- (5) *Gray v Gurney Seed & Nursery Co.*, 231 N.W. 940 (S.D., 1930) (no evidence of breach of warranty of seeds)
- (6) *Smith v Denholm & McKay Co.*, 192 N.E. 631 (Mass., 1934) (express warranty at time of sale of cosmetic product does not extend to subsequent sales of the same product)
- (7) *Buckley v Shell Chemical Co.*, 89 P. (2d) 453 (Cal., 1939) (manufacturer's written disclaimer prevailed over dealer-agent's oral representations concerning fertilizer)
- (8) *Bel v Adler*, 11 S.E. (2d) 495 (Ga., 1940) (dealer's statement held a mere recommendation)
- (9) *Beckett v F. W. Woolworth Co.*, 34 N.E. (2d) 427 (Ill., 1941) (no reliance by purchaser on dealer's statement that cosmetic was safe or on card enclosed in package by manufacturer, where purchaser had been using the product over 10 years)
- (10) *Henderson v National Drug Company*, 23 A. (2d) 743 (Pa., 1942) (no evidence of breach of warranty of drugs)

(c) General References:

Refer to material cited in Section A, p. 29.

d. Warranties Imposed by Law

4. A vendor has under certain conditions an obligation imposed by law to sell a product which is of a merchantable quality and reasonably fit for the particular purpose for which it is bought.

Comment: The comment noted in Section A, pp. 29-30 is equally applicable here.

(a) Cases holding vendor liable for breach of implied warranty of quality or fitness:

- (1) *Wilcox, Gibbs & Co. v Hall*, 53 Ga. 635 (1875) (fertilizer)
- (2) *Jones v George*, 61 Tex. 345 (1884) (insecticide)
- (3) *Flynn v Bedell*, 136 N.E. 252 (Mass., 1922) (wearing apparel)
- (4) *Swift & Co. v Etheridge*, 129 S.E. 453 (N.C., 1925) (fertilizer)
- (5) *Blanchard v Kronick*, 169 N.E. 438 (Mass., 1929) (feed containing Paris Green)
- (6) *Larson v Farmers' Warehouse Co.*, 297 Pac. 753 (Wash., 1931) (seeds)
- (7) *Haller v Rudmann*, 292 N.Y.S. 586 (1937) (defective bottle containing rubbing alcohol)
- (8) *Manning Mfg. Co. v Hartol Products Corp.* 99 F. (2d) 813 (Vt., 1938) (kerosene)
- (9) *Bianchi v Denholm & McKay Co.*, 19 N.E. (2d) 697 (Mass., 1939) (cosmetics)
- (10) *Zirpola v Adam Hat Stores*, 4 A. (2d) 73 (N.J., 1939) (wearing apparel)
- (11) *Smith v Gimbel Bros., Inc., and Societe Colffure, Inc.*, 259 N.Y. App. Div. 1037 (1940) (permanent wave preparation; memo opinion)
- (12) *Griffin v Taylor*, 16 S.E. (2d) 186 (Ga., 1941) (fertilizer)
- (13) *Dumbrow v Ettinger*, 44 F. Supp. 763 (N.Y., 1942) (drugs)
- (14) *Henderson v Berce*, 50 A. (2d) 45 (Me., 1946) (seeds)
- (15) *Graham v Jordan Marsh Co.*, 67 N.E. (2d) 404 (Mass., 1946) (cosmetics)
- (16) *Reynolds v Sun Ray Drug Co.*, 52 A. (2d) 666 (N.J., 1947) (cosmetics)
- (17) *Davis v Radford*, 63 S.E. (2d) 822 (N.C., 1951) (drugs)
- (18) *Ringstad v I. Magnin & Co.*, 239 P. (2d) 848 (Wash., 1952) (wearing apparel)

(b) Cases holding vendor not liable for alleged breach of implied warranty of quality or fitness:

- (1) *Dent v Murphy*, 13 Ky. Law Rep. 46 (1891) (fertilizer; abstract opinion)
- (2) *Bowker Fertilizer Co. v Wallingford*, 111 Atl. 329 (Me., 1920) (fertilizer purchased under stated chemical formula)
- (3) *Smith v Denholm & McKay Co.*, 192 N.W. 631 (Mass., 1934) (cosmetic sold under trade name)
- (4) *Binion v Sasaki*, 41 P. (2d) 585 (Cal., 1935) (no implied warranty of contaminated food in absence of privity)
- (5) *Smith v S. S. Kresge Co.*, 79 F. (2d) 361 (Mo., 1935) (complaint based on negligence with no allegation of warranty)
- (6) *Bel v Adler*, 11 S.E. (2d) 495 (Ga., 1940) (cosmetic manufactured by reputable manufacturer and resold by dealer in original package)
- (7) *Cicarelli v Lipshetz*, 8 Conn. Supp. 529 (1940) (no evidence of breach of warranty in sale of lipstick)
- (8) *Poplar v Hochschild, Kohn & Co.*, 24 A. (2d) 783 (Md., 1942) (no implied warranty of container of perfume)
- (9) *Landers v Safeway Stores*, 139 P. (2d) 788 (Ore., 1943) (breach of warranty of bleaching solution not the proximate cause of injury complained of)
- (10) *McGee v Bennett*, 33 S.E. (2d) 577 (Ga., 1945) (careless conduct by purchaser of fungicide)
- (11) *Warler v Pearlman's R.R. Salvage Co.*, 52 S.E. (2d) 3 (N.C., 1949) (no evidence of breach of warranty of glue)
- (12) *Yornack v Farmers' Cooperative Ass'n. of N.J.*, 78 A. (2d) 421 (N.J., 1951) (breach of warranty of insecticide was not the proximate cause of injury complained of)
- (13) *Fleamix, Inc. v Lindeman & Co.*, 82 A. (2d) 450 (N.J., 1951) (no causal connection between alleged breach of warranty of fitness of oil and explosion of heating unit)

(c) General References:

Refer to material cited in Section A, pp. 30-31.

C. Special Problems in Warranty Cases Involving Vendors in General

a. Damages

Note: The amount of damages awarded in warranty action depends upon the facts and circumstances in each case. Generally, there is no difference between the amount of damage which may properly be awarded in a tort action or in a warranty action. As in tort cases, an award is not set aside as excessive unless it fails to bear some reasonable proportion to the injury or loss sustained.

The measure of damages for breach of warranty is stated to be the loss directly and naturally resulting from the breach. In the absence of special circumstances, this would be the difference between the actual value of the product sold and its value if it had been as warranted. However, in cases concerning chemical products there is usually more in issue than the efficacy-factor and therefore special damages, personal or property, are generally involved. Where personal injury is traceable to a breach of warranty, the allowable damages would reflect the cost of the injuries to the plaintiff including physical pain and expenses for treatment and care. Where property damage is involved, the measure of damages is generally the difference in the market value of the property immediately before and after injury plus such incidental expenses as are incurred by reason of the product's non-conformance to the warranty.

(a) Cases involving the measure of damages in warranty:

- (1) Jones v George, 61 Tex. 345 (1884) (insecticide)
- (2) Swain v Schieffelin, 31 N.E. 1025 (N.Y., 1892) (chemical ingredient in food product)
- (3) Sherwin-Williams Co. of Texas v Offenhauser, 42 S.W. (2d) 859 (Tex., 1931) (insecticide)
- (4) Phillips v Sharp, 185 N.E. 562 (Ohio, 1932) (seeds)
- (5) Ingraham v Associated Oil Co., 6 P. (2d) 645 (Wash., 1932) (insecticide)
- (6) Griffin v Taylor, 16 S.E. (2d) 186 (Ga., 1941) (fertilizer)
- (7) Henderson v Berce, 50 A. (2d) 45 (Me., 1945) (seeds)

(b) Cases where damage awards were not set aside as excessive:

- (1) Simpson v American Oil Co., 14 S.E. (2d) 638 (N.C., 1941) (\$7,000 for inflammation of skin and boils of serious and recurrent nature)
- (2) Pietrus v J. R. Watkins Co., 38 N.W. (2d) 799 (Minn., 1949) (\$20,000 for loss of hair)

(c) Cases where damage awards were set aside on other grounds:

- (1) Smith v Denholm & McKay Co., 192 N.E. 631 (Mass., 1934) (\$8,500 for peripheral neuritis)

(d) Cases where damage awards were set aside as excessive:

- (1) Sherwin-Williams Co. of Texas v Offenhauser, 42 S.W. (2d) 859 (Tex., 1931) (\$4,983 allowed for ineffectual insecticide; \$3,112 set aside as speculative)
- (2) Yonick v Farmers' Cooperative Ass'n. of N.J., 78 A. (2d) 421 (N.J., 1951) (\$2,500 for injury to poultry)

(e) General References:

- (1) Texts and Encyclopedias:
 - (i) Vold, Sales, sec. 157 (1931)
 - (ii) Uniform Sales Act, sec. 69
 - (iii) Williston, Contracts, secs. 1391-1396 (1938)
- (2) Legal Periodicals: - (None)
- (3) Annotations:
 - (1) 16 A.L.R. 856, 885 - "Warranties and conditions upon sale of seed, nursery stock, etc."

b. Contributory Negligence

Note: The defense of contributory negligence in product liability cases is usually found in actions grounded in negligence and seldom appears in warranty actions. However, the principles of contributory fault of the plaintiff, discussed p. 23 supra, apply to either theory of action.

(a) Cases where contributory negligence was found:

- (1) Fredendall v Abraham & Straus, Inc., 18 N.E. (2d) 11 (N.Y., 1938) (plaintiff failed to use reasonable care in use of cleaning fluid)
- (2) McGee v Bennett, 33 S.E. (2d) 577 (Ga., 1945) (plaintiff carelessly purchased and used fungicide)

(b) Cases where contributory negligence was not found:

(No chemical-products liability cases)

(c) General References:

Refer to material cited in Section C, p. 24.

c. Allergies (Negligence and Warranty Actions)

Note: In recent years the problem of the allergic consumer has become increasingly important in product liability cases involving chemicals, principally chemicals in cosmetics. The problem arises where the manufacturer or seller defends a negligence or breach of warranty suit on the ground that the plaintiff's injury was caused by his own hypersensitive condition rather than by an unsafe ingredient in the product itself or that the particular hypersensitivity of the plaintiff was such a rarely encountered condition or occurred in such a small proportion of the consumer population that the resulting injury was unforeseeable. The courts have not squarely defined the legal principles which should apply in such situations or set forth the public policy which should be invoked. It is reasonably clear, however, that the defendant cannot rely solely upon the fact that the product was fit for use by the average user and that the plaintiff is not required to prove that a majority of users would be injuriously affected. Recovery is generally denied when the allergy involved is relatively unknown or when it exists among an infinitesimal proportion of the population. Conversely, recovery is generally allowed when the product might affect a normal person or when it affects a discernible proportion of the population.

The question as to whether the manufacturer should label his product with a statement of ingredients which have allergenic properties or with a caution as to the hypersensitive conditions which are likely to be aggravated because of the presence of the ingredients has not as yet been extensively developed by the courts.

(a) Cases where recovery was denied to an allergic plaintiff:

- (1) *Bradt v Hollaway*, 136 N.E. 254 (Mass., 1922) (dyed neck piece; warranty action)
- (2) *Walstrom Optical Co. v Miller*, 59 S.W. (2d) 895 (Tex., 1933) (dye in eye-glass frames; negligence action)
- (3) *Cream v Inecto*, 99 N.Y.L.J. 2283 (1938) (hair dye; negligence action)
- (4) *Zager v F. W. Woolworth Co.*, 86 P. (2d) 389 (Cal., 1939) (cosmetic; warranty action)
- (5) *Ross v Porteous, Mitchell & Braun Co.*, 3 A. (2d) 650 (Me., 1939) (dress shield containing rhodamine dye; warranty action)
- (6) *Cicarelli v Lipshetz*, 8 Conn. Supp. 526 (1940) (lipstick; warranty action)
- (7) *Cleary v John M. Maris Co.*, 19 N.Y.S. (2d) 38 (1940) (lead from metallic nipple shield; negligence action)
- (8) *Barrett v S. S. Kresge Co.*, 19 A. (2d) 502 (Pa., 1941) (dress; warranty action)
- (9) *Landers v Safeway Stores*, 139 P. (2d) 788 (Ore., 1943) (bleaching solution; warranty action)
- (10) *Payne v R. H. White Co.*, 49 N.E. (2d) 425 (Mass., 1943) (dress; warranty action)
- (11) *Longo v Touraine Stores*, 66 N.E. (2d) 792 (Mass., 1946) (gloves; warranty action)
- (12) *Singer v Oken*, 87 N.Y.S. (2d) 686 (1949) (phenol in calomine lotion; negligence action)
- (13) *Briggs v National Industries, Inc.*, 207 P. (2d) 110 (Cal., 1949) (thioglycolate in cold wave solution; negligence action)
- (14) *Bennett v Pilot Products Co.*, 235 P. (2d) 525 (Utah, 1951) (ammonium thioglycolate and potassium bromate in permanent wave solution; negligence action)

(b) Cases where recovery was allowed to an allergic plaintiff:

- (1) *Garkin v Brown & Sehler Co.*, 143 N.W. 48 (Mich., 1913) (dye in fur; negligence action)
- (2) *Flynn v Bedell Co.*, 136 N.E. 252 (Mass., 1922) (dye in fur; warranty action)
- (3) *Smith v Denholm & McKay Co.*, 192 N.E. 631 (Mass., 1934) (thallium acetate in hair dye; warranty action; decision for defendant on other grounds)
- (4) *Arnold v May Department Stores Co.*, 85 S.W. (2d) 748 (Mo., 1935) (hair dye containing trihydroxy benzoin; negligence action)
- (5) *Zirpola v Adam Hat Stores, Inc.*, 4 A. (2d) 73 (N. J., 1939) (hat containing aniline dye; warranty action)
- (6) *Bianchi v Denholm & McKay Co.*, 19 N.E. (2d) 697 (Mass., 1939) (aniline dye in cosmetic; warranty action)
- (7) *Taylor v Newcomb Baking Co.*, 59 N.E. (2d) 293 (Mass., 1945) (trisodium phosphate in soap; negligence action)
- (8) *Carter v Yardley & Co.*, 64 N.E. (2d) 693 (Mass., 1946) (perfume; negligence action)
- (9) *Graham v Jordan Marsh Co.*, 67 N.E. (2d) 404 (Mass., 1946) (cold cream; warranty action)
- (10) *Reynolds v Sun Ray Drug Co.*, 52 A. (2d) 666 (N.J., 1947) (lipstick; warranty action)

(c) General References:

- (1) Texts and Encyclopedias:
 - (i) Dickerson, *Products Liability and the Food Consumer*, pp. 211-230
- (2) Legal Periodicals:
 - (i) Barasch, *Allergies and the Law*, 10 Brook. L. Rev. 363 (1941)
 - (ii) Cavitch, *Liability of Manufacturer or Vendor to an Allergic Consumer*, 49 Mich. L. Rev. 253 (1950)
 - (iii) Horowitz, *Allergy of the Plaintiff as a Defense in Actions Based upon Breach of Implied Warranty of Quality*, 24 So. Calif. L. Rev. 221 (1951)
 - (iv) Notes: 29 B.U.L.A. 397 (1949); 19 *ibid.* 501 (1939); 26 Minn. L. Rev. 668 (1942); 24 Iowa L. Rev. 792 (1939)
- (3) Annotations:
 - (i) 27 A.L.R. 1504 - "Implied warranty upon retail sale of garment for personal wear."
 - (ii) 121 A.L.R. 464 - "Seller's or manufacturer's liability for injuries as affected by peculiar or unusual susceptibility of buyer or user to injury from dye or other ingredient in article sold."

d. Disclaimer of Liability for Breach of Warranty

Note: The general rule is that a manufacturer or other vendor may effectively disclaim by contract or by labeling any or all warranties which would otherwise attach in the sale of his product. Provisions for nonwarranty may be operative when used on labels, on letterheads, invoices, bills of sales, catalogues, or other extrinsic media which bring home the terms of the disclaimer to the purchaser. It is not essential that the plaintiff actually read and understand the disclaimer, if in fact it was made and could have been read and understood with reasonable effort.

Non-warranty provisions or disclaimers are, as a practical matter, looked upon with disfavor in the courts and are subject to strict construction. Some jurisdictions have imposed limitations by statute on the power of a manufacturer or vendor to disclaim. Where the question has been left to the courts, judicial legislation is encountered. Frequently, the courts hold a disclaimer inoperative as to warranties imposed by law on the ground that contracting parties cannot immunize themselves from the public policy of the law. Thus, a clause in a contract or on a label, excluding all warranties, express or implied, may be limited by the courts in its effect to exclude express or implied-in-fact warranties which would otherwise attach. The warranties of merchantability and fitness imposed by law, remain operative.

The seed industry has been particularly active in attempts to limit liability by contractual disclaimers and the standard non-warranty clause used by them has received frequent attention in the courts. For this reason, selected cases involving seeds are collected in a footnote to the following annotation.

(a) Cases holding a disclaimer effective:

- (1) Manglesdorf Seed Co. v Busby, 247 Pac. 410 (Okla., 1926)²⁹ (disclaimer on invoice accompanying sale of seed - "we give no warranty express or implied.")
- (2) E. I. DuPont de Nemours and Co. v Baridon, 73 F. (2d) 26 (Iowa, 1934) (dicta that disclaimer effective against breach of warranty but not against negligence)
- (3) Buckley v Shell Chemical Co., 89 P. (2d) 453 (Cal., 1939) (disclaimer on order blank accompanying sale of fertilizer)
- (4) Charles Loroni & Son v Globe Laboratories, 95 P. (2d) 173 (Cal., 1939) (disclaimer on bottle of Anti-Hog Cholera Serum; dicta that ineffective as to negligence)
- (5) Gibson v California Spray-Chemical Corp., 188 P. (2d) 316 (Wash., 1948) (disclaimer on invoice accompanying sale of insecticide)

(b) Cases holding disclaimer ineffective:

- (1) Patterson v Orangeburg Fertilizer Co., 108 S.E. 401 (S.C., 1921) (ineffective as to implied warranty of fertilizer)
- (2) Swift & Co. v Etheridge, 129 S.E. 453 (N.C., 1925) (ineffective as to implied warranty of fertilizer)
- (3) Ingraham v Associated Oil Co., 6 P. (2d) 645 (Wash., 1932) (ineffective as to implied warranty of insecticide in view of express oral warranty)
- (4) Stevenson v B. B. Kirkland Seed Co., 180 S.E. 197 (S.C., 1935)³⁰
- (5) Ebers v General Chemical Co., 17 N.W. (2d) 176 (Mich., 1945) (disclaimer in advertising pamphlet accompanying sale of insecticide ineffective in view of express warranties in same pamphlet)

(c) General References:

(1) Texts and Encyclopedias:

- (i) 55 C. J., sec. 698
- (ii) Vold, Sales, sec. 150 (1931)
- (iii) 46 Am. Jur., Sales, secs. 318, 354

(2) Legal Periodicals:

- (i) Bogert & Fink, Business Practices Regarding Warranties in the Sale of Goods, 25 Ill. L. Rev. 400 (1930)
- (ii) Greenhaigh, Disclaimer of Warranties, Wis. L. Rev. 459 (1939)
- (iii) Notes: (1947) 32 Iowa L. Rev. 784; (1948) 24 N.D. Bar Briefs 151; (1948) 1 Vand. L. Rev. 467

(3) Annotations:

- (i) 16 A.L.R. 880; 32 A.L.R. 1244; 62 A.L.R. 454; 117 A.L.R. 476; 168 A.L.R. 589 - "Seeds, nursery stock, etc., effect of disclaimer of warranty clause on sale thereof."
- (ii) 75 A.L.R. 1017 - "Provision in sale contract to the effect that only conditions incorporated therein shall be binding."
- (iii) 117 A.L.R. 1350 - "Validity of provision of contract of sale of personal property negating implied warranties."
- (iv) 160 A.L.R. 357 - "Necessity of buyer's actual knowledge of disclaimer of warranty of personal property."

e. Notice of Breach of Warranty

Note: The Uniform Sales Act provides that where a buyer fails to give notice to the seller of the breach of any warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller is not liable. The purpose of this notice is to advise the seller that he must meet a claim for damages in order that he might advantageously investigate the merits of the claim. The required notice is informal. The courts have generally held that the question of the reasonableness of the notice in point of time is one of fact for the jury. In many cases a six months' delay in sending the notice has been held fatal, and in some cases a delay of four months defeated the action.

(a) Illustrative cases involving notice of breach:

- (1) Whitfield v Jessup, CCH 22, 117 (Cal., 1947) (nonsuit granted when notice was delayed 11 months after first purchase and 5½ months after plaintiff discovered cause of illness; citing numerous cases)
- (2) Murphy Laboratories v Emery Industries, 95 F. Supp. 651 (Pa., 1951) (six months unreasonable)
- (3) Ringstad v I. Magnin & Co., 239 P. (2d) 848 (Wash., 1952) (four months delay - question for jury)

29. Seed cases holding that where a purchaser accepts goods with notice of disclaimer of warranty, there can be no recovery against the vendor upon a claimed breach of warranty, include: Leonard Seed Co. v Crary Canning Co., 132 N.W. 902 (Wis., 1911); Blizzard Bros. v Growers' Canning Co., 132 N.W. 66 (Iowa, 1911); Ross v Northrup, King & Co., 144 N.W. 1124 (Wis., 1914); Miller v Germain Seed & Plant Co., 222 Pac. 817 (Cal., 1924); Manglesdorf Seed Co. v Williams, 247 Pac. 413 (Okla., 1926); Larson v Inland Steel Co., 255 Pac. 919 (Wash., 1927); Davis Co. v Bertrand Seed Co., 271 Pac. 123 (Cal., 1928); Lumbrazo v Woodruff, 175 N.E. 525 (N.Y., 1931); Hoover v Utah Nursery Co., 7 P. (2d) 270 (Utah, 1932); Puratich v Pacific Marine Supply Co., 51 P. (2d) 1080 (Wash., 1935); Reynolds v Binding-Stevens Seed Co., 67 P. (2d) 440 (Okla., 1937); Kennedy v Cornhusker Hybrid Co., 19 N.W. (2d) 51 (Neb., 1945); Pyle v Eastern Seed Co., 198 S.W. (2d) 562 (Tex., 1946); Dutch Mill Gardens v J. J. Grullemans & Sons, 238 S.W. (2d) 232 (Tex., 1951).

Seed cases holding disclaimer inoperative under particular circumstances include: Landreth v Wyckoff, 73 N.Y.S. 388 (1901); Phillips v Sharp, 185 N.E. 562 (Ohio, 1932); Rocky Mountain Seed Co. v Knorr, 20 P. (2d) 304 (Colo., 1933).

30. Seed cases holding that the fact that the purchaser does not read the statement of disclaimer is immaterial include: Ross v Northrup, King & Co., 144 N.W. 1124 (Wis., 1914); Pimpinello v Swift & Co., 170 N.E. 530 (N.Y., 1930); Kennedy v Cornhusker Hybrid Co., 19 N.W. (2d) 51 (Neb., 1945).

f. Miscellaneous Points of Procedure

1. Recovery-over Action

- (1) E. O. Painter Fertilizer Co. v Kil-Tone Co., 143 Atl. 332 (N. J., 1928) (in recovery-over action, plaintiff's right of action started at time sale was made to him by defendant and therefore statute of limitations ran from that period and not from time that plaintiff lost a judgment to a third-party purchaser)
- (2) Brown v Godefry Mfg. Co., CCH 22, 252 (N.Y., 1951) (default of retailer in action for breach of warranty of hair dye not binding on jobber)
- (3) Davis v Radford, 63 S.E. (2d) 822 (N.C., 1951) (retailer sued for breach of warranty of drug has the right to implead the wholesale dealer from whom he purchases)

2. Statute of Limitations

- (1) E. O. Painter Fertilizer Co. v Kil-Tone Co., 143 Atl. 332 (N.J., 1928) (*supra*)
- (2) Verdi v The National Mineral Co., CCH 22, 126 (Ill., 1947) (warranty action for personal injuries arising from use of permanent wave preparations manufactured by defendant held barred, since statute of limitations ran from time of injury)

3. Wrongful Death Statutes

- (1) Graco v S. S. Kresge Co., 12 N.E. (2d) 557 (N.Y., 1938) (wrongful death statute covered warranty action)
- (2) Whiteley v Webb's City, Inc., CCH 22, 268 (Fla., 1951) (wrongful death statute covered tort actions but not warranty actions)

SUPPLEMENTARY ANNOTATIONS TO PART 1

(Covering the years 1952 and 1953)

Section 1

(No supplementary material)

Section 2-A (Manufacturers Liability for Negligence)

Page 8, Rule 1(a), after subpara. (4) add:

- (5) *Pope v Edward M. Rude Carrier Corp.*, 75 S.E. (2d) 584 (W. Va., 1953)
(explosive manufacturer)

- (6) *Stull's Chemicals v Davis*, 263 S.W. (2d) 806 (Tex., 1953) (herbicide manufacturer)

Page 8, Rule 1(b), after subpara. (3) add:

- (4) See discussion in *Gainey v Folkman*, 114 F. Supp. 231 (Ariz., 1953)
(landowner's liability)

Page 8, Rule 1(c)(2) after subpara. (xiii) add:

- (xiv) *Crop Dusting: Legal Problems in a New Industry*, 6 Stanford L. Rev. 69 (1953).

- (xv) *Griffith, Fault Triumphant*, 28 N.Y.U.L.Rev. 1069 (1953)

Page 10, Rule 2(c), after subpara. (50) add:

- (51) *Saporito v Purex Corp.*, 243 P. (2d) 910 (Cal., 1952) (manufacturer of cleaning fluid liable for personal injury to purchaser from retailer)
- (52) *Cohan v Associated Fur Farms*, 53 N.W. (2d) 788 (Wisc., 1952) (feed-ingredient supplier liable to purchaser from processor-dealer for loss of mink)
- (53) *Higbee v Giant Food Shopping Center*, 106 F. Supp. 586 (Va., 1952) (manufacturer of permanent wave preparation liable for personal injury to purchaser from retailer)
- (54) *Willey v Pyrogas Co.*, 251 S.W. (2d) 635 (Mo., 1952) (manufacturers of safety valve and heater liable for personal injury to purchaser from retailer)
- (55) *Saporito v Purex Corp.*, 255 P. (2d) 7 (Cal., 1953) (manufacturer of bleaching solution liable for personal injury to purchaser from retailer)
- (56) *Burr v Sherwin-Williams Co.*, 258 P. (2d) 58 (Cal., 1953) (pesticide manufacturer liable for property damage to non-purchaser)
- (57) *Pruett v Burr*, 257 P. (2d) 690 (Cal., 1953) (pesticide manufacturer liable for property damage to non-purchaser, reversed on other grounds)
- (58) *American Cyanamid Co. v Fields*, CCH 22,327 (W. Va., 1953) (manufacturer of poultry medicine incorporated in feed liable for injury to poultry to purchaser from dealer)
- (59) *Marrero v Gluck*, 122 N.Y.S. (2d) 197 (1953) (hair dye manufacturer liable to beauty parlor operator for personal injury of patron)

Page 11, Rule 2(e)(2), after subpara. (ix) add:

- (x) 21 U. of Cinn. L. Rev. 460 (1952) - "Theory of Recovery by the Ultimate Consumer from the Retailer or Manufacturer in Contract or Tort"
- (xi) *Noel, Product Liability of a Manufacturer in Tennessee*, 22 Tenn. L. Rev. 985 (1953)

Page 12, Rule 3(a), after subpara. (16) add:

- (17) *McClanahan v California Spray-Chemical Corp.*, 75 S.E. (2d) 712 (Va., 1953)
(fungicide inadequately labeled with warnings under federal and state economic poisons laws)
- (18) *Hoskins v Jackson Grain Co.*, 63 S. (2d) 514 (Fla., 1953) (seed labeled with false or misleading statements contrary to state seed law)

Page 12, Rule 3(b), after subpara. (1) add:

- (2) *Boncek v Pennsylvania R. Co.*, 105 F. Supp. 700 (N.J., 1952) (dicta-violation of penal statute is not negligence per se under New Jersey law)

Page 12, Rule 3(c), after subpara. (3) add:

- (4) *Cohan v Associated Fur Farms*, 53 N.W. (2d) 788 (Wisc., 1952) (statute prohibiting sale of adulterated mixed feed not applicable to unmixed feed ingredient)

Page 12, Rule 3(e)(2), after subpara. (vi) add:

(vii) A Rationale of Negligence Per Se, 26 Ind. L. J. 419 (1951)

(viii) Woods, Effect of the Food, Drug, and Cosmetic Act on Private Litigation, 8 Food, Drug, Cosmetic Law Journal 511 (1953)

Page 13, Rule 4(a), after subpara. (22) add:

(23) Kieffer v Blue Seal Chemical Co., 196 F. (2d) 614 (N. J., 1952) (failure to label cleaning mixture with notice of dangerous composition)

(24) McClanahan v California Spray-Chemical Corp., 75 S.E. (2d) 712 (Va., 1953) (label on fungicide failed to warn against use contrary to directions)

(25) See, Hardy v Procter & Gamble, CCH 22,340 (C.A. 5th, 1954) (sufficiency of warning on detergent with respect to effects on the eye held a jury question)

(26) Tomao v A. P. De Sanno & Son, 209 F. (2d) 544 (C.A. 3rd, 1954) (failure to warn as to maximum safe operating speed of grinding wheel)

Page 13, Rule 4(b), after subpara. (5) add:

(6) Hopkins v E. I. Du Pont De Nemours & Co., 199 F. (2d) 930 (Pa., 1952) (failure to warn of the danger of premature explosion of dynamite under certain conditions)

Page 13, Rule 4(c), after subpara. (8) add:

(9) Mauro v Great A & P Tea Co., CCH 22,276 (N.Y., 1952) (label on food extract "90% alcohol" held adequate warning of flammability)

(10) Webb v Sandoz Chemical Works, 69 S.E. (2d) 689 (Ga., 1952) (label on drug showed that it was to be used under physician's supervision)

(11) Stull's Chemicals v Davis, 263 S.W. (2d) 806 (Tex., 1953) (label on herbicide warned against harmful drifting potential)

Page 15, Rule 6(a), after subpara. (7) add:

(8) Willey v Pyrogas Co., 251 S.W. (2d) 635 (Mo., 1952) (failure to test safety valve and heater)

(9) Seaton Ranch Co. v Montana Vegetable Oil & Feed Co., 252 F. (2d) 1040 (Mont., 1952)

(10) Saporito v Purex Corp., 255 P. (2d) 7 (Cal., 1953) (failure to pressure test bottled bleaching solution)

(11) International Harvester Co. v Sharoff, 202 F. (2d) 52 (Colo., 1953)

Page 16, Rule 7(a), after subpara. (10) add:

(11) Higbee v Giant Food Shopping Center, 106 F. Supp. 586 (Va., 1952) (excessive alkali in permanent wave preparation)

(12) See, Hardy v Procter & Gamble, CCH 22, 340 (C.A. 5th, 1954) (detergent)

(13) Shafer v Barbier, 259 S.W. (2d) 461 (Ky., 1953) (alleged poisonous ingredient in eyebrow dye)

(14) Burns v Ralston Purina Co., 75 S.E. (2d) 563 (Ga., 1953) (alleged poisonous ingredient in poultry feed)

Page 16, Rule 8(a), after subpara. (7) add:

(8) Burr v Sherwin-Williams Co., 258 P. (2d) 58 (Cal., 1953) (contaminated pesticide)

Page 17, Rule 9(a), after subpara. (3) add:

(4) Saporito v Purex Corp., 255 P. (2d) 7 (Cal., 1953) (explosion of bottled bleaching solution)

Section 2-B (Vendors Liability for Negligence)

Page 18, Rule 1(a), after subpara. (5) add:

(6) Bowman Biscuit Co. v Hines, 251 S.W. (2d) 153 (Tex., 1952), reversing CCH 22,280 (Tex., 1952) (food wholesaler not strictly liable for personal injury to purchaser from retailer)

(7) Cone v Virginia-Carolina Chemical Corp., 174 So. 554 (Miss., 1937) (fertilizer dealer)

Page 19, Rule 3(b), after subpara. (1) add:

- (2) Cone v Virginia-Carolina Chemical Corp., 174 So. 554 (Miss., 1937) (retail fertilizer dealer)

Page 19, Rule 4(b), after subpara. (3) add:

- (4) Strauel v Peterson, 52 N.W. (2d) 307 (Neb., 1952) (no right of action accrued by violation of the Bang's Disease Act)

Page 20, Rule 5(b), after subpara. (10) add:

- (11) Cone v Virginia-Carolina Chemical Corp., 174 So. 554 (Miss., 1937) (dealer did not know of dangerous character of fertilizer)

Page 20, Rule 5(c), after subpara. (3) add:

- (4) Blissenbach v Yanko, 107 N.E. (2d) 409 (Ohio, 1951) (construction of vaporizer apparent to purchaser)

Page 21, Rule 7(a), after subpara. (21) add:

- (22) See, Kautzmann v James, 66 S. (2d) 36 (Fla., 1953) (misbranding of drug-doctrine of res judicata barred recovery)
- (23) See, Walgreen Drug Co. v Sharp & Dohme, CCH 22,350 (Ill., 1954) (misbranding of drug-recovery over action)

Page 22, Rule 8(b), after subpara. (9) add:

- (10) Cone v Virginia-Carolina Chemical Corp., 174 So. 554 (Miss., 1937) (sale by dealer of fertilizer)
- (11) Willey v Pyrogas Co., 251 S.W. (2d) 635 (Mo., 1952) (sale by wholesale dealer of defective heater)
- (12) Shafer v Barbier, 259 S.W. (2d) 461 (Ky., 1953) (no proof of harmful ingredient in dye applied by beautician)

Section 2-C (Special Problems in Negligence Cases)

Page 23, Item a(a), after subpara. (17) add:

- (18) Burt v Lake Region Flying Service, Inc., 54 N.W. (2d) 339 (N.D., 1952) (\$1,100 for loss of produce of oats crop)
- (19) Kieffer v Blue Seal Chemical Co., 107 F. Supp. 288 (N. J., 1952) (\$250,000 for permanent disfigurement and loss of earning power)

Page 23, Item a(c), after subpara. (5) add:

- (6) Dubois v Phillips Petroleum Co., 59 S. (2d) 107 (La., 1952) (damages for injury to rice crop reduced)

Page 23, Item a(d)(2), after subpara. (ii) add:

- (iii) 21 U. of Kan. City L. Rev. 160 (1953) - Damages - Liability from Crop Dusting

Page 24, Item b(a), after subpara. (11) add:

- (12) Grossgold v Brooklyn Jewish Center, 112 N.Y.S. (2d) 66 (1952) (over-exposure to ultra-violet lamp)
- (13) Blissenbach v Yanko, 107 N.E. (2d) 409 (Ohio, 1951) (construction of vaporizer apparent to purchaser)
- (14) Black v Bennett, 55 N.W. (2d) 795 (Mich., 1952) (use of embalming fluid by experienced person)

Page 24, Item b(b), after subpara. (10) add:

- (11) Fein v Bonetti, 111 N.Y.S. (2d) 840 (1952) (application of hair dye)
- (12) McClanahan v California Spray-Chemical Corp., 75 S.E. (2d) 712 (Va., 1953) (failure to follow directions for use on label of fungicide, held question for jury)

Page 25, Item c(a), after subpara. (8) add:

- (9) Willey v Pyrogas Co., 251 S.W. (2d) 635 (Mo., 1952) (negligence of manufacturer in testing not relieved by negligence of dealer)

Page 25, Item e(a), after subpara. (2) add:

- (3) Shafer v Reo Motors, 205 F. (2d) 685 (Pa., 1953) (disclaimer releasing motor vehicle manufacturer from liability for breach of warranty and "all other obligations or liabilities" held effective bar against either breach of warranty or negligence actions)

- (4) Maryland Cas. Co. v Owens-Illinois Glass Co., 116 F. Supp. 122 (W. Va., 1953) (disclaimer effective as to negligence and warranty)

Page 25, Item e(b), after subpara. (3) add:

- (4) Burr v Sherwin-Williams Co., 258 P. (2d) 58 (Cal., 1953) (disclaimer on label ineffective as to third parties not having opportunity to see the label)

Page 25, Item e(c), after subpara. (ii) add:

- (iii) General Digest, Sales, key no. 267

Page 26, Item f(a), after subpara. (3) add:

- (4) Saporito v Purex Corp., 243 P. (2d) 910 (Cal., 1952) (explosion of bottled cleaning fluid)
- (5) Burr v Sherwin-Williams Co., 258 P. (2d) 58 (Cal., 1953) (sale of pesticide)
- (6) Pope v Edward M. Rude Carrier Corp., 75 S.E. (2d) 584 (W. Va., 1953) (explosion of dynamite)
- (7) See, Lock v Confair, 93 A. (2d) 451 (Pa., 1953) (explosion of carbonated beverage)

Page 26, Item f(b), after subpara. (6) add:

- (7) Webb v Sandoz Chemical Works, 69 S.E. (2d) 689 (Ga., 1952) (injury from use of drug)
- (8) Koktavy v United Fireworks Mfg. Co., 117 N.E. (2d) 16 (Ohio, 1954) (explosion of aerial bomb)

Page 26, Item f(c)(2), after subpara (xiii) add:

- (xiv) Note: 13 Mont. L. Rev. 53 (1952)

Page 27, Item g.2(a), after subpara. (6) add:

- (7) McClanahan v California Spray-Chemical Corp., 75 S.E. (2d) 712 (Va., 1953) (fact of registration of fungicide under federal and state economic poisons laws admissible; evidence showing effect of such registration not admissible)
- (8) See Pruett v Burr, 257 P. (2d) 690 (Cal., 1953) (certain memos prepared by state officials in investigation not admissible as hearsay)

Page 27, after Item h.2., add a new subsection to read:

3. Statute of Limitations

1. In most states, product liability claims for injury based on negligence are governed by statutes of limitation which commence to run from the "date of the injury" or from the "date when the cause of action accrues." However, in at least one state, the statute of limitations for such claims relates to "the date of the act or omission complained of." The question becomes important when considerable time elapses between the placing of a product on the market and subsequent injury or damage from the product.

(a) Cases in which this question was involved:

- (1) Dincher v Marlin Firearms Co., 198 F. (2d) 821 (Conn., 1952) (Connecticut statute of limitations runs from time of negligence complained of and not time of injury)

Page 27, after Item h.3., add a new section to read:

1. Liability of Governmental Units

In many cases, the use of chemicals by federal, state and local governmental units produces liability claims. As a general rule the principle of sovereign immunity bars the action. However, there may be a question whether the government was acting in a proprietary capacity in which case there may be recovery, Brown v Sioux City, 49 N.W. (2d) 853 (Iowa, 1953) or, in the case of the federal government, whether the Federal Tort Claims Act permits the suit. For a recent case denying government liability under this Act for crop spraying operations, see Harris v United States, 205 F. (2d) 765 (C.A. 10th, 1953), and Bowden v United States, 200 F. (2d) 176 (C.A. 4th, 1952). An annotation in 25 A.L.R. (2d) 1057 is rather exhaustive on the tort liability of state and local governmental units for damage resulting from insecticide operations.

Section 3-A (Manufacturers Liability for Breach of Warranty)

Page 28, Rule 2(a), after subpara. (4) add:

- (5) Randall v Goodrich-Gamble Co., CCH 22,279, reversed 54 N.W. (2d) 769 (Minn., 1952) (manufacturer of liniment liable to subvendee for breach of express warranty (reversed on rehearing because of erroneous instructions))

- (6) Worley v Procter & Gamble Mfg. Co., 253 S.W. (2d) 532 (Mo., 1952) (detergent manufacturer subject to liability for personal injury to purchaser from dealer where warranty was made on label; no liability on other grounds)
- (7) Burr v Sherwin-Williams Co., 258 P. (2d) 53 (Cal., 1953) (pesticide manufacturer liable for property damage to non-purchaser)

Page 28, Rule 2(b), after subpara. (6) add:

- (7) Gohan v Associated Fur Farms, 53 N.W. (2d) 788 (Wisc., 1952) (feed-ingredient supplier not liable to purchaser from processor-dealer for loss of mink)
- (8) Frier v Procter & Gamble Distributing Co., 252 P. (2d) 850 (Kan., 1953) (detergent manufacturer not liable for personal injury to ultimate user)
- (9) Wood v General Electric Co., 112 N.E. (2d) 8 (Ohio, 1953) (manufacturer of electric blanket not liable for personal injury to purchaser from dealer)

Page 28, Rule 2(c), after subpara. (2)(ii) add:

- (iii) 21 U. of Cinn. L. Rev. 460 (1952) "Theories of Recovery by the Ultimate Consumer from the Retailer or Manufacturer in Contract or Tort"

Page 29, Rule 3(a), after subpara. (5) add:

- (6) Park v Moorman Mfg. Co., 241 P. (2d) 914 (Utah, 1952) (statement by salesman that poultry feed concentrate would produce at a certain level held an express warranty)
- (7) Worley v Procter & Gamble Mfg. Co., 253 S.W. (2d) 532 (Mo., 1952) (detergent manufacturer subject to liability for warranty of safety on label; no liability on other grounds)
- (8) Wasatch Chemical Co. v Leon, 259 P. (2d) 301 (Utah, 1953) (pesticide manufacturer liable to purchaser on basis of oral claims for safety made at the time of sale)

Page 30, Rule 4(a), after subpara. (7) add:

- (8) Burr v Sherwin-Williams Co., 258 P. (2d) 58 (Cal., 1953) (pesticide manufacturer)
- (9) Wasatch Chemical Co. v Leon, 259 P. (2d) 301 (Utah, 1953) (pesticide manufacturer)

Section 3-B (Vendors Liability for Breach of Warranty)

Page 31, Rule 2(b), after subpara. (2) add:

- (3) Bowman Biscuit Co. v Hines, 251 S.W. (2d) 153 (Tex., 1952) reversing CCH 22,280 (Tex., 1952) (food wholesaler not liable for personal injury to purchaser from retailer)
- (4) Duncan v Juman, 96 A. (2d) 415 (N.J., 1953) (food vendor not liable for personal injury to members of purchaser's family)

Page 31, Rule 3(a), after subpara. (8) add:

- (9) Phillips v Whelan Drug Co., CCH 22,286 (Pa., 1952) (oral statement that cosmetic was suitable for bleaching skin held an express warranty)
- (10) Keller v Flynn, 105 N.E. (2d) 532 (Ill., 1952) (oral statement that hogs were long time treated and safe held an express warranty)
- (11) Postell v Boykin Tool & Supply Co., 71 S.E. (2d) 783 (Ga., 1952) (oral statement that dealer "would stand behind" product, held an express warranty)

Page 31, Rule 4(c)(2), after subpara. (v) add:

- (vi) Amram & Goodman, Problems in the Law of Implied Warranty, 3 Syracuse L. Rev. 259 (1952)

Page 32, Rule 4(a), after subpara. (18) add:

- (19) Higbee v Giant Food Shopping Center, 106 F. Supp. 586 (Va., 1952) (retailer of cosmetics sold in sealed package liable for breach of implied warranty of wholesomeness)
- (20) Schilling v Roux Distributing Co., 59 N.W. (2d) 907 (Minn., 1953) (hair dye)

Section 3-C (Special Problems in Warranty Cases)

Page 33, Item a(a), after subpara. (7) add:

- (8) Park v Moorman Mfg. Co., 241 P. (2d) 914 (Utah, 1952) (feed; measure of damages for breach of warranty where subject-matter has no true market value)
- (9) Wasatch Chemical Co. v Leon, 259 P. (2d) 301 (Utah, 1953) (pesticide)

Page 33, Item a(c), after subpara. (1) add:

- (2) Missouri Bag Co. v Chemical Delinting Co., 58 S. (2d) 71 (Miss., 1952) (damages not proved to reasonable certainty)

Page 33, Item a(d), after subpara. (2) add:

- (3) Higbee v Giant Food Shopping Center, 106 F. Supp. 586 (Va., 1952) (\$4,000 damages for temporary loss of hair held excessive and reduced to \$1,500)

Page 34, Item c(a), after subpara. (14) add:

- (15) Worley v Procter & Gamble Mfg. Co., 253 S.W. (2d) 532 (Mo., 1952)

Page 34, Item c(b), after subpara. (10) add:

- (11) Schilling v Roux Distributing Co., 59 N.W. (2d) 907 (Minn., 1953) (ingredient in hair dye)

Page 34, Item c(c)(2), after subpara. (iv) add:

- (v) 51 Mich. L. Rev. 447 (1953)
- (vi) Cady, Cosmetics and the Allergic Consumer: a medicolegal synthesis, 8 Food, Drug, Cosmetic Law Journal 701 (1953)

Page 34, Item c(c)(3), after subpara. (ii) add:

- (iii) 26 A.L.R. (2d) 963 - "Seller's or manufacturer's liability for injuries as affected by buyer's or user's allergy or unusual susceptibility to injury from article."

Page 35, Item d(a), after subpara. (5) add:

- (6) Hall v Mosteller, 245 S.W. (2d) 338 (Tex., 1952) (disclaimer in contract of sale of seeds effective in breach of contract action based upon failure of seeds to produce)
- (7) Shafer v Reo Motors, 205 F. (2d) 685 (1953) (disclaimer in contract of sale of motor coach)
- (8) Maryland Cas. Co. v Owens-Illinois Glass Co., 116 F. Supp. 122 (W. Va., 1953) (disclaimer in contract)

Page 35, Item d(b), after subpara. (5) add:

- (6) McPeak v Boker, 53 N.W. (2d) 130 (Minn., 1952) (disclaimer in bill of sale that boat "was not guaranteed in any way" did not exclude implied warranties)
- (7) Keller v Flynn, 105 N.E. (2d) 532 (Ill., 1952) (disclaimer after contract is concluded is ineffectual unless buyer assents to change)
- (8) Burr v Sherwin-Williams Co., 258 P. (2d) 58 (Cal., 1953) (disclaimer on label not seen by ultimate purchaser)
- (9) Diepeveen v Larry Vogt, 99 A. (2d) 329 (N.J., 1953) (disclaimer in sale of bulbs ineffective because made after consummation of sale)

Page 35, Item d(c)(2), after subpara. (iii) add:

- (iv) 53 Col. L. Rev. 858 (1953) - Warranties, disclaimers and the parol evidence rule

Page 35, Item e(a), after subpara. (3) add:

- (4) De Lucia v Coca-Cola Bottling Co., 89 A. (2d) 749 (Conn., 1952) (lack of notice by buyer of breach barred warranty action arising from the presence of a decayed grasshopper in a bottled beverage)
- (5) Cohan v Associated Fur Farms, 53 N.W. (2d) 788 (Wisc., 1952) (estoppel to raise question of untimely notice-question for jury)
- (6) Mead v Coca-Cola Bottling Co., 108 N.E. (2d) 757 (Mass., 1952) (type of notice required)
- (7) Victorson v Albert M. Green Hosiery Mills, 202 F. (2d) 717 (Pa., 1953) (notice of breach given four months after last shipment and ten months after initial shipment not unreasonable as a matter of law)

Page 36, Item f.1., after subpara. (3) add:

- (4) Cohan v Associated Fur Farms, 53 N.W. (2d) 788 (Wisc., 1952) (doctrine of res judicata barred recovery-over action)

Page 36, Item f.2., after subpara. (2) add:

- (3) Blessington v McCrory Stores Corp., 111 N.E. (2d) 421 (N.Y., 1953) (breach of warranty claim governed by statute of limitations pertaining to contracts)

Page 36, Item f., add new subsection:

4. Subrogation

- (1) Bankers Indemnity Ins. Co. v Frigidaire Sales Corp., 113 F. Supp. 405 (Mo., 1953)

PART II

Section 1. Product Liability Decisions Involving Pesticides (Including Agricultural and Household Insecticides, Fungicides, Rodenticides, Herbicides, and Disinfectants)

1. Jones v George, 61 Tex. 345 (1884)

Action to recover damages for a breach of warranty in the sale of an insecticide by the defendant druggist to the plaintiff. Plaintiff was sold a quantity of "chrome green" by defendant instead of "Paris Green" as requested. The product was purchased for use on plaintiff's farm in controlling cotton worms. The evidence showed that "Paris Green" would have destroyed the worms on plaintiff's cotton, whereas the product furnished was wholly ineffective. Plaintiff offered to prove the value of the cotton as it stood before destruction by the worms, but this was excluded by the court on the ground that the value of the cotton did not constitute an element of actual damage. This, together with the giving of an instruction assuming the same principle, was assigned as error.

Held, reversed. Although technically no warranty existed,³¹ there was an implied contract that the seller sold and delivered an article of the kind contracted for. The true measure of damages in such a case should have been the value of the crop before it was destroyed by worms, the cost of the insecticide, the cost of its preparation and application, with interest on the money expended.

2. West Disinfecting Company v Plummer, 44 App. D.C. 345 (1916)

Action to recover damages for personal injuries sustained by plaintiff as a result of an explosion which occurred during the application of an insecticide manufactured by defendant. Plaintiff had purchased a quantity of insecticide known as "Kil-Bug" for use in spraying the premises of his employer. While using this with a sprayer, also furnished by defendant, plaintiff's eyes were severely injured when an explosion occurred. The evidence showed that defendant had orally represented that the insecticide was not poisonous and could be used in the accompanying sprayer without harm to the person using it, and that defendant had failed to properly label the receptacle. Recovery was sought on the grounds of false representations, failure to label, and the selling of a sprayer which was not in proper condition in that it failed to indicate when sufficient air had been pumped in the machine. Numerous instructions were given by the court, and the jury returned a verdict for the plaintiff for \$2,000.

Held, affirmed. The basis of liability was stated by the court as follows:

"The defendant was charged, and the jury necessarily so found, that the disinfectant was sold with the representation of its harmlessness. Whether so or not, it was the duty of the defendant to label the can containing the fluid so as to show its dangerous character, or to represent the same to the party purchasing. A man who delivers an article which he knows to be dangerous, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault, and it matters not whether the person injured was the actual purchaser from the defendant, if his use of the same was that intended."

3. Mossrud v Lee, 157 N.W. 758 (Wis., 1916)

Action to recover damages for the loss of plaintiff's cows sustained as a result of applying "Quack Destroyer" to his grass. The compound was purchased by plaintiff from defendant dealer. Eight cows died from eating the grass to which the mixture had been applied. Recovery was sought on the ground that defendant had negligently failed to label his product with the word "Poison" as required by statute. The jury rendered a verdict of \$450 for plaintiff and defendant appealed.

Held, affirmed. The violation of the statute in question constituted negligence as a matter of law. The evidence further supported the finding that the negligence was the proximate cause of the injury resulting, and that plaintiff was not guilty of contributory negligence.

4. Midland Valley R. Co. v Rippe, 161 Pac. 233 (Okla., 1916)

Action to recover damages for the loss of plaintiff's cattle caused by their drinking water containing arsenic (for eradication of Texas ticks). The poison flowed from a dipping vat maintained by the defendant carrier on its right of way. Plaintiff sued on the theory that defendant was negligent in failing to enclose its dipping compound so as to prevent injury to trespassing cattle.

Held, judgment for plaintiff affirmed. The evidence was sufficient to support a finding of negligence on the part of the railroad company.

5. Missouri, K & T Ry. Co. v Rose, 160 Pac. 734 (Okla., 1916)

Action to recover damages for the loss of plaintiff's cow alleged to have been killed by the negligence of the defendant railway company. The evidence showed that the cow, running at large, was poisoned by drinking an arsenic dip insecticide used by the defendant for destroying fever ticks on livestock. The dip had flowed from a tank car of the defendant and had formed a pool along defendant's right of way. The defendant's agent failed to remedy the condition after being notified of its existence.

31. The court said that an implied warranty of fitness and quality would have arisen if the "Paris Green" had been of inferior quality but that the non-conformity of a product delivered to the description under which it was sold was in the nature of a breach of contract. It will be noted that this is now covered under the uniform sales act by the warranty of description.

Held, judgment for plaintiff affirmed. The evidence was sufficient to support a finding of negligence in that the defendant failed to exercise reasonable care to prevent injury to the cow after discovery of the escaped poisonous fluid.³²

6. Fitzgerald v Brooklyn Institute of Arts and Sciences, 162 N.Y.S. 625 (1916)

Action to recover damages for personal injuries to plaintiff caused by the explosion of a disinfectant which defendant and others were using on stuffed bird specimens in a case. The plaintiff assisted in the disinfecting operation. The disinfectant contained carbon disulphide. The evidence showed that the quantity used in a space of that size formed a highly explosive mixture, that it was likely to dissolve the insulation on electric wires in the case, whereby a spark sufficient to explode the mixture could be created. Recovery was sought on the ground that defendant, supervising the disinfecting, was negligent in using such a quantity under the circumstances.

Held, judgment dismissing the complaint reversed. There was sufficient evidence of negligence for the jury.

7. Kramer v Carbolineum Wood Preserving Co., 177 Pac. 771 (Wash., 1919)

Action to recover damages for the destruction of a large part of plaintiff's prune orchard resulting from the use of an insecticide sold by defendant. Plaintiff had actually purchased the insecticide from a seed company which was not connected with the defendant. Recovery was sought on the ground that plaintiff had made a prior purchase of the same product some years before from another party and that the labels on the can of this product stated "Trunks of fruit trees painted with Avenarius Carbolineum will not be troubled with borers and will become healthier."

Held, directed verdict for defendant affirmed. There was no privity of contract between plaintiff and defendant. The court concluded:

"The Avenarius Carbolineum is not shown to be of a noxious or dangerous kind. It was not shown that the respondent (defendant) had been guilty of fraud or deceit in passing off the article, or that the respondent had sold or ever had possession of the article purchased by the appellant (plaintiff); and it was not shown that the respondent had been negligent in any respect with reference to the sale of the article purchased by the appellant and used upon his fruit trees. Not coming within any of these exceptions, the general rule must apply that, where there is no privity of contract between the appellant and the respondent with reference to the sale of the Avenarius Carbolineum, no liability exists against the respondent."

8. McCrossin v Noves Bros. & Cutler, 173 N.W. 566 (Minn., 1919)

Action to recover damages for wrongful death against a wholesaler dealer in drugs. The defendant dealer had sold a quantity of "Roach Doom" to the state board of control for use in the extermination of roaches in various state institutions. Plaintiff's intestate, an employee of one of these institutions, ate some of this compound in ignorance of its poisonous character and subsequently died. Recovery was sought on the ground that the product was not labeled to show its poisonous and dangerous nature.

Held, judgment for defendant. A manufacturer or vendor, putting out and selling articles inherently dangerous, without notice to others of their dangerous nature and qualities, is liable for any injury to any third person which might have been reasonably foreseen by the manufacturer or dealer in the exercise of ordinary care. However, the complaint here was defective since (a) there was no allegation that Roach Doom was imminently dangerous, (b) there was no positive allegation that defendant, a vendor, actually knew that Roach Doom contained poisonous or deleterious ingredients, and (c) there was no allegation that the label did not give adequate notice of the character of the substance, since the name Roach Doom itself would be sufficiently suggestive of the danger to life from the preparation.

9. Smith v Payne, 206 Pac. 715 (Utah, 1922)

Action to recover damages for the loss of plaintiff's sheep poisoned by the use of an excessive solution of cresol spray used by defendant to disinfect the cars used in transporting the sheep. The evidence showed that the disinfectant, instead of being a 3 per cent solution of cresol, the amount prescribed by government formula, was from 5 to 9 times the proper amount. The loss of the sheep was due to the inhalation of the cresol fumes and the consumption of the disinfectant.

Held, judgment for plaintiff affirmed. There was sufficient evidence to support a jury finding of negligence on the part of the carrier.

10. Cliff v California Spray-Chemical Corp., 257 Pac. 99 (Cal., 1927)

Action to recover damages for personal injuries sustained by plaintiff from the use of an insecticide manufactured by defendant. The product, "Ortho Lime Sulphur Solution," consisted of 10% lime, 20% sulphur and 70% water, and was sold for use in spraying orchards and vineyards. Plaintiff bought it from a fruit exchange of which he was a member, the exchange having purchased it from a retailer who had in turn bought it from the defendant manufacturer. The barrels or drums were properly labeled and indicated the quantity, quality and ingredients of the solution. Plaintiff had used the spray for four years prior to the accident in question, which occurred when the solution squirted into his eye as he opened a barrel for the first time. The manufacturer was charged with negli-

32. Other cases involving the liability of railroads for damage to livestock arising from the use of chemicals on rights of way include:

- (1) *Ft. Worth & R. G. Ry. Co. v Brown*, 173 S.W. 943 (Tex., 1914)
- (2) *Texas & N. O. R. Co. v Jones*, 242 S.W. 269 (Tex., 1922)
- (3) *St. Louis-S. F. Ry. Co. v Fletcher*, 253 S.W. 12 (Ark., 1923)
- (4) *Texas & N. O. R. Co. v Kaderli*, 33 S.W. (2d) 832 (Tex., 1930)
- (5) *McKenzie v Powell*, 22 S.E. (2d) 735 (Ga., 1942)
- (6) *Louisville & N. R. Co. v Gillespie*, 172 S.W. (2d) 1015 (Tenn., 1943)
- (7) *Wright v Illinois Cent. R. Co.*, 16 S. (2d) 381 (Miss., 1944)

gence in packing the solution and failure to warn of dangers incident to its use. Defendant contended that it was not guilty of negligence, that it was not liable to a purchaser from a retailer, and that the loss of plaintiff's eye was not due to injury caused by the solution but by attempted removal by surgery of scar tissue from the eye after it had successfully healed.

Held, judgment for defendant affirmed.³³ The court reviewed the evidence and concluded:

"The record shows that the labels which were placed upon the drums gave specifically and in detail the quantity, quality, and ingredients contained in each. The accuracy of the label is unquestioned. There was also testimony to the effect that the substance had been handled for many years without anyone experiencing any injurious results.nor was there any testimony introduced from which the jury could conclude that the chemical content of the drums were not correctly stated on the labels, nor was there any testimony from which the jury could conclude that the contents of the drum in question was imminently or inherently dangerous, or contained anything from which the jury could conclude that a user thereof, in the ordinary course of handling, or in applying it to the uses and purposes for which it was intended, would be exposed to any hazards, or to anything that might result injuriously to either life or limb.... There being no contractual relations between the plaintiff and the defendant in this case... recovery can only be had in tort, and then only when the compound or substance sold is imminently and inherently dangerous and such danger concealed by the seller."

11. Kolberg v Sherwin-Williams Co., 269 Pac. 975 (Cal., 1928)

Action to recover for damage sustained by plaintiff from the use upon his orange orchard of a product manufactured and sold by the defendant for the purpose of spraying orange and other citrus trees to destroy scale. The solution, known as "Citro-mulsion", contained about 73% heavy gravity hydrocarbon oil and about 27% inert ingredients. Experiments conducted prior to the sale showed that solutions with from 4% to 8% of the citromulsion with the balance water resulted in 75% - 90% defoliation. The manufactured article was sold by the agents of defendant to the plaintiff through a dealer under an agreement that the dealer would apply the spray to plaintiff's orange trees under the direction and control of defendant's agents. The spray was applied under this arrangement and resulted in serious injury to the trees sprayed and in the loss of a large portion of the crop of oranges. Plaintiff sued upon the theory that the manufactured article was inherently dangerous to citrus fruit trees; that this fact was known to the defendant, and that the plaintiff was induced to purchase it and have it applied to his trees through the false representation of defendant's agents that it would not injure the trees or the fruit or the buds. Judgment was rendered for \$6,100 in favor of plaintiff, and defendant appealed.

Held, affirmed. The liability of the defendant rested upon the rule that a manufacturer or seller of an article inherently dangerous to life or property is liable for injuries to the ultimate consumer who has purchased through a middleman. The evidence was sufficient to show that the product contained oil that was inherently dangerous to leaves and that defendant knew this by reason of prior experiments.

12. White v National Bank of Commerce, 278 Pac. 915 (Cal., 1929)

Action by plaintiff seller to recover the purchase price of a tree spray in which the defendant purchaser filed a cross-complaint for property damage caused by the spray after representations by plaintiff's agents that the spray was harmless. Evidence was introduced showing that the use of the spray, which contained oil, damaged the fruit growing on defendant's citrus trees in the sum of \$2,300. Judgment was entered in favor of the defendant in the sum of \$714, the difference between the amount of the alleged damage and the purchase price of the spray. Plaintiff appealed on the grounds that there was no showing of negligence and, secondly, that he had disclaimed liability for harm resulting from the use of his spray.

Held, affirmed. (1) The evidence supported the finding that plaintiff's agents falsely represented that the spray "would not burn, scald, or in any way harm citrus fruit trees, their fruits or foliage, regardless of the temperature or weather conditions." These representations must have been known by plaintiff to be false due to the findings by other entomologists of the injurious effects of spraying citrus trees with this product. (2) The evidence would not support a finding that any label, containing a disclaimer of results, actually appeared on any of the drums of spray which were delivered to the defendant.

13. Sherwin-Williams Co. of Texas v Offenhauser, 42 S.W. (2d) 859 (Tex., 1931)

Action to recover damages for breach of warranty against a manufacturer of arsenate of calcium. The defendant sold to the plaintiff a quantity of drums of arsenate of calcium for resale to other farmers for use in the control of cotton worms and boll weevils. The drums were labeled with the name of the product, that it was "sold for insecticide purposes" and contained directions for use upon potatoes and other vegetables, and for dusting cotton for cotton boll weevils. The evidence showed that the quantity purchased by plaintiff from defendant for \$2,700 was, in turn, sold by plaintiff to farmers for \$4,983, but that the product completely failed to kill insects as represented and plaintiff was forced to make refunds and furnish another brand of insecticide. Recovery was sought on the ground that the substance sold by defendant was not an insecticide as represented, was not marketable, and was not suitable for the purposes for which it was sold. The jury returned a verdict in favor of plaintiff for \$8,095.

Held, judgment modified and affirmed. (1) The evidence established that arsenate of calcium is well known as an insecticide and is used for the purpose of killing army worms and boll weevils feeding upon cotton plants and was sold for that purpose. These facts established that there was an implied warranty that the product was reasonably useful for the purpose for which it was sold. The jury were justified in finding that there was a breach of this warranty. (2) For the breach of warranty, the measure of damages was the difference between the value of the product warranted and the value of the product actually delivered. If the article delivered were wholly worthless the entire value warranted could be recovered. Therefore, recovery of \$4,983 was justified.

33. The court held that the trial court should have directed a verdict in favor of defendant but that since the jury gave a verdict for defendant, there was no prejudicial error.

However, damages of \$2,500 as injury to plaintiff's business, \$437 for replacing some of the worthless arsenate to the farmers, and \$175 for investigations, were too remote and speculative to authorize recovery.

14. Ingraham v Associated Oil Co., 6 P. (2d) 645 (Wash., 1932)

Action to recover damages for breach of warranty sustained by plaintiff as a result of spraying his peach orchard with "Avon Spray Emulsion," an oil spray manufactured by defendants. Plaintiff contended that at the time the defendants sold the oil spray to him, they expressly warranted³⁴ that the spray would kill aphids pests on fruit trees and would not injure the trees or fruit, whereas the spray was not suitable for the purposes for which it was intended in that it was old, and the elements composing the spray had broken down, thereby freeing the oil. The evidence further showed that when the spray was applied it killed some of the trees and injured many others and damaged the growing crops and that it failed to kill the aphids pests. Defendant contended that at the time the spray was sold there appeared upon each of the containers a notice disclaiming any warranty, either express or implied, "for any injury resulting from handling and using the product."

Held, judgment for plaintiff affirmed. (1) The jury were justified in finding that the defendant made an express warranty of his product in the oral representations to plaintiff and that these were breached. Since the jury found that an express warranty of fitness was made, no subsequent disclaimer would be effective unless assented to by the plaintiff. (2) The court correctly instructed the jury that, in assessing damages, they should estimate the difference in the market value of the orchard before and after the injury complained of, and, in estimating the market value of the orchard, they should consider the value of the crop which the trees would have produced during the current season had they not been injured, less the cost of producing and harvesting the crop.

15. W. T. Rawleigh Co. v Shoulitz, 56 F. (2d) 148 (Pa., 1932)

Action to recover damages for personal injuries to plaintiff caused by the explosion of a chemical disinfectant manufactured by defendant and sold to plaintiff by a traveling dealer. The proof at trial showed that when the plaintiff handled the purchased bottle of disinfectant, it exploded and destroyed the sight of one eye. There was also proof tending to show that the ingredients used in the disinfectant were such that a gas would form which would accumulate, if not released, and cause an explosion. Recovery was sought on the ground of negligence. After a verdict for plaintiff, defendant appealed on the ground that the trial court should have given binding instructions for defendant on the ground that there was no privity between plaintiff and defendant.

Held, affirmed. The defendant prepared the disinfectant for the purpose of sale through a dealer and therefore could not avoid liability on the ground of lack of technical privity.

16. Cole v New England Tree Expert Co., 163 Atl. 742 (R.I., 1933) 35

Action by a farmer to recover damages for the death of one of his cows. The evidence showed that the defendant was engaged in spraying trees on a public road adjacent to plaintiff's pasture. Some of the spraying solution containing arsenate of lead was carried by the wind to the pasture and the cow was poisoned through eating some of the grass. Defendant had knowledge of the proximity of the farm but gave no notice to the plaintiff of his operations.

Held, judgment for plaintiff affirmed. Where animals are injured or killed by reason of eating poisonous substances present upon land through the act of a defendant, a right of action against him will lie in behalf of the owner of the livestock.

17. S. A. Gerrard Co. v Fricker, 27 P. (2d) 678 (Ariz., 1933)

Action to recover damages for injury to plaintiff's bees caused by the defendant's dusting his lettuce crop with an insecticide, "Dutox No. 20". The defendant employed an aerial dusting company to perform the spraying to control worms. The spraying was done in the morning from an airplane flying over the field and over plaintiff's apiary. Seventy-five colonies of bees were destroyed by the insecticide. A verdict was rendered for \$2,000 in favor of plaintiff, and defendant appealed on the grounds that the dusting company was an independent contractor and that therefore defendant was not liable for any damage suffered by the plaintiff, and secondly, that the verdict was excessive.

Held, affirmed. (1) The owner of premises may not delegate the work of dusting or spraying a crop with poisonous insecticides to an independent contractor and thus avoid liability. (2) The verdict was not excessive. The proper measure of damages was the difference between the market value of the bees at the time they were damaged and the value of the colony after bees were killed, with reasonable expenses incurred in effort to mitigate loss.³⁶

18. E. I. DuPont de Nemours v Baridon, 73 F. (2d) 26 (Iowa, 1934)

Action to recover for damage to gladiolus bulblets allegedly caused by the use of "Semesan", a seed disinfectant or fungicide manufactured by defendant and purchased by plaintiff through a dealer. The company recommended its use for the treatment of seeds, roots, and bulbs before planting and represented it as a safe and beneficial plant disinfectant, and, by labels on the containers and by pamphlets furnished to customers through dealers, directed how it should be used. Plaintiff sought recovery on the ground that the defendant negligently failed to

34. The original complaint was framed on the theory of both an express and implied warranty. During the course of the trial, the court withdrew from the jury all evidence pertaining to an implied warranty and submitted only the question whether an express warranty had been made.

35. See, Gilman v City of Concord, 195 Atl. 672 (N.H., 1937) (action against a municipality to recover for the loss of plaintiff's chickens, poisoned by a tree spray employed by defendant to eradicate pests; judgment for defendant on the theory of governmental immunity)

36. The court estimated compensable damages as follows: market value of 75 colonies destroyed or absorbed, \$7.50 each - \$562.50; damages to 308 rebuilt colonies at \$4.50 each - \$1,382.00; wages of two apiculturists \$100; honey fed to bees - \$80; wages of plaintiff for extra work caused by the poisoning of bees - \$300. The court rejected as speculative a claim for damages by reason of the loss of increase, fixed at 250 hives.

give proper directions for the treatment of bulblets. The company alleged that the plaintiff's loss was the result of the improper use of the product, i.e., the bulblets were not dried and planted immediately after treatment. The trial court charged the jury that if plaintiff had followed the directions for use and his bulblets were destroyed, he would be entitled to recover. The jury returned a verdict for \$7,500 in favor of plaintiff, and defendant appealed contending that the nonwarranty of results clause³⁷ printed on the label attached to the containers constituted a defense, that there was no privity of contract between the parties, and that there was no substantial evidence of negligence on the part of the defendant.

Held, reversed. Although the lack of privity was no defense, notwithstanding the fact that only property damage was involved, and although the disclaimer was ineffective to relieve liability for negligence, there was reversible error in the court's instructions and a defect in plaintiff's proof. First, under the charge of the court the liability of the defendant was that of an insurer of the safety of its product when used as directed, whereas under the law it must appear that the manufacturer knew or in the exercise of reasonable care should have known that its product if used as directed or recommended by it would cause or be likely to cause such injury. Second, the evidence showed that plaintiff did not use the product as directed. As expressly stated by the court:

"The manufacturer is not an insurer that in every instance and under all circumstances no injury will result from the use of his product as directed or recommended, but if he knows or in the exercise of reasonable care should know that if his product is used as directed or recommended it will cause or be likely to cause material injury, then he is liable to any person who, in reliance upon his representations, directions, and recommendations, uses the product for the purpose and in the manner directed and recommended by the manufacturer and who suffers injury as a direct result, unless it appears that the user also knew or in the exercise of reasonable care should have known that the use of the product would be injurious or would be likely to cause the injuries complained of."

19. Miles v A. Arena & Co., 73 P. (2d) 1260 (Cal., 1937)

Action to recover damages for the death of plaintiff's bees caused by a poisonous dust, containing calcium arsenate, floating from defendant's field where mellons were being dusted by an airplane to plaintiff's apiary about one-half mile away. Evidence showed that the dust was found in the hives and on the dead bees after the dusting operations.

Held, judgment for plaintiff affirmed. The court stated:

"It must be conceded that, in itself, dusting vegetables to kill pests that prey upon them is a necessary and lawful operation which the owner of the vegetables may perform either himself or through his servants, or may have performed by an independent contractor. However, he should not do the dusting, or have it done, under conditions which would indicate to a reasonably prudent person that damage to his neighbor would result.³⁸ Defendant knew, or should have known, that the light dust projected under pressure onto the mellons would float in the air; there is evidence that a light breeze was blowing during the dusting operations. They should have known that the dust would float for a considerable distance when propelled by such a breeze. Dusting material containing a poison that would kill bees was used. Under the conditions prevailing at the time, they should have foreseen the ensuing damage to plaintiff. It follows that they must respond in damages."

20. Pannella v Reilly, 23 N.E. (2d) 87 (Mass., 1939)

Action to recover for damage to plaintiff's lettuce crop as the result of defendant's spraying trees on his adjoining property with a solution or compound containing arsenate of lead. The evidence showed that before the spraying began the plaintiff objected because of the danger to his crop, but that the defendant disregarded this and ordered the spraying.

Held, judgment for plaintiff affirmed. The court stated:

"The spraying of a poisonous substance in the immediate vicinity of or practically over a crop of vegetables intended for human consumption was the performance of work of such a character that damage would necessarily result to the owner of the vegetables unless reasonable precautions were taken to avert such damage. Here the trial court could find that no adequate measures were adopted to protect the plaintiff's property from being sprinkled with the poison, and that the defendant, unmindful of the plaintiff's protest ordered the work to be done and witnessed its performance. Care in the selection of an independent contractor in these circumstances was not a defense."

21. Ellis v Orkin Exterminating Co., 143 S.W. (2d) 108 (Tenn., 1939)

Action to recover damages for the death of plaintiff's intestate allegedly caused by the negligence of defendant. Defendant was employed by the parents of plaintiff's intestate, a child, to exterminate bed bugs and vermin on their premises. The house was vacated by all occupants and turned over to the defendant for a period of twenty-four hours. Plaintiff's intestate entered the house during this period through a window which had

37. The provision read: "The use of Semesan being beyond the control of the manufacturer, no guarantee, express or implied, is made as to the effects of such use, whether or not in accordance with these directions or claimed so to be." The court held that this provision constituted a disclaimer of results but not a disclaimer of safety.

38. Applying the familiar rule where damage to a plaintiff's property has resulted from drifting smokes, dust, noxious gases or similar substances originating on a defendant's property, that "No person is permitted by law to use his property in such a manner that damage to his neighbor is a foreseeable result." See, Restatement of Torts, Sec. 364 *et seq.*

been left unlocked and was asphyxiated by the hydrocyanic acid used by defendant. Recovery was sought on the ground that defendant was negligent in leaving the window unlocked.

Held, directed verdict for defendant affirmed. The proximate cause of the child's death was his own act of entering the house, as a trespasser in violation of the instructions of his parents and the warnings of the defendant.³⁹

22. Larrimore v American National Insurance Co., 89 P. (2d) 340 (Okla., 1939)

Action to recover for personal injuries sustained by plaintiff when rat poison exploded and burned her while she was working in a coffee shop leased to her employer by the defendant. The defendant had furnished the rat poison to plaintiff's employer for use on the premises. The evidence showed that the poison contained about two percent phosphorous and was not dangerously inflammable.

Held, judgment for defendant affirmed. (1) Although the defendant knew that the compound was poisonous, there was no showing that he knew or should have known that it was explosive or inflammable. (2) Assuming that the defendant violated the statute, "Whoever shall, except in a safe place on his own premises, lay out strychnine or other poison, is guilty of a misdemeanor", there was no showing that plaintiff's injury was caused by exposure to a hazard from which it was the purpose of the statute to protect him.

23. Hammond Ranch Corporation v Dodson, 136 S.W. (2d) 484 (Ark., 1940)

Action to recover damages for injury to plaintiff's stock poisoned in their pastures adjoining the defendant's farm by the spreading of a spray containing arsenic. The evidence showed that the airplane pilot spraying defendant's cotton spread the spray upon the pastures of the plaintiff, without cutting off the spray while making his circle over the pasture in turning around to go over the cotton field. Immediately thereafter a mule, heifer, and two milk cows became sick, one dying on the day the poison was spread, another shortly thereafter, there being no evidence that any of the animals were sick before the spreading of the poison. The jury returned a verdict for plaintiff and defendant appealed on the grounds that there was insufficient evidence to go to the jury, and, secondly, that the operator conducting the dusting was an independent contractor.

Held, affirmed. (1) The evidence justified a finding for the plaintiff. (2) The dusting company was an agent of the defendant, rather than an independent contractor, since the liability arising from the work was non-delegable.

24. Simpson v American Oil Co., 8 S.E. (2d) 813 (N.C., 1940)

Action to recover damages for personal injuries sustained by plaintiff while she was using an insecticide manufactured by the defendant oil company and sold by the defendant druggist. The spray settled upon her body causing inflammation and boils of a serious and recurrent nature. The can in which the insecticide was sold contained the following label statement: "For Best Results use Amox hand Sprayer - How to Use Amox - The 100% Active Insecticide. Amox is made for the purpose of killing insects, it is not poisonous to human beings, but is sure death to insects. Amox Liquid Spray is non-poisonous to human beings, but is not suited for internal use. Do not spray on food or plants. Note with all its insect killing power Amox may be used freely indoors." Plaintiff sought recovery on the grounds of negligence and breach of warranty. The defendant oil company relied heavily on the fact that it was not in privity with plaintiff. After a jury trial, the court entered a judgment for \$5,000 in favor of plaintiff, and the defendant oil company appealed. (A voluntary nonsuit was taken as to the retail druggist.)

Held, reversed on technical grounds. However, the court affirmed that the printed assurances on the label that the product as used in a spray was harmless to human beings constituted a warranty by defendant running with the product into the hands of the consumer, for whom it was intended. In the words of the court:

"Here we have written assurances that were obviously intended by the manufacturer and distributor of Amox for the ultimate consumer, since they are intermingled with instructions as to the use of the product; and the defendant was so anxious that they should reach the eye of the consumer that it had them printed upon the package in which the product was distributed. The assurances that the product as used in a spray was harmless to human beings while deadly to insects was an attractive inducement to the purchaser for consumption, and such purchase in large quantities was advantageous to the manufacturer. We know of no reason why the original manufacturer and distributor should not, for his own benefit and that, of course, of the ultimate consumer, make such assurances, nor why they should not be relied upon in good faith, nor why they should not constitute a warranty on the part of the original seller and distributor running with the product into the hands of the consumer, for whom it was intended."

25. Simpson v American Oil Co., 14 S.E. (2d) 638 (N.C., 1941)

On the first appeal from a judgment in favor of plaintiff, 8 S.E. (2d) 813, supra, the court granted a new trial because of error in the instructions to the jury involving the possibility of a double recovery on both theories presented in the pleadings, namely, negligence and breach of warranty. On the second trial, the questions of negligence and implied warranty were eliminated altogether and the case went to the jury solely upon the express warranty printed upon the container. A verdict of \$7,000 was returned for the plaintiff. The court, on this appeal by defendant, affirmed the judgment.

26. Orr v Shell Oil Co., 177 S.W. (2d) 608 (Mo., 1943)

Action to recover for personal injuries sustained by plaintiff while employed as a laborer at the Whitmire Research Corporation, manufacturing chemists. Under contract, the Whitmire Corporation compounded an insect

39. See, King v Ohio Valley Terminix Co., 214 S.W. (2d) 993 (Ky., 1948) (action for breach of warranty against exterminator for failure to insulate plaintiff's residence and laboratory against termites as advertised)

spray for the defendant Shell Company according to Shell's formulae, ingredients, containers and specifications. The defendant Strain was an employee of Shell and was stationed at the Whitmire plant. His duties were to test the finished products for compliance with the formulae and to inspect the packages for shipment. Plaintiff was employed in mixing the insect spray. One of the ingredients used was a compound known chemically as Alphanapthylthio cyanate. After working on this mixture, plaintiff suffered skin irritations and chronic nephritis. Recovery was sought on the ground that the defendant oil company was negligent in failing to warn plaintiff of the danger incident to the use of its chemicals, and against the defendant Strain for improper supervision. The trial court found for the plaintiff and awarded a judgment for \$40,000. This amount was reduced by remittitur to \$20,000.

Held, judgment against Shell Company affirmed and judgment against Strain reversed. The defendant company knew of the inherent dangers of the chemical and therefore had the duty to warn plaintiff. However, the evidence showed that the defendant Strain had no knowledge of the toxic quality of the chemical since the chemical was furnished under its trade name which was a product new and unknown to him. His duties did not call for an analysis of the chemical but only of the finished product. The court set forth the evolution of the rule as follows:

"The rule is now well settled that a duty is imposed upon the one who furnished an article which he knows, or ought to know, to be peculiarly dangerous to give notice of its character or bear the natural consequences of his failure to do so. This rule originated as an exception to the general rule of non-liability where no privity of contract exists, and was applied in cases involving injuries from poisonous drugs, chemicals, explosives or articles inherently dangerous to person or property....The rule has been extended to cover articles not only inherently dangerous in their nature, but dangerous because of the use to which they are to be put by whoever may use them for the purpose intended."

27. Underhill v Motes, 146 P. (2d) 374 (Kan., 1944)

Action to recover damages for loss of cows due to alleged poisoning. There was an alfalfa field adjacent to the pasture land leased by plaintiffs. Plaintiffs contended that one of the defendants had furnished poison to kill grasshoppers which were infesting the alfalfa and that plaintiffs' cows ate some of the poison near the pasture fence, which separated the pasture from the alfalfa field, and that the cows died as a result thereof. The grasshopper poison had been obtained by defendants from a Federal Farm Bureau. Directions for its use expressly provided that it should be scattered so as to fall on the ground in individual flakes, thus eliminating the danger of poisoning domestic or wild animals or birds. The poison was found in chunks near the fence.

Held, judgment for plaintiff affirmed. The evidence supported a jury finding that defendants were negligent in applying the poison as they did.⁴⁰

28. Bender v William Cooper & Nephews, 55 N.E. (2d) 94 (Ill., 1944)

Action to recover for personal injuries to plaintiff as the result of a pine oil disinfectant splashing into her eyes. The product was manufactured by defendant and purchased by plaintiff through a retailer. The injury occurred while plaintiff was diluting the disinfectant in a water container. The disinfectant which was used around dog kennels contained a label showing detailed directions for use, its strength, and a statement that it was "safe, non-irritating and of pleasing odor." Plaintiff, an educated woman, had read the label and was diluting the product in accordance with the directions. Recovery was sought both on the ground of negligence and breach of warranty. Plaintiff relied strongly on the label statement that the product manufactured by the defendant was safe and non-irritating. At the close of plaintiff's evidence, the trial court directed a verdict for defendant and plaintiff appealed.

Held, affirmed. There was no evidence that the disinfectant would irritate or injure the eye if it were diluted in accordance with the directions on the label. The court stated:

"A user of the disinfectant who reads the language of the entire label is clearly apprised that the disinfectant must be diluted with water before it can be used for any of the purposes stated on the label, and the words upon which plaintiff bases her right to recover refer to the disinfectant after the addition of water in accordance with the directions given. Plaintiff knew, far better than the average individual, the effect that this very strong disinfectant, undiluted, would have upon the eyes, and....she concedes, as she must, that the disinfectant was not intended to be used upon any part of the human body."

29. McGee v Bennett, 33 S.E. (2d) 577 (Ga., 1945)

Action in warranty to recover for damage to plaintiff's peanut seeds resulting from the use of a fungicide purchased from defendant. Plaintiff purchased a quantity of the unpackaged fungicide, five per cent cerasan, and

40. Other cases involving liability to pasture tenants for injury to livestock caused by the use of pesticides include;

- (1) Brady v Sutter Butte Canal Co., 278 Pac. 505 (Cal., 1929) (loss of sheep caused by consumption of grass sprayed with arsenic solution; cause of action stated)
- (2) Wolfson v Wheeler, 19 P. (2d) 1004 (Cal., 1933) (loss of sheep caused by the spreading of thallium to kill rodents by the county agricultural commissioner; recovery allowed)
- (3) Moores v Rumsey, 36 P. (2d) 15 (Okla., 1934) (loss of cattle poisoned by arsenic insecticide; recovery allowed)
- (4) Reif v Morrison, 100 P. (2d) 229 (N.M., 1940) (loss of cattle caused by consumption of grasshopper poison; recovery allowed)
- (5) Holt v Mundell, 112 P. (2d) 1039 (Colo., 1941) (loss of cattle caused by consumption of grasshopper poison; recovery allowed)
- (6) White v Splawn, 133 P. (2d) 298 (Wash., 1943) (injury to cattle caused by consumption of weed poison)

contended that he had requested two per cent ceresan. The evidence was conflicting on this point. Recovery was sought on the ground of breach of implied warranty. The case was submitted to the jury who rendered a verdict in favor of defendant. Plaintiff appealed, alleging numerous errors in the court's instructions to the jury.⁴¹

Held, judgment for defendant affirmed. (1) A buyer who knows that an article sold is different from the one which he ordered cannot recover for injury caused solely by his negligent use thereof or by his negligent failure to discover the difference. (2) Pamphlets published by the manufacturer and agricultural bulletins from experimental station were admissible in evidence to show the use of the chemical purchased to treat the peanut seed was in the experimental stage and that the buyer was aware of such fact. (3) The statute requiring branding and statement of contents of packages containing calcium arsenate, lead arsenate, etc., and "other insecticides and fungicides" did not apply to ceresan under the rule of *quidam generis*.

30. Ebers v. General Chemical Co., 17 N.W. (2d) 176 (Mich., 1945)

Action by a farmer to recover for damage to peach trees resulting from the use of an insecticide manufactured by defendant. Defendant manufactured ethylene dichloride emulsion and sold and distributed it under the trade name of "E-D-E" for the control of peach tree borers. Defendant had prepared and distributed to the public, including plaintiff, an advertising pamphlet which read in part: "E-D-E Kills Peach Tree Borers the Safe, Economical Way - Kill the Peach Tree Borer Before it Kills Your Trees - Use the original E-D-E - the uniformly safe and efficient control for peach tree borer."⁴² The pamphlet also stated: "The use of this material being beyond our knowledge and control and involving elements of risk to vegetation, we do not make any warranty, express or implied, as to the effects of such use, whether or not in accordance with directions or claimed so to be." Plaintiff purchased from various dealers 30 gallons of E-D-E and applied it to about 1,700 peach trees. Later over 400 of these trees died or were materially injured. Plaintiff sued contending that the E-D-E caused the tree injuries; that defendant gave improper directions for its use and application; and that defendant was negligent in placing the product on the market in Michigan without first making field tests in Michigan to determine whether or not, under local climatic and soil conditions, it would injure peach trees. It was also alleged that the product was sold under an implied warranty by defendant that it was fit for the uses and purposes intended and would not injure peach trees. At the conclusion of the evidence, the court directed a verdict in favor of defendant and plaintiff appealed.

Held, reversed. (1) Defendant could not escape liability merely by showing that it followed the recommendations of the United States Department of Agriculture, which recommendations were based upon field tests in states other than Michigan. It was a jury question whether defendant was negligent in distributing his product in Michigan without proper field tests having been made in Michigan. (2) Defendant could not rely upon the disclaimer of guarantee or warranty appearing in its advertising pamphlet due to the other positive representations in the pamphlet that the product was safe. In the words of the court:

"This was a representation by defendant that, if used as directed, its product E-D-E was safe and would not kill peach trees. If it was negligent in placing such product on the market in Michigan without proper field tests to determine its effect on peach trees in this State, or if it gave improper directions for the use and application of the product, it cannot escape responsibility for such negligence merely by adding a disclaimer of warranty to its representation of safety. Although plaintiff claims under the theory of an implied warranty, the real question is whether or not defendant was negligent." (3) Privity of contract was not necessary, since defendant represented the product to be "uniformly safe" with knowledge that it was inherently dangerous.^{43 44}

31. Harder v. Malonev, 26 N.W. (2d) 930 (Wis., 1947)

Action to recover damages for the death of plaintiff's intestate allegedly caused by the negligence of defendant. The defendant employed an exterminator (joined as a co-defendant) to disinfect his premises with cyanide gas. The premises were posted with signs reading "Danger - Fumigating with Cyanide Gas - Deadly Poison - All Persons are Warned to Keep Away - Do Not Enter." Plaintiff's intestate entered the premises to commit larceny and was killed by the fumes.

Held, judgment for defendants affirmed. The defendants were not negligent in failing to give adequate warnings. And, secondly, the contributory negligence of plaintiff's intestate was the sole cause of the injuries which he sustained.

32. Gibson v. California Spray-Chemical Corp., 188 P. (2d) 316 (Wash., 1948)

Action to recover damages for the loss of an apple crop resulting from the use of a chemical compound called "Elgetol" purchased by plaintiffs from the defendant. Plaintiffs purchased a quantity of the compound at defendant's local warehouse and signed an invoice which disclaimed all warranties, express or implied.⁴⁵ (Each of the cans, containing the compound, showed similar disclaimers but the cans were not introduced in evidence.) Prior to the purchase, plaintiffs had read a small paper published by defendant which stated that Elgetol had shown good control of mildew but that it should be "stirred thoroughly in its container before removing the proper dosage." The paper recommended usage in the pink or calyx sprays. Plaintiffs were orally informed at the time of sale that the product was in the experimental stage. The evidence was conflicting as to the stage of bud development when

41. These instructions are set forth in full in the reported opinion.

42. Detailed directions for use were stated in the pamphlet.

43. Citing with approval *Kolberg v. Sherwin-Williams Co., supra*, and *E. I. DuPont de Nemours & Co. v. Baridon, supra*. Note that the court bottomed its decision on the tort theory of misrepresentation and not warranty.

44. The complete pleadings in the Ebers case are contained in an excellent annotation in 17 N.C.C.A. (N.S.) 660.

45. The statement on the invoice read: "California Spray-Chemical Corporation guarantees the above material sold to be true to label, if labeled, but makes no other representation or warranty, express or implied, and shall not be held responsible for any injury resulting from the use or handling of said material whether or not used in accordance with directions. When mentioned, results from use of the corporation's products are given for information only. No representative of the corporation may vary any of the foregoing and the buyer hereby accepts said material subject to all the terms hereof."

the product was applied and as to the dosage used. Recovery was sought under three theories of action, viz. (1) breach of express warranty, (2) breach of implied warranty, and (3) negligence in recommending the product as a mildew control. The jury returned a verdict for defendant, but the trial court entered an order granting plaintiffs a new trial.

Held, reversed with directions to enter judgment for defendant. (1) There was no warranty in connection with the sale, but, on the contrary, an express disclaimer of any warranty on the part of defendant. The fact that plaintiffs did not read the disclaimer was not material. (2) Under the circumstances, the statements in the pamphlet published by defendant were neither false nor negligently made. (3) There was no evidence that the defendant concealed any information regarding the nature or action of the chemical as a fungicide or insecticide. In conclusion, the court stated:

"....respondent had full knowledge that the product as a fungicide and as a thinner during apple blossom time was in the experimental stage. As far as the evidence shows, respondent could easily have obtained from the extension service of the United States and the state department of agriculture full information regarding the chemical most advisable to use under the conditions which then existed in his orchard....The case does not fall within the principles announced in cases involving foods, drugs, and products inherently dangerous to the health and safety of human beings...Elgetol was a merchantable product. There was no danger to be incurred in using it as a dormant spray. The evidence does not show that its use is more dangerous than the old standby of lime and sulphur, taking into consideration that lime and sulphur cannot be followed by summer oils."

33. Lundberg v Bolon, 194 P. (2d) 454 (Ariz., 1948)

Action to recover for damage to plaintiff's bees caused by drifting poisonous dust called "Quick Kill - 155" spread by an airplane on an adjoining cotton crop owned by defendant. Plaintiff's apiary was located 880 feet west of defendant's crop. The jury returned a verdict for \$1300 (later reduced by the court to \$936.80) and defendant appealed on the principal ground that the evidence did not establish the causal connection between the dusting and the death of the bees in that it was equally likely that the bees went upon the field of cotton that was dusted and were poisoned there.

Held, affirmed (one judge dissenting). There was sufficient evidence for the jury to believe that the death of the bees resulted from defendant's negligence. The court properly instructed the jury as follows:

"It is not enough....for the plaintiff to prove to you by a preponderance of the evidence that the defendant did use the insecticide upon his cotton and that it did drift over....into the colonies of bees of this plaintiff in order to entitle him to recover....but he must go further and prove that that was the proximate cause of death of the bees which he claims died."

34. Luthringer v Moore, 190 P. (2d) 1 (Cal., 1948)

Action to recover damages for personal injuries to plaintiff resulting from the inhalation of hydrocyanic acid gas which was being used by defendant pest control operator in fumigating adjoining premises. The case was submitted to the jury on the theory of absolute liability for miscarriage of an ultra-hazardous activity. The jury awarded \$10,000 in damages and defendant appealed.

Held, affirmed. The use of hydrocyanic acid for fumigation is an "ultra-hazardous activity" which subjected the user to absolute liability for harm resulting from its miscarriage. The exercise of due care by the pest control operator under such circumstances does not operate to relieve liability.

35. Lenk v Smezia, 213 P. (2d) 47 (Cal., 1949)

Action to recover for damage to plaintiff's bees caused by defendants' dusting nearby tomato fields with an insecticide compound, containing arsenic trioxide, by airplane. Recovery was sought on the ground that the dust was permitted to drift on plaintiff's hives. The cause was tried by the court sitting without a jury. Judgment was rendered in favor of defendant.

Held, affirmed. Findings that plaintiff's loss resulted from his own contributory negligence and not from the negligence of defendants were sustained by evidence that it was customary to dust fields in the vicinity with substances poisonous to bees, that defendants gave him notice of their intention to dust the fields, that plaintiff would neither move them nor confine them, that defendants used due care in dusting and waited until the wind was blowing away from the hives, and that the bees obtained the poison while trespassing away from the hives and carried it back with them.

36. Jeanes v Holtz, 211 P. (2d) 925 (Cal., 1949)

Action to recover damages for the death of plaintiff's bees from poison, known as "Cryolite 70," spread by an airplane during crop dusting operations on defendant's pepper fields. Plaintiff sued both the landowner and two commercial applicators on the ground that the dust was permitted to float in the air about the field and upon surrounding properties and adjacent alfalfa fields so as to pollute the air and cause the property damage in question.

Held, judgment for defendants on demurrer affirmed. It was not alleged that the dust settled upon the hives or upon the property of the plaintiff, but only that the bees came in contact with the dust while on defendants' property and property of others than plaintiff immediately adjacent thereto. This was not a sufficient basis upon which to predicate liability.

37. Burns v Vaughn, 224 S.W. (2d) 365 (Ark., 1949)

Action to recover for damage to plaintiffs' cotton crop caused by the defendant's dusting his rice crop with 2,4-D by an airplane. When a breeze arose, the dust drifted to the plaintiffs' farms which were located about a mile from the dusting operation. The evidence showed that the defendant knew of the dangerous nature of the dust and warned the airplane pilot, but the latter continued his operations despite the breeze. Judgment was rendered

against the defendant and the manufacturer of the chemical. The defendant appealed contending that he should have received a directed verdict. The manufacturer made default and did not appeal.

Held, affirmed. Although there was no absolute liability for this damage, the evidence was sufficient to make the question of negligence to the jury since the defendant knew of the drifting properties of the dust.

• Chapman Chemical Co. v Taylor, 222 S.W. (2d) 820 (Ark., 1949)

Action to recover for damage to plaintiff's cotton crop caused by the use by defendant, Elms Co., of a 4-D dust in spraying a rice crop on land owned by the Elms Co. The land was three-fourths of a mile from plaintiff's crop. It was undisputed that particles of the 2,4-D had drifted and caused the damage. The Elms Co. filed a cross-complaint against the Chapman Chemical Company which was the distributor and sole agent of the manufacturer of the product in Arkansas. The jury returned a verdict against the chemical company, but in favor of the defendant Elms Co., and the chemical company and plaintiff appealed.

Held, affirmed. (1) The defendant Elms Co. could be held liable only if it could have foreseen the probability of injury from the use of 2,4-D. The jury could properly find, as to this defendant, that there was no previous experience in the use of agricultural chemicals which gave any indication of the danger of using 2,4-D on a crop three-fourths of a mile away. (2) As to the chemical company, a different test of liability must be applied. This test, one of absolute liability, was correctly set forth in the trial court's instruction to the jury as follows:

"It was the duty of the defendant Chapman Chemical Company before putting an inherently dangerous product on the market to make tests to determine whether or not it would damage crops of others; if you believe from a preponderance of the evidence in this case that the 2,4-D dust applied on July 1, 1947, by the Elms Planting Company was an inherently dangerous product liable to damage the property of others, and that such tests were not made, then you are told that the defendant Chapman Chemical Company is negligent."⁴⁶

2b) Privity of contract between the chemical company and plaintiff was not necessary to recovery.⁴⁷ One justice dissented on the ground that the rule of absolute liability should not have been applied to the chemical company. This justice concluded:

"I think the manufacturer's duty should be that of making such tests as are reasonably necessary in the circumstances....It is shown that 2,4-D is harmless to narrow-leaved plants, but suppose for argument's sake that there is in the world one narrow-leaved plant that the dust will injure. Upon the majority's reasoning the Chemical Company would be liable for failing to test the dust on that particular plant, even though it may have made experiments with ten thousand other species. So as to the drifting quality of the chemical, the proof shows that many agricultural dusts have been widely used during a quarter of a century, yet none has ever before been known to drift more than a few rods. I think the jury should have had the opportunity to decide whether the Chemical Company acted with ordinary prudence in assuming that 2,4-D would float in the same way as other dusts."⁴⁸

39. Kennedy v Clayton, 227 S.W. (2d) 934 (Ark., 1950)

Action to recover for damage to growing cotton through use by defendant of a pesticide, 2,4-D, on nearby realty. The chemical was applied by airplane and drifted over plaintiffs' crops. The jury returned a verdict for \$4,460.78 on demands aggregating \$14,727.23 and both parties appealed on the ground of various errors made by the court in instructing the jury.

Held, affirmed. (1) The following instruction by the trial court to the jury summarized the applicable law: "If you find from a preponderance of the evidence that the....(defendant) had, or in the exercise of ordinary care should have had, knowledge of sufficient facts to have caused an ordinarily prudent person, in the same or similar circumstances, to believe that the 2,4-D dust might reasonably be anticipated to damage the plaintiffs' cotton, and that such dust put out by them did in fact drift upon plaintiffs' cotton and damage the same, then your verdict should be for....(plaintiffs)." (2) A further instruction summarized the correct measure of damages to be applied by the jury: "the actual cash value of each of such plaintiffs' crop at the time of its destruction,....(with interest thereon from the date of the injury) at the rate of six percent per annum."

40. Yormack v Farmers' Cooperative Association of New Jersey, 78 A. (2d) 421 (N.J., 1951)

Action to recover damages for breach of the implied warranties of quality and fitness in the sale of an insecticide by defendant for use in plaintiff's chicken roosts. At the trial, plaintiff testified that he asked the clerk in defendant's store for "Black Leaf 40" but that there was none on hand so a 5-gallon can of "ICC Carbolineum" was given instead. The can did not bear any label revealing the instructions for its use. Later plaintiff sprayed his coops with this material. On the following day 50 chickens were found dead and some 357 died during the succeeding two weeks. The remaining layers were sold at the best price obtainable. Defendant's clerk testified that the plaintiff specifically asked for a can of carbolineum; that there was no discussion concerning its intended use; that the container bore a label. Other evidence was introduced showing that carbolineum

46. Citing with approval *Luthringer v Moore*, 190 P. (2d) 1 *supra*, and the Restatement of Torts, secs. 519, 523. It will be noted that the Chapman case was actually premised on the doctrine of negligence per se rather than the distinct rationale of the Luthringer case.

47. Citing *MacPherson v Buick Motor Co.*, 111 N.E. 1050 *supra*, and *Carter v Yardley & Co.*, 64 N.E. (2d) 693 *supra*.

48. Two important procedural points were involved in this case, i.e., the sufficiency of the service on the chemical company and the propriety of joining the chemical company as a co-defendant. The court held that service of process was sufficient under the statute providing that any non-resident doing business in Arkansas would be deemed to have appointed the Secretary of State as Agent on whom process could be served in any action arising out of the non-resident's doing business within the state. The bringing of the chemical dusts into the state and making tests there was deemed to constitute the doing of business by the chemical company. Joinder was proper under the Uniform Contribution Among Tortfeasors Act.

has been commonly used as a standard marketable insecticide by poultry owners without harmful conlengthy span of years. There was evidence that if the skin of the chickens came in contact with it might be irritation, but there was no evidence that this contact could result in death. The jury plaintiff \$2,500 damages.

Held, reversed and remanded for a new trial. Although the conflicting evidence was sufficient jury determination of the disputed questions of fact, nevertheless there was no evidence that the would or could cause the death of man or fowl. Moreover, in the admeasurement of damages, the jury festly influenced either by passion, sympathy, prejudice, or mistake."

41. Mailink v Pollard, 226 P. (2d) 69 (Cal., 1951)

Action by a distributor of insecticides against a farming co-partnership to recover an amount merical insecticides supplied for crop dusting. Defendants cross-complained, claiming that the ir chased from and applied by plaintiff had destroyed their crops. At the trial, plaintiff produced tomological evidence to show that the crop failure was due to infestation by thrips and lack of mc that these conditions existed prior to the use of plaintiff's insecticides. Defendants claimed th cides were harmful and were negligently applied by plaintiff and that either or both of these fact damage. Outstanding in their testimony was proof that a one-half acre plot of beans dry farmed or parable to at least part of the land on which the field crops were planted, produced at the rate c acre under conditions similar in most material respects to the conditions affecting the field crop that the half acre plot had not been dusted with plaintiff's insecticides. This plot had also bee thrips, but the infestation had not prevented a fair crop.

Held, judgment for plaintiff affirmed. The court said:

"Appellants' cause depended upon proof that the insecticides were harmful and were negliger used and that either or both of these factors caused the damage. On the other hand, respon attributed the crop failure to insects and drought and poor soil. That there was a crop fa was admitted. Clearly, the insects and the lack of moisture could have caused the failure. may be conceded also that chemical insecticides, if wrongly selected and carelessly used, c the same. Under the evidence the court could have found either for or against the conflict theories."

42. Walton v Sherwin-Williams Co., 191 F. (2d) 277 (Ark., 1951)

Action by a group of cotton farmers to recover for damages to their cotton crop sustained whe 2, 4-D mixed in an oil solution drifted from the rice fields where it was being applied by airplan ing rice farmers. Recovery was sought against the manufacturer of the 2, 4-D on the ground that h the product was dangerous when used in areas of mixed crops and on the ground that the product was tested and labeled. Interrogatories were submitted to the jury who found that 2, 4-D when used as was not inherently dangerous, that the product was reasonably pre-tested and adequately labeled, a farmers and pilots responsible for the spraying were negligent in applying the product. Judgment against the plaintiffs who appealed on the theory that under Chapman Chemical Co. v Taylor, supra, manufacturer was strictly liable.

Held, judgment for defendant affirmed.

(1) Since 2, 4-D when used in liquid form could be used safely if the proper precautions were ing it, the rule of Chapman Chemical Co. v Taylor (involving 2, 4-D in dust form) was not applicab care was the proper standard to gauge the manufacturer's liability.

(2) The negligence of the applicators in applying the spray was the intervening cause of the therefore, a bar to a suit against the manufacturer.

43. McKennon v Jones, 244 S.W. (2d) 138 (Ark., 1951)

Action to recover damages for loss of honey bees and honey alleged to have resulted while the dusting their cotton crops by airplane. The manufacturer of the "R-H Dust" used and the pilot who the defendants to spread the pesticide were made third party defendants under the Uniform Contribu feors Act. There was evidence that the pilot flew over the plaintiffs' apiary and dusted the be with the dust. The jury found for the plaintiffs' in the sum of \$1,500 against the pilot and the ploying him, but in favor of the manufacturer. The defendants appealed.

Held, affirmed. The evidence supported the verdict. The defendants who employed the pilot w for his negligent acts since the work performed was inherently dangerous.

44. Brown v Sioux City, 49 N.W. (2d) 853 (Iowa, 1951)

Action against a municipality for damages for the killing of plaintiff's bees and the loss of hives located at a municipal airbase on an acreage rented by plaintiff from defendant. The damage the defendant sprayed plaintiff's acreage with chlordane for grasshopper control. Recovery was sc ground that the defendant was negligent in failing to warn plaintiff of the spraying operations. sustained defendant's motion for judgment notwithstanding the verdict on the ground that the defen in a governmental capacity.

Held, reversed. The defendant was acting in a proprietary capacity in renting the property t and as such was responsible for its negligent conduct.

45. W. B. Bynum Cooperage Co. v Coulter, 244 S.W. (2d) 955 (Ark., 1952)

Action to recover damages for crop losses sustained by plaintiffs as the result of the sprayi dant's rice with 2, 4-D from an airplane. The liquid spray drifted from the place of release over boring cotton crops of plaintiffs. Recovery was sought on the ground that the spraying operation negligently. The jury returned a verdict for plaintiffs, and defendant appealed on the ground of instruction to the jury on the question of damages. This instruction permitted the jury to find t of the crop at the time it was damaged, to consider its probable value at maturity, less the diffi cost of production based on a full or probable crop.

Held, judgment for plaintiffs affirmed.

46. Heeb v Prysock, 245 S.W. (2d) 577 (Ark., 1952)

Action against rice grower to recover for damage to plaintiffs' cotton crops as a result of the use of 2,4-D by defendant. The damage occurred when the 2,4-D drifted from the place of release over defendant's rice crop and settled upon the neighboring cotton crops of the plaintiffs. Plaintiffs contended that the aviator employed by the defendant to do the spraying was negligent in applying the material in a manner in which the risk of drift would be involved.

Held, judgment for plaintiff affirmed. There was sufficient evidence that the aviator was negligent in doing the spraying and this negligence was binding upon the defendant who employed him.

47. Southwestern Bell Tel. Co. v Smith, 247 S.W. (2d) 16 (Ark., 1952)

Action against telephone company and agent to recover for the loss of plaintiff's three cows as the result of the use of a 2,4-D and 2,4,5-T formulation by defendants. The loss occurred when the cows consumed grass upon which the material had been sprayed by defendants from a tank for the purpose of destroying vegetation under its telephone lines. Plaintiff contended that both the telephone company and the applicator were negligent in conducting the operation where a hazard to livestock would be involved.

Held, judgment for plaintiff affirmed as to each defendant.

48. Monsanto Chemical Co. v American Bitumuls Co., 249 S.W. (2d) 428 (Mo., 1952)

Action against a chemical manufacturer to recover for the loss of a quantity of powdered 2,4-D acid owned by plaintiff. Under a contractual agreement, plaintiff supplied the defendant with the chemical for processing and conversion into a liquid weed killer. The material was held at defendant's plant for plaintiff's account. A quantity was damaged or destroyed in a fire on the defendant's premises. After the fire, plaintiff was compensated for the loss by its insurer. Recovery was then sought against the defendant for negligence. Defendant relied on a provision in the contract between the parties that "Monsanto (plaintiff) agrees to carry adequate insurance to cover all stocks of materials held by Cal-Spray (defendant) for Monsanto's account" contending that this made the defendant a beneficiary of the insurance.

Held, judgment for defendant affirmed. The insurance provision in the contract was for the mutual benefit of the parties and shifted the risk of loss to the insurer.

49. Burt v Lake Region Flying Service, Inc., 54 N.W. (2d) 339 (N.D., 1952)

Action against a commercial applicator for damage to plaintiff's oats crop as a result of the use of 2,4-D. Plaintiff employed the defendant to spray his crops. Plaintiff's evidence showed that the yield from the oats sprayed by defendant averaged 11 bushels per acre whereas an adjacent unsprayed plot averaged 53 bushels and that the sprayed oats were of much poorer development and growth than the unsprayed oats. It was undisputed that the spray would not cause any damage to oats or other grains when mixed and used according to the directions of the manufacturer and of the state agricultural extension service. Recovery was sought on the ground that the fields were negligently sprayed. After a verdict for plaintiff, defendant appealed on the grounds that there was no evidence of negligence and no competent evidence as to the amount of damages.

Held, affirmed. (1) The fact that the spray would not cause damage when properly mixed and used and yet did cause damage supports the inference that defendant was negligent in the mixing or application. (2) There was sufficient evidence upon which to predicate damages since the measure of damages in cases of this kind is the difference in value between the crop actually produced and that which would have been produced had the spray been effective. 48a

50. Harris v United States, 106 F. Supp. 298 (Okla., 1952)

Action against the federal government to recover for damage to plaintiffs' crops as a result of the use of 2,4-D by employees of the United States Fish and Wildlife Service. The damage occurred when the 2,4-D drifted from the place of release over land owned by the federal government and settled upon the nearby crops of the plaintiffs. Recovery was sought under the Federal Tort Claims Act, 28 U.S.C.A. 1346 (b) which permits suits against the United States "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable...."

Held, judgment for defendant. (1) The decision to conduct the spraying constituted the exercise of a discretionary function within the meaning of the Federal Tort Claims Act, 28 U.S.C.A. 2680 (a) which expressly excepts such action from the scope of the Act. (2) The actual spraying was done in a careful and prudent manner and was similarly exempt under the provisions of 28 U.S.C.A. 2680 (a).

51. Faire v Burke, 252 S.W. (2d) 289 (Mo., 1952)

Action against adjoining landowners for damage to a cotton farmer's crop resulting from the spraying of corn with 2,4-D. Recovery was sought on the ground that the defendants negligently used the spray at a time when a strong wind was present and as a result the spray drifted from its place of release. The trial court gave judgment for defendants and plaintiff appealed on the question of the sufficiency of the evidence to sustain the judgment.

Held, reversed. (1) There was evidence showing that the spray caused some damage to plaintiff's crop contrary to the finding of the trial court. (2) On the question of damages the court stated the rule as follows:

"The measure of damages for injury to or partial destruction of a growing crop is the difference between the crop's value immediately before and its value immediately after the injury; and that value is determined by the maturity value of the probable crop but for destruction or injury, and by a deduction therefrom of the value of the labor and the expense which subsequent to its injury or destruction and but for it, would have been required to mature, care for, and market the crop!"

48a. The trial court instructed the jury on the issue of damages — "In arriving at such damages, if you come to that question, you will determine from the evidence the number of bushels of oats the plaintiff threshed from the two plots of land that were sprayed, then you will determine from the evidence the additional number of bushels of oats that he would have obtained from the two plots of land if the alleged injury had not occurred and you will determine from the evidence the value of this additional number of bushels on the farm of the plaintiff as of the time of the alleged injury...."

52. Wilson v Geigy & Co., 73 S.E. (2d) 487 (N.C., 1952)

Action against a chemical manufacturer to recover for damage to plaintiff's tobacco crop allegedly caused by benzene hexachloride dust emanating from defendant's insecticide plant.

Held, judgment for defendant affirmed, on the ground that there was no evidence establishing a causal relation between the dust from defendant's plant and the injury to plaintiff's tobacco crop.

53. Smith v Okerson, 73 A. (2d) 857 (N.J., 1950)

Action against a potato grower by a dairy farmer for consequential damages resulting from the use of an arsenic solution. The solution used by the defendant on his crops drifted to plaintiff's adjoining pastures preventing the use of the pastures by plaintiff's cattle. Damages sought by plaintiff were for the special feeding costs which were made necessary through the temporary loss of the pastures for feeding purposes. A suit was pending at the time of the spraying involved in this action based on a prior spraying operation by defendant which resulted in the death of some of plaintiff's cattle. The cattle had eaten grass contaminated with arsenic which had drifted.

Held, judgment for plaintiff. The court first rejected a contention that the defendant should be held strictly liable under the theory of Rylands v Fletcher and ruled that the common law rules of negligence apply in crop spraying cases. The court went on to find that the defendant was placed on notice of the risk involved in spraying close to plaintiff's pastures by virtue of the prior incident and was, therefore, negligent in failing to take precautionary steps against a recurrence.

54. Kentucky Aerospray v Mays, 251 S.W. (2d) 460 (Ky., 1952)

Action against a commercial aerial applicator by a minnow dealer for loss of minnows resulting from the use of toxaphene. The toxaphene used by the defendant in spraying a tobacco field drifted to plaintiff's adjoining land and settled in a pond containing a substantial number of minnows. All of the minnows were killed as a result. Plaintiff had judgment in the trial court and defendant appealed on the ground, inter alia, that there was no proof that the spraying was conducted negligently.

Held, judgment for plaintiff affirmed. The court dispensed with the contention that there was no negligence with this statement: "... we must hold that, if appellant allowed the chemical compound to fall and settle in the pond in the spraying operation so that the minnows were poisoned, appellant was guilty of negligence."

55. Bowden v United States, 200 F (2d) 176 (C.A. 4th, 1952)

Action against the United States Government by a sheep owner for loss of sheep resulting from the use of DDT sprays by the National Advisory Committee on Aeronautics. Plaintiff contended that some of his sheep died as a result of exposure to these government spraying operations. There was no evidence that any of the sheep declared lost were ever in the vicinity of the spraying.

Held, judgment for defendant. The court held that there was no evidence that any sheep died as a result of the spraying and no evidence of negligence on the part of the United States.

56. Alexander v Seaboard Air Line R. Co., 71 S.E. (2d) 299 (S.C., 1952)

Action against a railroad by a cotton grower for damage to cotton plants resulting from the use of 2,4-D by the railroad on its right of way adjacent to plaintiff's plants. The railroad contended that it had employed an independent contractor to do the spraying and that the contractor was solely responsible for the damage. The jury returned a verdict of \$1,750 against the railroad and an appeal was taken.

Held, affirmed. The court reaffirmed the well settled rule that the independent contractor doctrine does not relieve the principal from liability arising from the use of inherently dangerous materials.

57. Harris v United States, 205 F. (2d) 765 (C.A. 10th, 1953)

On appeal from Harris v United States (case no. 50) held, affirmed. The court further held that the single spraying operation which was involved fell short of a taking within the meaning of the "just compensation clause" of the Fifth Amendment to the United States Constitution.

58. Stull's Chemicals v Davis, 263 S.W. (2d) 806 (Tex., 1953)

Action against a chemical manufacturer by a cotton grower to recover damages to plaintiff's cotton crop caused by the use of 2,4-D on adjacent property. Recovery against the manufacturer was sought on the ground that the 2,4-D was sold to the applicator without sufficient warnings as to its drifting potential and harmful effects on cotton. At the trial, the manufacturer introduced in evidence copies of the label used on the product which contained specific warnings against drifting and stated that cotton would be injured by such drift.

Held, judgment for plaintiff reversed. First, the court stated that the manufacturer was not subject to strict liability since the product was not shown to be "inherently dangerous". Second, the warning statement on the label was deemed to be adequate caution to the user of hazards connected with the use of the product.

59. Pendergrass v Lovelace, 262 P. (2d) 231 (N. Mex., 1953)

Action against an adjoining landowner by a cotton grower for damage to plaintiff's cotton crop resulting from an aerial application of 2,4-D which drifted. There was evidence that the commercial applicator employed by the defendant flew over plaintiff's land and emitted 2,4-D. Defendant defended on the grounds that (1) the applicator was an independent contractor whose negligent acts could not be attributable to defendant, and (2) the evidence as to the measure of damages was speculative.

Held, judgment for plaintiff affirmed. First, the court followed the well-settled rule that inherently dangerous operations are not delegable so as to render the principal immune from liability under the independent contractor doctrine. Second, the court held that there was sufficient basis for

a determination of damages in the evidence which showed a comparison between the produce from plaintiff's crop after damage and produce from other crops in the area which were not damaged.

60. Gainey v Folkman, 114 F. Supp. 231 (Ariz., 1953)

Action against a cotton grower by a cattle owner to recover damage for injury to plaintiff's cattle and injunctive relief against further cotton dusting on defendant's adjacent ranch. Plaintiff contended that defendant's aerial dusting operations with DDT, EHC, and parathion drifted over to plaintiff's land, impregnated alfalfa used as cattle feed, caused injury to cattle consuming the alfalfa, and caused personal injury to one of the ranch hands. Recovery was sought under the doctrine of absolute liability.

Held, judgment for defendant and injunction denied. There was no evidence that the injuries complained of were caused by the dusting operations. The court indicated that the principle of absolute liability would have applied if there were proof of harm proximately caused by the dusting.

61. Adams v Henning, 255 P. (2d) 456 (Cal., 1953)

Action against a landowner by a potato farmer for damage to potato crops arising from the use of 2,4-D by defendant on adjacent land. The evidence was conflicting on the nature and extent of the damage. The trial court granted a motion for nonsuit and plaintiff appealed.

Held, reversed. The court indicated that the evidence as a whole predominated in favor of defendant but that there were sufficient factual questions involved to require the trial court to enter formal findings of facts instead of to dispose of the case as a matter of law.

62. George v Cox, 261 S.W. (2d) 201 (Tex., 1953)

Action against a commercial applicator by a cotton grower to recover for damage to plaintiff's cotton crop resulting from the use of a pesticide by defendant on adjoining property. Recovery was sought on the theory of trespass. At the trial, the defendant offered no evidence in defense.

Held, judgment for plaintiff affirmed. The court in weighing the evidence emphasized in particular the failure of the defendant to offer any defense. (There was no finding of negligence on the part of the defendant -- probably because the theory of action was trespass.)

63. Wasatch Chemical Co. v Leon, 259 P. (2d) 301 (Utah, 1953)

Action against a grower by a chemical manufacturer for an unpaid bill incurred by the purchase of a pre-emergence weed killer containing oil. The grower counterclaimed alleging substantial damage to his onion crop by reason of the use of the product. The onions damaged were beneath the surface of the earth at the time the product was applied to surface plants. Recovery was sought for breach of warranty on the ground that the manufacturer's plant physiologist represented orally to the grower that the product, although destructive to all plant life which it directly contacted, would not destroy plants under the soil.

Held, judgment against manufacturer affirmed. The court held that the manufacturer through its agent expressly and impliedly warranted the safety of its product, which warranty was breached.

64. Burr v Sherwin-Williams Co., 258 P. (2d) 58 (Cal., 1953)

Action against a commercial applicator company, a distributor and a manufacturer by a cotton grower for damage to plaintiff's cotton crop resulting from the use of a DDT solution. The manufacturer had sold the material to the distributor who, in turn, had sold it to the commercial applicator for mixing and use on plaintiff's cotton. Recovery was sought on the ground that the material contained a 2,4-D (or derivative) contaminant due to negligent manufacture or application. Recovery was also sought for breach of implied warranty. The jury returned a verdict of over \$12,000 against the manufacturer under instructions by the court that res ipsa loquitur was applicable.

Held, affirmed. The doctrine of res ipsa loquitur was properly applicable. With respect to the warranty count, the court held that privity between the manufacturer and grower was not essential since the cause of action was based on the breach of a public duty. Although the label on the container of the material sold by the manufacturer contained a disclaimer against warranty liability, the court ruled this was not operative against the grower who never had the opportunity to see the container or label.

65. Pruett v Burr, 257 P. (2d) 690 (Cal., 1953)

Action against a grower, commercial applicator company and manufacturer by a cotton grower for damage to plaintiff's cotton crop resulting from the use of a DDT solution. The damage occurred when the material drifted from the place of release over land owned by the defendant grower and settled upon the nearby cotton crop of plaintiff. Recovery was sought on the ground that the material contained a 2,4-D (or derivative) contaminant due to negligent manufacture or use. The only evidence bearing on contamination was contained in letters and memoranda prepared by government officials who had made an investigation. The jury returned a verdict against the manufacturer under instructions by the court that res ipsa loquitur was applicable.

Held, reversed, on the ground that the evidence showing contamination was hearsay and, therefore, was erroneously admitted. The court stated, however, that res ipsa loquitur was properly applicable despite the fact that multiple defendants were involved.

66. McClanahan v. California Spray-Chemical Corporation, 75 S.E. (2d) 712 (Va., 1953)

Action against a fungicide manufacturer by apple growers to recover for damage to apple orchards owned by plaintiffs as a result of the use of the fungicide. The damage occurred when the material was applied ten days to two weeks after the petal fall spray during a period of serious scab infection. The label on the product directed that the material should be used up until petal fall and warned

against use after petal fall to avoid a food residue problem. A disclaimer on the label purported to release the manufacturer from all liability arising from the use of the material.

The action was initially brought on the common-law ground that the manufacturer failed to label the material with adequate warnings against use after petal fall, during certain temperature conditions, and during periods of serious scab infection. The action was tried on a statutory basis. The trial court charged the jury that the Federal Insecticide, Fungicide and Rodenticide Act of 1947 and a counterpart Virginia statute required the manufacturer to place on the label "a warning or caution statement which may be necessary and if complied with adequate to prevent injury to living man and other vertebrate animals, vegetation, and useful invertebrate animals" and that a failure to do this constituted negligence per se. The specific question submitted to the jury was whether such a warning had been given with respect to use during periods of serious scab infection. A jury verdict of \$30,000 was returned. This verdict was set aside by the trial court and judgment entered for defendant on the ground that the label on the product complied with federal and state law and the damage was caused by use after petal fall contrary to directions on the label. Plaintiffs appealed.

Held, judgment n.o.v. reversed and verdict for plaintiffs reinstated. (Two justices dissenting.)

(1) The federal and applicable state laws regulating the manufacture and sale of pesticides were violated because the label on the material in question failed to warn against the consequences of use after petal fall during periods of serious scab infection. The violation constituted negligence per se.

(2) The provisions of such laws relating to directions for use and those relating to warnings are separate and serve distinct purposes. Warnings are to assure safe use -- directions to assure effective use. Therefore, it was no defense (in a case involving a safety factor) that the material in question was not used in accordance with the manufacturer's directions. 48b

67. Parks v Atwood Crop Dusters, 257 P. (2d) 653 (Cal., 1953)

Action against a grower and a commercial applicator company by a cotton grower for damage to plaintiff's cotton crop resulting from the use of a defoliant (aereo cyanamide dust). The damage occurred when the defoliant drifted from the place of release over land owned by the defendant grower and settled upon the nearby cotton crop of plaintiff. Recovery was sought on the ground of negligent application. The jury returned a verdict of over \$13,000 in favor of plaintiff and defendants appealed.

Held, affirmed. There was sufficient evidence that the defendants knew of the drifting potential of the material and that it was likely to damage cotton which was not ready for defoliation.

48b/ Numerous issues of first impression were presented in the case bearing on the application of the Federal Insecticide, Fungicide and Rodenticide Act and counterpart state law to civil product liability litigation. The opinion of the court should be referred to in this regard. Among the interpretive questions involved were (a) the nature and scope of "labeling" as defined in these laws and (b) the meaning of the term "commonly recognized practice" as used in the misbranding sections of these laws.

Other significant issues disposed of in the trial court but not discussed on appeal included the effect of registration and label approval by the government agencies responsible for administering and enforcing laws regulating the manufacture and sale of pesticides and the effect of a disclaimer provision on the label against liability. The trial court allowed evidence showing that the product in question was registered under applicable law but disallowed any proof as to the effect of such registration in determining compliance with labeling requirements. The disclaimer was allowed in evidence but the court refused to instruct the jury that this was a valid defense.

Section 2. Product Liability Decisions Involving Fertilizers

1. Dent v. Murphy, 13 Ky. Law Rep. 46 (1891)

Action to recover damages for breach of warranty in the sale of fertilizer by the defendant dealer to plaintiff. Plaintiff made the purchase upon the faith of recommendations in circulars issued by defendant, which plaintiff had seen prior to the sale. At the time of the sale nothing was said by either party as to the value, character, or quality of the product. By reason of a latent defect in the fertilizer, plaintiff's crops were injured.

Held, judgment for defendant. There was neither an express nor an implied warranty, and plaintiff could not recover for the injury to his crops, unless it was caused by some defect known to defendant at the time of the sale. (abstract opinion)⁴⁹

2. Swift & Co. v. Meekins, 102 S.E. 138 (N.C., 1920)

Action to recover the purchase price of a quantity of fertilizer sold by plaintiff to defendant. Defendant counterclaimed for breach of warranty as to the quality of the fertilizer. Recovery on the counter-claim was sought on the basis of statements made by plaintiff's agent at the time of purchase that the product was "as good fertilizer as there was on the market." The trial court submitted the question of warranty to the jury. From a judgment for plaintiff, defendant appealed.

Held, reversed. The language used by the agent constituted a warranty in law and the jury should have been so instructed.

3. Bowker Fertilizer Co. v. Wallingford, 111 Atl. 329 (Me., 1920)

Action to recover the purchase price of fertilizer sold to the defendant by the plaintiff manufacturer. Defendant contended that the fertilizer was inferior and its use damaged his potato crop and caused him to have a crop of inferior and unmarketable potatoes. In support of this defense, defendant offered to prove that other fertilizer mixed to the same formula of the "4-6-10" sold by plaintiff, produced a marketable crop under similar soil conditions and methods of cultivation. The court ruled that this defense was insufficient and ordered judgment for plaintiff. Defendant excepted.

Held, exception overruled. The sale was for fertilizer of a 4-6-10 brand and imported no guaranty of suitability or results. The only warranty involved was one of guaranteed analysis and for this purpose defendant's evidence was inadmissible to establish a breach.

4. Patterson v. Orangeburg Fertilizer Co., 108 S.E. 401 (S.C., 1921)⁵⁰

Action against the defendant fertilizer manufacturer to recover damages for crop losses allegedly sustained as the result of the fertilizers' containing an appreciable quantity of borax. Plaintiff purchased the fertilizer direct from the defendant. The evidence showed that the fertilizer contained a deleterious quantity of borax and that when plaintiff used it, serious crop losses resulted. The trial court directed a verdict for defendant and plaintiff appealed. On appeal, defendant urged: (1) that the statute law of the state purporting to regulate the sale of fertilizers prescribed an exclusive remedy for plaintiff, (2) that the warranty of the defendant that it did not guarantee results from the use of the fertilizer was exclusive of any implied warranty, (3) that the contract of sale limited the filing of a claim to 10 days after receipt of goods, and (4) that the action was in tort and negligence was not proved.

Held, reversed, that the case should have been submitted to the jury. The court answered defendant's contentions as follows: (1) The statutory remedy was cumulative and did not supersede the common law remedy; (2) the warranty did not by implication exclude the usual implied warranties; (3) the contract provision was contrary to public policy and void; (4) the complaint and proof sustained a cause of action on any one of three theories, i.e., action for damages for breach of contract due to a failure of consideration, action for damages for the breach of the implied warranty of fitness of the goods sold, or an action in tort for negligence in supplying a fertilizer containing a deleterious ingredient.

49. Early decisions involving warranties in the sale of fertilizers include:

- (1) Mason v Chappell, 15 Grat. 572 (Va., 1860)
- (2) Walters v Croasdale & Co., 43 Ga. 204 (1871)
- (3) Radcliff v Gunby, 46 Ga. 464 (1871)
- (4) Sims v Howell, 49 Ga. 620 (1873)
- (5) Allen v Young, 62 Ga. 617 (1878)
- (6) Farrow v Andrews & Co., 69 Ala. 96 (1881)
- (7) Walker v Pue, 57 Md. 155 (1881)
- (8) Morris v Bradley Fertilizer Co., 64 Fed. 55 (C.C.A. 3rd, 1894)

50. Followed on similar facts in Willcox, Ives & Co. v. Brazzell, 117 S.E. 203 (S.C., 1923)

5. Hubbard Fertilizer Co. of Baltimore City v American Irona Corp., 120 Atl. 522 (Md., 1923)

Action to recover money expended by the plaintiff fertilizer company as damages resulting from the use of its fertilizer by customers. The alleged damage was occasioned by excessive borax in the muriate of potash sold by the defendant ingredient-supplier to the plaintiff. The evidence showed that the defendant knew that the potash purchased by plaintiff was to be used in the manufacture of chemical fertilizer. The purchase of the quantity in question was made by trade name, i.e., Irona potash. Recovery was sought for breach of express and implied warranties.

Held, judgment for defendant affirmed. (1) There was no evidence of any breach of the express warranty that the percentage of borax would not exceed a certain amount. (2) There was no implied warranty of fitness since the product was sold under its trade name (applying the uniform sales law).

6. Swift & Co. v Etheridge, 129 S.E. 453 (N.C., 1925)

Action to recover the purchase price of a quantity of fertilizer sold by plaintiff to defendant. Defendant defended on the ground that the fertilizer proved worthless and that this constituted a breach of warranty.

Held, judgment for defendant reversed on technical grounds. The court noted, however, that there was a warranty of quality and fitness implied by law and a warranty required by statute that the commercial fertilizers were of the guaranteed analysis. This warranty was not negated by a clause in the note, executed at the sale, that "the consideration of this note is commercial fertilizer sold....without any warranty as to results from its use, or otherwise."⁵¹

7. E. O. Painter Fertilizer Co. v Kil-Tone Co., 143 Atl. 332 (N.J., 1928)

Action to recover damages for breach of warranty against a fertilizer manufacturer. The defendant sold the fertilizer to plaintiff dealer under the oral representation that it would act as a destroyer of insects and as a stimulant to the growth and productiveness of tomato plants. Plaintiff resold the product to a third party under the same representation. The third party used the product and it destroyed his tomato crop. Suit was brought against plaintiff and recovery was allowed. Plaintiff then sued defendant for the amount of this recovery.

Held, judgment for defendant affirmed, due to the statute of limitations since plaintiff's cause of action accrued when defendant made the original representation (an implied warranty) and not when judgment was recovered against it by a third party.

8. Buckley v Shell Chemical Co., 89 P. (2d) 453 (Cal., 1939)

Action to recover damages for breach of warranty against the retailer and the manufacturer of a fertilizer. Plaintiff contended that the retailer had made oral representations to him that the fertilizer bought would produce a large crop of good quality potatoes whereas the potatoes actually produced were of an inferior quality. Recovery against both the retailer and the manufacturer was sought on the ground that the retailer was the manufacturer's agent. The order blank signed by plaintiff contained the following provision: "Because of weather hazards which affect the productiveness and, or, quality of growing crops, it is understood and agreed that.... (the retailer) shall not be held responsible for productiveness and, or, quality of the undersigned's crops."

Held, judgment for both defendants affirmed. The written waiver of warranties in the order was a complete disclaimer of inefficaciousness and controlled any inconsistent oral warranties. Since plaintiff attempted to impose liability on the manufacturer as the undisclosed principal of the retailer, the manufacturer could take advantage of the disclaimer.

9. Griffin v Taylor, 16 S.E. (2d) 186 (Ga., 1941)

Action to recover the purchase price of a quantity of fertilizer sold by the plaintiff dealer to the defendant. The buyer defended on the ground that the plaintiff had breached the implied warranty of fitness and had furnished fertilizer which was hardened into lumps and therefore worthless for use. The court instructed the jury that if the fertilizer was not deficient in chemical analysis or ingredients as specified by the buyer, there was no breach of warranty. Instructions were also given that the measure of damages for a breach of warranty is the difference between the contract price and the actual value of the goods at the time and place of delivery. The court excluded evidence offered by defendant to show the expenses incurred by him, consisting of land rent, labor, plants, seed, in using the fertilizer and to show the value of the crops produced. The jury returned a verdict for plaintiff, and defendant appealed from an order denying a motion for a new trial.

Held, reversed. (1) The court erred in expressly excluding from the jury any consideration of the implied warranty that the fertilizer was suitable for fertilizing crops,⁵² as the instructions tended to confine the jury to the consideration of the statutory warranty that the fertilizer was of the represented chemical analysis. (2) The court properly excluded the evidence offered by defendant to show his net loss, since the failure of the defendant to make a profit on the crops was too remote to be the basis of damages for a breach of the warranty that the fertilizer was reasonably suited to the use intended. (3) The court erred, however, in instructing the jury as to the measure of damages since defendant should be allowed to recover such incidental damages as the expenses of hauling and distributing the worthless fertilizer.

51. The rationale of the opinion would seem to be that implied warranties of merchantability and fitness for use cannot be disclaimed. Compare this with a statement in an earlier North Carolina case, *Carter v McGill*, 89 S.E. 28 (1916) that "....plaintiff, and others in the fertilizer trade similarly situated, can protect themselves against too great a hazard in respect to the loss of crops by a provision in their contracts to the effect that they are not to be liable for any results from the use of the fertilizer or for any loss of crops..."

52. Citing *Wilcox, Gibbs & Co. v Hall*, 53 Ga. 635 (1875) where it was said: "A seller of fertilizers warrants that the article is merchantable and reasonably suited to the use intended. He warrants that it is a manure, that it is reasonably suited for giving additional capacity to land to produce a crop...The seller does not warrant against the seasons, so that, if his fertilizer fails on account of the seasons, the purchaser is liable."

10. North American Fertilizer Co. v Combs, 212 S.W. (2d) 526 (Ky., 1948)

Action to recover damages for breach of warranty in the sale of fertilizer manufactured by defendant.⁵³ Plaintiff had purchased the fertilizer from a dealer for the indicated purpose of using it as a field fertilizer in the growing of tobacco. The product designated as "6-8-6" contained the proper parts of nitrogen, phosphoric acid and potash but the nitrogen component contained an excessive quantity of cyanamid and caused a total destruction of plaintiff's tobacco plants in the tobacco bed where it was applied. There was evidence of a local custom to use "6-8-6" as a tobacco bed fertilizer, but that defendant manufactured the product for field cultivation and sold another product, containing less cyanamid, for plant beds.

Held, judgment for plaintiff reversed. (1) There was no privity between the manufacturer and the defendant except that springing from the express warranty that the product had the specified component parts and the further implied warranty that the product was fit for the common usage of the ordinary fertilizer.⁵⁴ Here the product was subjected to a special use. (2) The provision of the uniform sales act that "an implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade" was not applicable, since this provision does not extend beyond the seller so as to include the manufacturer.

11. Cone v Virginia-Carolina Chemical Corp., 174 So. 354 (Miss., 1937)

Action against a fertilizer dealer for personal injury sustained by plaintiff as a result of handling a commercial fertilizer purchased from defendant. It was contended that the injury was caused by the sulphuric acid content. Recovery was sought on the ground that the defendant knew the general custom of farmers to handle commercial fertilizer with their hands and yet failed to give notice of the dangerous qualities of sulphate of ammonia which was contained in the fertilizer sold. Defendant relied upon the fact that it was a retailer and had purchased the product from the manufacturer upon a guaranteed analysis. At the trial, there was no proof of the analysis of the product in question and no proof that the defendant was a manufacturer.

Held, directed verdict for defendant affirmed. The plaintiff failed to prove that the defendant was a fertilizer manufacturer or had any knowledge of its being dangerous or improperly prepared. The court stated:

"A person who buys articles not constituting food, drink or medicine, to be taken internally, cannot hold the seller liable for injury if such articles were bought from a reputable manufacturer or dealer. A distinction must be borne in mind between those substances constituting food, drink or medicine, to be taken internally, and those intended for use on external objects. A manufacturer of fertilizer is not under the same liability as a warrantor as those selling food-stuffs, drink or medicine, to be taken into the body."

53. The dealer was also sued but received a directed verdict.

54. Note that the court indicated that lack of privity would not have barred the plaintiff in this suit, if the fertilizer had been applied to its common use, i.e., in the field.

Section 3. Product Liability Decisions Involving Drugs

1. Thomas v Winchester, 6 N.Y. 397 (1852)⁵⁵

Action to recover damages for personal injuries against a manufacturing druggist who negligently labeled and sold, as extract of dandelion, a jar of extract of belladonna. This poisonous compound was sold to a retail druggist as extract of dandelion, and the druggist bought it believing it was such. Plaintiff purchased the compound from the retail druggist and administered it to his wife. Recovery was sought on the ground of negligence. Defendant moved for a nonsuit on the ground that since the defendant was the remote vendor of the article, and there was no privity of contract, the action could not be maintained.

Held, judgment for plaintiff. The general requirement of privity established in Winterbottom v Wright does not apply to the sale of a poisonous drug in place of a harmless medicine, since this is an act "imminently dangerous to human life."

2. Davis v Guarnieri, 15 N.E. 350 (Ohio, 1887)

Action to recover damages for the death of plaintiff's intestate caused by the drinking of oil of bitter almonds, a poisonous drug. The drug was mistakenly sold to the plaintiff by defendant druggist instead of oil of sweet almonds as requested. No label on the retail package indicated the contents.

Held, judgment for plaintiff affirmed. The evidence established a sufficient cause of action in negligence. Privity of contract was not necessary.

3. Fisher v Golladay, 38 Mo. App. 531 (1889)

Action to recover damages for personal injuries sustained as a result of plaintiff's receiving and consuming sulphuric acid on an application to purchase sulphuric ether from defendant druggist. No label was on the bottle.

Held, judgment for plaintiff affirmed. Defendant was liable under the common law and also negligent as a matter of law in violating the statute requiring poison labels on products such as sulphuric acid.

4. Blood Balm Co. v Cooper, 10 S.E. 118 (Ga., 1889)

Action to recover damages for personal injuries sustained by plaintiff as a result of using a proprietary medicine manufactured by the defendant. Plaintiff made the purchase through a retail druggist. The evidence showed that the plaintiff used the medicine in accordance with the prescription accompanying it and that the quantity thus prescribed and consumed by plaintiff contained a harmful amount of iodide of potash. The defendant contended in defense that there was no privity of contract between the parties and that the drug was not imminently poisonous.

Held, judgment for plaintiff affirmed. Since the manufacturer undertook to prescribe directions for the use of his product and the product when used as directed was injurious, he was liable irrespective of privity.

5. Howes v Rose, 42 N.E. 303 (Ind., 1895)

Action against a retail druggist to recover damages for personal injuries sustained by plaintiff as a result of taking a quantity of Tartaric acid sold by defendant as Rochelle salts. Defendant had purchased the medicine from a reputable manufacturer with the label on the bottle reading "Rochelle salts." Recovery was sought on the ground of negligence.

Held, judgment for plaintiff reversed. The mere sale of a wrong drug does not establish a prima facie case. Therefore, there was no showing of negligence by the defendant.⁵⁶ (overruled in Knoefel v Atkins, 81 N.E. 600 (Ind., 1907))

6. Gibson v Torbert, 88 N.W. 443 (Iowa, 1901)

Action against a druggist to recover damages for personal injuries sustained as a result of an explosion of phosphorus purchased by plaintiff from defendant. Pursuant to an order, the defendant had delivered three sticks of phosphorus to plaintiff. Plaintiff dropped one stick, which ignited, and, on his attempting to pick it up, caused the explosion of the remaining sticks in his hands. Recovery was sought on the ground that defendant knew that plaintiff was uneducated and should have specifically warned him of the dangerous nature of phosphorus.

Held, judgment for defendant. The article ordered was not such a new and unknown substance, with the dangerous qualities of which the general public, and therefore the plaintiff, was not acquainted, as to render defendant negligent in selling it without a specific warning.

7. West v Emmanuel, 47 Atl. 965 (Pa., 1901)

Action to recover damages for the death of plaintiff's daughter alleged to have been caused by a headache powder sold to her by defendant druggist. The druggist sold the drug in the manufacturer's sealed package.

55. This case is usually regarded as the parent of the "dangerous instrumentality" doctrine.

56. Other early decisions involving negligence in the sale of drugs include:

- (1) Norton v Sewall, 106 Mass. 143 (1870)
- (2) Hansford's Adm'x. v Payne & Co., 74 Ky. 380 (1875)
- (3) Brown v Marshall, 11 N.W. 392 (Mich., 1882)
- (4) Walton v Booth, 34 La. Ann. 913 (1882)
- (5) Wohlfahrt v Beckert, 92 N.Y. 490 (1883)
- (6) Minner v Scherpick, 5 N.Y.S. Rept. 851 (N.Y., 1886)
- (7) Smith v Hays, 23 Ill. App. 244 (1887)
- (8) Brunswick v White, 8 S.W. 85 (Tex., 1888)

Held, judgment of nonsuit in favor of defendant affirmed. The court stated the rule as follows: "In the sales of patent or proprietary medicines furnished by the compounder of the ingredients which compose them, the druggist is not required to analyze the contents of each bottle or package he receives. If he delivers to the consumer the article called for with the label of the proprietary or patentee upon it, he cannot be justly charged with negligence in so doing."

8. Darks v Scudders-Gale Grocer Co., 130 S.W. 430 (Mo., 1910)

Action against defendant wholesaler to recover damages for the death of the plaintiff's intestate, a retailer, who used ginger extract containing wood alcohol for medicinal purposes. The product was sold by defendant to plaintiff's intestate under the oral representation that the product was manufactured by him and was harmless. Recovery was sought on the theory of negligence.

Held, judgment for plaintiff affirmed. Where a person selling an article represents to the purchaser that it is wholesome and safe, and it is proved that the article is a deadly poison, dangerous to human life, and that a person, relying upon the statement, purchases the article and uses it for the purposes for which it has been sold and is injured thereby, the seller is liable as a matter of law.

9. McKibbin v F. E. Bax & Co., 113 N.W. 158 (Neb., 1907)

Action to recover damages for personal injuries sustained by plaintiff as the result of using a drug sold by the defendant. The defendant sold the drug to a minor who, in turn, administered it to plaintiff. Recovery was sought on the ground that defendant was negligent in selling a poisonous article to a minor.

Held, judgment for defendant. The sale by the druggist was not the proximate cause of the injury complained of.

10. Willson v Faxon, Williams & Faxon, 101 N.E. 799 (N.Y., 1913)

Action against a retail druggist to recover damages for personal injuries alleged to have been caused through taking a proprietary medicine sold to plaintiff by defendant under its own label. The label contained a statement that the medicine was "purely vegetable," and was orally represented to plaintiff by defendant's clerk at the time of purchase as being the same as another harmless preparation. The medicine actually contained a mineral poison. Defendant contended that it had purchased the medicine from a reputable manufacturer and was justified in placing reliance upon its vendor that the product was as represented.

Held, judgment for plaintiff. Negligence may be predicated upon the evidence that the medicine contained a dangerous mineral poison and that the defendant although representing itself to be the manufacturer and, therefore, presumably acquainted with all the ingredients going to make up the medicinal preparation which it sold to the plaintiff, knew practically nothing about the nature of the compound, and had taken no effective means to ascertain the true character thereof. The druggist representing himself as the manufacturer became liable to the purchaser to the same extent as the actual manufacturer would have been if the purchase had been made from him.

11. Wright v Howe, 150 Pac. 956 (Utah, 1915)

Action to recover damages for the death of four horses and for injury to a fifth resulting from the consumption of boiled linseed oil purchased from defendant dealer. Plaintiff's employee had requested raw linseed oil which was a harmless remedy whereas the product furnished was deleterious when used for the purpose for which the oil was purchased.

Held, judgment for plaintiff affirmed. The defendant was negligent in supplying a harmful substance instead of a harmless one.

12. Levin v Muser, 194 N.W. 672 (Neb., 1923)

Action to recover damages for the death of plaintiff's intestate caused by the consumption of oil of mirbane, a deadly poison. The poison was sold by the defendant drug-wholesaler to the defendant retailer who, in turn, sold it to the deceased without any label thereon, except the words "oil of mirbane." Death was caused when the deceased drank some of the oil of mirbane believing it to be a throat gargle. Recovery was sought against the retailer and the wholesaler on the ground that each was negligent in failing to label the bottle as a poison.

Held, judgment sustaining demurrer in favor of the defendant wholesaler affirmed. The complaint did not warrant the inference that the sale was the proximate cause of the death.

13. Hruska v Parke, Davis & Co., 6 F. (2d) 536 (Mo., 1925)

Action against a manufacturing chemist to recover damages for personal injuries sustained by plaintiff as a result of treatment with defendant's medicinal preparation called "Camphor Solution Neutral." The drug was injected into the plaintiff's body by a physician. Plaintiff alleged that the preparation contained mineral oil instead of vegetable or animal oil as advertised by defendant. Defendant demurred to the complaint on the ground that there was no privity. The court sustained the demurrer and plaintiff appealed.

Held, reversed. The cause of action contained the elements of an action for fraud, in which the element of privity of contract is not essential, as well as an action for negligence, since defendant was engaging in a highly technical business affecting the health and safety of the public.

14. Ellis v Lindmark, 225 N.W. 395 (Minn., 1929)

Action to recover damages for injuries to plaintiff's poultry caused by the consumption of raw linseed oil. The oil was purchased from defendant retail druggist in response to an order for cod liver oil. The retail druggist had purchased the oil from the defendant wholesale druggist. Recovery was sought against both parties for negligence.

Held, judgment for plaintiffs affirmed. The evidence supported a finding that both the wholesaler and the retailer were negligent in supplying the wrong product to plaintiffs. The negligence of the retailer was not as a matter of law an intervening and the sole proximate cause.

15. Forney v Sears, 280 Pac. 56 (Wash., 1929)

Action against a druggist to recover damages for personal injuries caused by the use of sodium fluoride.

Plaintiff lived in the home of the purchaser of the chemical and used it by mistake in place of salts. Recovery was sought on the ground that the sodium fluoride was not labeled as a poison. In the applicable poisons statute, sodium fluoride was not mentioned as one of the poisons requiring a label.

Held, judgment for defendant. No common law duty was imposed on the defendant to label the sodium fluoride as a poison. When the purchaser made the purchase, she got what she desired and it was so labeled. She impliedly represented to the dealer that she knew its properties and uses and was a fit person to whom the sale could be made.

16. Campbell v Stamper Drug Co., 277 Pac. 770 (Colo., 1929)

Action to recover damages for the death of plaintiff's husband caused by his consumption of strychnine purchased from the defendant druggist. The druggist sold the strychnine instead of quinine as requested. This was later consumed by the deceased without reading the label on the bottle showing that it was poisonous strychnine. Plaintiff sued on the theory of common law negligence and the violation of the statute requiring the dispenser of poisons such as strychnine to satisfy himself that the purchaser was aware of the poisonous character of the preparation and that it was to be used for legitimate purposes. The trial court directed a verdict for defendant.

Held, reversed. (1) The violation of the statute was negligence per se and made a prima facie case against the defendant. (2) Plaintiff and her husband were not guilty as a matter of law of contributory negligence in failing to determine that the bottle delivered by defendant's clerk contained strychnine instead of quinine.

17. People's Service Drug Stores v Somerville, 158 Atl. 12 (Md., 1932)

Action to recover damages for personal injuries resulting from plaintiff's taking three capsules of strychnine compounded by defendant druggist. Recovery was sought on the ground that defendant had failed to label the preparation "poison" as required by statute and had filled the prescription without making any inquiry of the purchaser.

Held, judgment for plaintiff reversed. There was no evidence that the violation of the statute was the proximate cause of the injury complained of.

18. Trumbaturi v Katz & Besthoff, 158 So. 16 (La., 1934)

Action to recover damages for the death of plaintiff's demented daughter caused by the consumption of carbolic acid sold to the daughter by the defendant druggist. Plaintiff alleged that the defendant would have discovered the mental condition of the deceased if he had attempted to obtain from her the information required by statute to be entered in the register of sales of poisons and that this caused the resulting death.

Held, judgment for defendant reversed. The complaint stated a cause of action.

19. Eckerd's, Inc. v McGhee, 86 S.W. (2d) 570 (Tenn., 1935)

Action against a druggist to recover damages for personal injuries sustained by plaintiff, a 15 year old girl. The defendant sold to plaintiff bichloride of mercury tablets and tincture of iodine in violation of the state statute prohibiting the sale of poisons to persons under 16 years of age without a written order from a responsible adult. The plaintiff took the tablets in a fit of despondency as the result of which she became seriously ill.

Held, judgment for defendant. Although the druggist was negligent as a matter of law in violating the statute, the plaintiff's act in taking the tablets with knowledge of what she was doing, and the probable consequences thereof, was the proximate cause of her injuries.

20. Halloran v Parke, Davis & Co., 280 N.Y.S. 58 (1935)

Action to recover damages for the loss of sight of plaintiff's eye as the result of an explosion of a pharmaceutical preparation manufactured by defendant. Recovery was sought on the ground that defendant was negligent in failing to give a warning of the dangerous character of the preparation and proper directions for use.

Held, judgment for plaintiff affirmed. (memorandum opinion)

21. David v McKesson & Robbins, 300 N.Y.S. 635 (1937)

Action by the administratrix of a young child against the manufacturer of bicarbonate of soda for negligence causing death. Sodium fluoride was found in the can containing the soda about three weeks after the death.

Held, judgment for plaintiff affirmed (without opinion). One judge dissented on the ground that the verdict was against the weight of the evidence as no sodium fluoride was discovered in autopsy.

22. Marigny v Deloie, 172 So. 808 (La., 1937)

Action to recover damages for personal injuries sustained by plaintiff when defendant druggist misinterpreted a prescription and delivered poisonous bichloride of mercury pills. The individual pills bore the word "poison" in small letters, but the container did not, contrary to statute. The container did show the printed words "for external use only."

Held, judgment for plaintiff affirmed. (1) The defendant was negligent in failing to plainly mark the container with such warnings as were required by law. (2) The plaintiff was not negligent in not noticing the small warnings on the tablets themselves and in not noticing that the box bore the inscription "for external use only," in view of the fact that he had been told by his physician to take the tablets internally and the fact that the box contained the typewritten inscription "two at bedtime, as directed."

23. Howard v Jacobs' Pharmacy Co., 189 S.E. 373 (Ga., 1937)

Action against a retail druggist to recover for personal injuries sustained as a result of using a patent medicine sold by the druggist to plaintiff. The medicine was allegedly old, deleterious and unfit for use.

Held, judgment for defendant sustained. There was no duty on the part of the druggist to open and inspect the sealed can containing the powder in question. The retailer owes to the consumer the duty to supply goods packed by reliable manufacturers.

24. Hoar v Rasmussen, 282 N.W. 652 (Wis., 1938)

Action to recover damages for personal injuries sustained by plaintiff as a result of using a compound con-

taining a slight amount of mercury to which plaintiff was allergic. The defendant druggist furnished this compound instead of calamine lotion with phenol as prescribed by the doctor and per the formula in the National Formulary. Later the druggist assured plaintiff's doctor that the compound did not contain mercury.

Held, judgment for plaintiff affirmed. The acts of the druggist constituted an actionable misrepresentation in tort.

25. Bennett Drug Stores v Mcsely, 20 S.E. (2d) 208 (Ga., 1942)

Action against a druggist to recover damages for the death of plaintiff's husband allegedly resulting from the sale of carbolic acid to the husband while he was intoxicated. The husband drank the poison and died.

Held, judgment for plaintiff affirmed. Since the sale was made to an intoxicated person, it was in violation of the statute prohibiting the sale of carbolic acid "unless upon due inquiry it shall be found that the person to whom it shall be delivered shall be aware of its poisonous character, and shall represent that it is to be used for a legitimate purpose." Such a statutory violation was negligence per se, and it was no defense that the voluntary drunkenness of the deceased was the proximate cause of his death since the doctrine of "last clear chance" applied.

26. Dumbrow v Ettinger, 44 F. Supp. 763 (N.Y., 1942)

Action to recover damages for breach of warranty in the sale of a liver extract by the defendant, a retail druggist. The drug was purchased from the defendant by the plaintiff's son and caused illness to the plaintiff when she consumed it.

Held, defendant's motion for summary judgment granted. There was no privity between the plaintiff and the defendant, and therefore there could be no recovery in warranty.

27. Henderson v National Drug Co., 23 A. (2d) 743 (Pa., 1942)

Action against a drug company to recover damages for personal injuries allegedly caused by liver concentrate purchased by the plaintiff's doctor from the defendant. The evidence showed that other persons had been made ill by the injection of liver concentrate purchased from defendant. There was no evidence that the drug contained an irritant.

Held, judgment for defendant. There was insufficient showing that the product in question caused the injury complained of. The court stated: "If those who make and compound drugs and medicines in packages or bottles, under the strict conditions prescribed by the National Food and Drug Act....and the Public Health Service Act.... for use by the public, can be mulcted in damages every time some person uses such drugs or medicines with harmful results, the making and selling of such products would be a most pecuniarily hazardous enterprise. That a lowering of the standard of proof in such cases would open the door to colossal fraud is obvious."

28. Singer v Oken, 87 N.Y.S. (2d) 686 (N.Y., 1949)

Action to recover damages for personal injuries sustained by plaintiff as the result of using a preparation consisting of calamine lotion and one per cent phenol purchased from the defendant druggist. Witnesses for the defendant testified at the trial that such lotion was not irritant and that it was in general use in the medical profession. The evidence showed that plaintiff was allergic to calamine containing phenol.

Held, judgment for defendant. The defendant was not negligent in selling such a product since he had no reason to apprehend that it would prove harmful to one person among a multitude of users.

29. Davis v Radford, 63 S.E. (2d) 822 (N.C., 1951)

Action to recover damages for breach of warranty in the sale of a salt substitute, Westal, by the defendant druggist to plaintiff's intestate. The retail druggist answered that the wholesale dealer who sold him the drug should be made a co-defendant if he was liable to the plaintiff, since he would have recourse against the wholesaler for breach of his implied warranty that the article was fit for human consumption.

Held, the retailer had the right to maintain a cross-action against the wholesaler. Under the rule in Simpson v American Oil Co., 8 S.E. (2d) 813, supra, the plaintiff could have maintained the action directly against the wholesaler. Furthermore, the principle is established in North Carolina that where the wholesaler has sold to a retail dealer for resale personal property, with implied warranty of fitness for the use for which it was purchased and sold, and the retail dealer has sold to a customer with the same warranty, and for breach of this warranty has been by judgment compelled to pay, the retail dealer may thereafter in turn maintain action against the wholesaler for the entire loss sustained.

30. Parker v State, 105 N.Y.S. (2d) 735 (1951)

Action by an administratrix against the State of New York for wrongful death and for pain and suffering resulting from homologous serum jaundice contracted after a transfusion of pooled blood plasma distributed by the State. The transfusion was ordered by a physician. Recovery was sought on the ground that the State was negligent in failing to affix a warning label to the plasma carton.

Held, complaint dismissed. There is a distinction between selling a medical preparation to the public, who may have no knowledge of the dangers attendant upon its use, and making available a preparation to a hospital at its request, whose physicians may be expected to have knowledge of the dangers involved in utilizing the therapeutic preparation ordered by them. The case at bar fell within the principle that there is no duty to give warning to the members of a profession against generally known risks.

31. Tuscany v U. S. Standard Products Co., 243 S.W. (2d) 207 (Tex., 1951)

Action to recover damages for personal injuries sustained by plaintiff's wife as a result of her self-injecting by hypodermic needle a drug known as estrogenic hormones, manufactured by the defendant. Recovery was sought on the grounds of negligence and breach of warranty. There was no evidence that the defendant had negligently manufactured the drug or that the drug was dangerous. The court entered judgment for defendant and the plaintiff on appeal urged the application of the *res ipsa loquitur* doctrine.

Held, judgment for defendant affirmed. There was no evidence that the drug contained any impurities, and, on the other hand, there was the inference that the conduct of the plaintiff's wife caused the resulting injury. *Res ipsa loquitur* was inapplicable since the cause of the injury was in question and the thing which did cause the injury was not in the exclusive control of defendant.

32. Whitelev v Webb's City, Inc., CCH 22, 268 (Fla., 1951)

Action by the personal representative of a deceased person for wrongful death against a retail druggist. The druggist sold the deceased a drug "Westsal," as a salt substitute, which resulted in death. Recovery was sought on the ground of a breach of the implied warranty of fitness.

Held, judgment for defendant. The personal representative of a deceased person does not have a cause of action for the death of such person based upon an implied warranty, since the applicable wrongful death statute applies to tort actions but not to contract actions.

33. Webb v Sandoz Chemical Works, 69 S.E. (2d) 689 (Ga., 1952)

Action against a manufacturer to recover for personal injury to plaintiff's wife as a result of consuming a patent medicine manufactured by defendant. The medicine "Cafergone" contained ergotamine tartrate and caffeine. Plaintiff contended that the drug was dangerous when used as directed and that it was not adequately labeled with a warning statement and directions for use. The drug was labeled "to be dispensed only by or on the prescription of a physician" and the directions contained the precaution that it "should be taken under medical supervision."

Held, judgment for defendant affirmed. The caution statement on the label made it clear that the drug was for use only by or on the prescription of a physician and not for indiscriminate use by the public. Blood Balm Co. v Cooper, 10 S.E. 118 (Ga., 1889) is distinguishable on this point.

34. Randall v Goodrich-Gamble Co., C.C.H. 22, 279 (Minn., 1952)

Action against manufacturer to recover for personal injury sustained by plaintiff as a result of using a liniment manufactured by defendant. The liniment was purchased from a retail dealer. Recovery was sought on the ground of breach of warranty. The warranty relied upon was a statement on the label of the product reading "For Man and Beast...Follow directions carefully and you will be rewarded with good results." Defendant contended that privity was lacking, that there was no express warranty, and that there was no reliance on any warranty at the time of sale.

Held, judgment for plaintiff affirmed: (1) A subvendee may recover against a manufacturer regardless of privity where an express warranty is involved; (2) The label statement constituted an express warranty that the product was not harmful to human skin when used as directed; (3) Since the use of the product resulted in personal injury, the question was whether there was reliance on the warranty at the time of use not at the time of sale.

35. Randall v Goodrich-Gamble Co., 54 N.W. (2d) 769 (Minn., 1952) reversing C.C.H. 22, 279 (1952)

On rehearing of the decision reported in C.C.H. 22, 279, the court reversed and granted a new trial on the ground that the trial court's instructions to the jury relating to the theory of express warranties were ambiguous. The court affirmed the law of the case that in the sale of drugs or foods, an express warranty may extend to an ultimate consumer if the warranty in the first instance induces the purchase and the usage is consistent with the purpose for which the product was purchased in reliance on the warranty.

36. American Cyanamid Co. v Fields, C.C.H. 22, 327 (W. Va., 1953)

Action against a manufacturer by a poultry raiser for the loss of a flock of plaintiff's pullets resulting from the consumption of mashed feed containing a poultry medicine. The medicine was manufactured by defendant and incorporated in the feed by a feed manufacturer not a party to the action. Recovery was sought on the ground that the medicine did not contain the proper content of nicotine. The evidence at the trial was conflicting as to the content of the medicine and as to whether the loss was attributable to poultry disease or poisoning. The jury returned a verdict for plaintiff.

Held, judgment for plaintiff affirmed, on the ground that the conflicting evidence was a proper subject for jury resolution.

37. Kautzmann v James, 66 S. (2d) 36 (Fla., 1953)

Action against a druggist for personal injury allegedly resulting from the consumption of a medicine intended only for external use. Plaintiff contended that defendant had mislabeled the drug and that this negligence caused a peptic ulcer. In a prior action between the parties, plaintiff had contended that her injury resulted from mental pain attendant upon discovery that the drug had been mislabeled. Recovery was denied in this prior action on the ground that the negligence of the druggist was not the proximate cause of the particular injury alleged -- that is, mental anguish.

Held, complaint dismissed on the ground of *res judicata*. The court held that the adverse judgment of the first suit was based upon the same set of facts which formed the basis of the second suit.

38. Walgreen Drug Co. v Sharp & Dohme, C.C.H. 22, 350 (Ill., 1954)

Action against a pharmaceutical manufacturer by a drug company to recover amounts paid by the drug company in an unsuccessful defense of an action by a consumer based upon the misbranding of a drug. The drug sold under a prescription was sulfamerazine instead of the sulfadoxine ordered. The evidence was conflicting as to whether the error was one of the drug company in filling the prescription or the pharmaceutical manufacturer in supplying the drug to the company.

Held, judgment for defendant. Plaintiff failed to establish that the misbranding was done by defendant -- it was more probable that there was an error by the plaintiff's clerk in filling the prescription.

Section 4. Product Liability Decisions Involving Cosmetics and Soap

1. Hasbrouck v Armour & Co., 121 N.W. 157 (Wis., 1909)

Action to recover damages for personal injuries sustained as the result of using a bar of toilet soap in which was embedded a needle. The plaintiff purchaser joined both the retailer and the manufacturer of the soap as defendants. Recovery was sought on the ground of negligence in marketing an adulterated product.

Held, order sustaining demurrers affirmed. There was no actionable negligence shown since the manufacturer and the dealer did not know or have reason to know of the needle's being in the soap. The resulting injury was so extraordinary as to be unforeseeable.

2. International Mercantile Marine Co. v Fels, 170 Fed. 275 (C.C.A. 2nd, 1909)

Action to recover for damage to plaintiff's vessel sustained as the result of an explosion of soap which was being transported on the vessel. The soap was manufactured and shipped by the defendant. The explosion resulted from naphtha fumes given off by the soap from its confined place of stowage. Recovery was sought on the ground that defendant negligently failed to warn plaintiff of the dangerous properties of the soap and the likelihood of an explosion when confined. There was evidence that prior to shipment defendant's agent had advised plaintiff of the hazard and had recommended stowage in a ventilated place.

Held, judgment for defendant affirmed. The evidence supported the finding that sufficient warning was given.

3. Armstrong Packing Co. v Clem, 151 S.W. 576 (Tex., 1912)

Action to recover damages for personal injuries sustained by plaintiff's wife as the result of using laundry soap which allegedly contained a poisonous or deleterious substance. The injury occurred to her hands as she was cleaning clothes with the soap. The product was manufactured by defendant and sold by him to a jobber; the jobber sold it to a retail dealer and the plaintiff's wife purchased it from the latter. Recovery was sought on the ground that defendant had improperly saponified the soap and was therefore negligent.

Held, judgment for plaintiff affirmed. The evidence sufficiently showed that the defendant failed to use care in the preparation of this particular product. Privity of contract between the manufacturer and the plaintiff was not necessary since the latter was the intended user.

4. Barrange v Hinckley Rendering Co., 119 N.E. 746 (Mass., 1918)

Action to recover damages for personal injuries sustained by plaintiff while using a bar of soap in which a needle had become embedded. The purchase of the soap was made from defendant, a retail dealer.

Held, directed verdict for defendant affirmed. There was no proof of actionable negligence. In support of the decision, the court said: "There is nothing inherently dangerous in a bar of soap; and it does not appear how or when the needle became embedded in it, or that the defendant knew of its presence before delivering it to the plaintiff or could have known of it by the exercise of reasonable diligence. Whether it came there during the process of manufacture or afterwards is wholly a matter of conjecture."

5. Karr v Inecto, Inc., 160 N.E. 398 (N.Y., 1928)

Action to recover damages for personal injuries to plaintiff allegedly caused by hair dye manufactured by defendant and sold to plaintiff, a beauty shop operator. The injury occurred when plaintiff used the product on the hair of a customer and some of the dye stained her finger. Twelve hours later her finger was red and painful. Recovery was sought on the ground that the injury was caused by an inherently dangerous substance in the product.

Held, judgment for plaintiff reversed. There was insufficient evidence to justify a finding that the injury resulted from contact with the product manufactured by defendant or that the chemical product was inherently dangerous or poisonous. The court stated: "Before the plaintiff may recover she must show, first, that the injury to the finger resulted from contact with the chemical product manufactured by the defendant; second, that the chemical product was inherently dangerous and poisonous; and, third, that the defendant was negligent in putting upon the market a dangerous and poisonous product."

6. Farley v Edward E. Tower & Co., 171 N.E. 639 (Mass., 1930)

Action to recover damages for personal injuries sustained by plaintiff while having a "water wave" in a hair-dressing establishment. Plaintiff was burned when an attendant in the establishment put eight or ten combs in her hair and was drying it with hot air from an electric dryer when the combs took fire. The combs were composed principally of pyroxylin, a compound of cellulose and nitric-acid. There was testimony that as a matter of common knowledge, pyroxylin was highly inflammable. The hairdresser, the dealer and the manufacturer of the combs were joined as defendants. A verdict was returned in favor of the defendant hairdresser and for the plaintiff as to the dealer and manufacturer. The latter appealed.

Held, affirmed. (1) As to the dealer—the jury could have found that the dealer knew of the dangerous character of the combs when heat was applied to them and yet failed to warn the plaintiff. (2) As to the manufacturer—the jury could have found that the manufacturer should have anticipated the dealer's failure to warn an ultimate user of the combs and yet failed to label the combs or otherwise disclose their dangerous character.

7. Smith v Denholm & McKay Co., 192 N.E. 631 (Mass., 1934)

Action in warranty to recover damages for personal injuries sustained by plaintiff from the use of a proprietary article used for hair removal. Various purchases of the product were made by the plaintiff by trade name, but at the time of the first purchase only, defendant's employee stated that the product was safe and harmless. The use of the product resulted in peripheral neuritis caused by the large amount of thallium acetate present. The evidence showed that the amount of thallium present could affect the system of a normal person but not to the extent found in the plaintiff, the effect in her case being accentuated by abnormal endocrine glands. The case was heard without a jury, and the court awarded damages of \$8,500 in favor of plaintiff.

Held, reversed. (1) The only warranty made was the express warranty made by defendant's employee at the time of the first sale and this did not cover the subsequent sales. As to subsequent sales, no express warranties were made and no implied warranties of fitness for use arose since the sales were made by trade name. (2) The fact that plaintiff was allergic would not have precluded recovery if a warranty were made, however, since it was shown that the product might affect a normal person.

8. Guyton v. S. H. Kress & Co., 5 S.E. (2d) 295 (S.C., 1939)

Action to recover damages for personal injuries sustained by plaintiff when a small bottle of fingernail polish, purchased from defendant, exploded. Plaintiff sued on the theory that the defendant was negligent in selling a substance having inflammable and explosive tendencies without giving warning of its dangerous character, and without furnishing directions for its use in a proper and safe manner.

Held, judgment for defendant affirmed. There was no showing that the defendant had actual knowledge of any dangerous nature of the product sold and under the circumstances, he had no reason to have such knowledge.

9. Bianchi v. Denholm & McKay Co., 19 N.E. (2d) 697 (Mass., 1939)

Action for breach of warranty and negligence⁵⁷ to recover damages for injuries to plaintiff's skin caused by using a face powder purchased from the defendant. There was evidence that a rash, diagnosed as dermatitis, appeared on the plaintiff's face shortly after she applied the face powder, which contained two aniline dyes. Plaintiff's skin was allergic to these dyes. Although the evidence showed that such dyes do not irritate the average person, there was evidence that "some" people were allergic.

Held, judgment for plaintiff. The sale of the product raised an implied warranty of fitness which defendant breached, notwithstanding the fact that the product was fit for use by the average person.

10. Elizabeth Arden, Inc. v. Brown, 107 F. (2d) 938 (Pa., 1939)

Action to recover damages for personal injuries sustained by plaintiff after using a cosmetic product manufactured by one defendant and retailed by the co-defendant. The plaintiff in making the purchase requested a suntan oil but was given another liquid preparation instead. After using this product, the plaintiff suffered kidney injuries attributable to anilin dye poisoning. The evidence did not show, however, that the toilet preparation in question contained anilin dye.

Held, judgment for plaintiff reversed. (1) The retailer was not liable, since a retailer is not responsible for the harmful effects of a patent medicine which he did not prepare.⁵⁸ (2) The manufacturer was not liable, since the evidence failed to show that the product contained any harmful ingredients which caused the injury complained of.

11. Maher v. Clairol, Inc., 31 N.Y.S. (2d) 751 (1941)

Action to recover damages for personal injuries sustained by plaintiff as the result of an application of a hair dye manufactured and sold by the defendant to beauty shops for treatment of patrons. Recovery was sought on the ground of negligence in marketing a dangerous product. The defense was based on the fact that the manufacturer had issued instructions in the use of his product to the operator in the beauty shops.

Held, judgment dismissing the complaint reversed. Whether the issuance of instructions by defendant to the beauty shop operators constituted reasonable care in the light of the alleged fact that the product was a poisonous and inherently dangerous preparation presented a question of fact for the jury.⁵⁹

12. Beckett v. F. W. Woolworth Co., 34 N.E. (2d) 427 (Ill., 1941)

Action to recover damages for breach of warranty in the sale of a toilet preparation, known as "Pinaud's '612' Creamy Mascara," by defendant to plaintiff. Plaintiff charged that the defendant expressly warranted that this preparation was harmless and free from any poisonous substances and was fit for the purpose of coloring and blackening her eyelashes, whereas its use caused a serious eye injury. The express warranty was alleged to have been made by defendant's clerk who stated, after the purchase was made, that the product was harmless. There was evidence that plaintiff had used the product for ten or twelve years. The trial court overruled defendant's motion for a directed verdict and defendant appealed.

Held, reversed. Since the alleged warranty was made after the sale of the product had been made and since plaintiff had used the product before, the essential element of reliance on the warranty was lacking.

13. Aicare v. Jean Jordeau, Inc., 138 F. (2d) 767 (N.J., 1943)⁶⁰

Action to recover damages for personal injuries sustained by plaintiff while using a tube of depilatory cream manufactured by defendant. The injury occurred when the cream squirted into plaintiff's eyes as she was puncturing the metal seal over the mouth of the tube containing the cream. The tube was punctured in accordance with the directions shown on the tube. Recovery was sought on the ground that defendant was negligent in the preparation of a cream possessing known dangerous properties (calcium sulphide), in packing the tube for sale without instructions as to the care necessary in its use, and in the manner in which the cream was injected into the tube. The jury returned a verdict in favor of defendant under instructions by the court that the plaintiff had the burden of proving freedom from contributory negligence.

Held, judgment for defendant reversed. The court's instruction to the jury with respect to contributory negligence was in error since the defendant had the burden of this proof.

57. The trial court ruled that there was no evidence of negligence.

58. Relying on *West v. Emanuel*, 47 Atl. 965, *supra*.

59. Compare, *Petzold v. Roux Laboratories, Inc.*, 11 N.Y.S. (2d) 565 (1939) (certain instructions by manufacturer of poisonous dye to beautician held immaterial.)

60. Applying Pennsylvania law.

14. Lawson v The Benjamin Ansehl Co., 180 S.W. (2d) 751 (Mo., 1944)

Action for the death of plaintiff's child as a result of his pouring highly inflammable fingernail polish remover on his clothes and touching a lighted match thereto. The product was harmless to the human skin when used as a polish remover, but contained inflammable ingredients which rendered it dangerous when exposed to fire.

Held, judgment for plaintiffs reversed. The manufacturer of a product which is perfectly harmless when used as intended is not liable to one not the purchaser of the product if such person makes a use of the product never intended or expected by the manufacturer. Therefore, there was no violation of the duty of the manufacturer to label the product to show its highly inflammable nature.⁶¹

15. Taylor v Newcomb Baking Co., 59 N.E. (2d) 293 (Mass., 1945)

Action by an employee against an employer for personal injuries sustained. The employee developed a dermatitis allegedly due to the use of a soap powder in carrying out his duties as a dishwasher. The soap had a base of trisodium phosphate. Medical testimony showed that the employee was allergic and that this was a common situation known to the trade.

Held, judgment for plaintiff. The jury could have found that the defendant knew or ought to have known that the soap powder was a possible source of danger to a class of persons of whom the plaintiff might be one. The court stated:

"It is not necessary that the majority of possible employees be susceptible. It is enough if a sufficient number are susceptible so that a jury could reasonably say that the defendant ought to have known and recognized the danger of injury and ought to have guarded against it."
(citing Bianchi v Denholm & McKay Co., supra)

16. Graham v Jordan Marsh Company, 67 N.E. (2d) 404 (Mass., 1946)

Action in warranty to recover damages for personal injuries sustained by plaintiff from the use of cold cream purchased by her from the defendant. Recovery was sought on the ground that defendant at the time of purchase represented that the product would be beneficial for her dry skin. After using it, plaintiff's face became burned and swollen. There was testimony to the effect that plaintiff's skin was super-sensitive. The trial court directed a verdict for defendant and plaintiff appealed.

Held, reversed. There was sufficient evidence that there was a breach of express warranty as well as the implied warranty of fitness for use.

17. Carter v Yardley & Co., 64 N.E. (2d) 693 (Mass., 1946)

Action against a perfume manufacturer to recover damages for personal injuries sustained by plaintiff. There was evidence that plaintiff suffered a second degree burn when she applied the perfume to her skin. There was also the testimony of witnesses who had used the perfume from the same bottle and suffered skin injury. In answer to interrogatories, the defendant declared that it did not know all the ingredients of the perfume, nor the proportion of the several ingredients. Plaintiff purchased the perfume from a retail dealer. The trial court, after a jury verdict for plaintiff, entered judgment for defendant on the ground that there was no privity.

Held, reversed. The absence of contractual relationship between the manufacturer and the purchaser did not in itself preclude recovery.⁶² Nor was the plaintiff required to prove that a majority of consumers would be injuriously affected, as it would be sufficient if a sufficient number were susceptible so that a jury could reasonably say that the defendant ought to have known and recognized the danger of injury.⁶³ In overruling prior Massachusetts decisions which had refused to follow the doctrine of MacPherson v Buick Motor Co., supra, the court stated: "The doctrine of the MacPherson case is now generally accepted. (citing texts and literature) Its acceptance has brought all dangerous things into the same class as the 'inherently dangerous' things to which the principle already stated has always been applied. The MacPherson case caused the exception to swallow the asserted general rule of non liability, leaving nothing upon which that rule could operate. Wherever that case is accepted, that rule in truth is abolished, and ceases to be part of the law."

18. Reynolds v Sun Ray Drug Co., 52 A. (2d) 666 (N.J., 1947)

Action to recover damages for breach of warranty in the sale of lipstick by the defendant dealer to the plaintiff. The use of the lipstick resulted in a skin infection. Recovery was sought on the theory of a breach of the implied warranty of fitness. Defendant contended that the plaintiff was allergic and that if the product did contain poisonous ingredients the defendant, being a dealer, did not have knowledge of this.

Held, judgment for plaintiff affirmed. (1) The fact that only a small proportion of users would suffer injuries because of the use of the lipstick did not absolve the seller from liability under the implied warranty created by the Uniform Sales Act. Otherwise, in every action for the breach of an implied warranty, it would be necessary to show that the article sold would be injurious to every user. (2) The contention that the defendant was not charged with knowledge of the poisonous nature of the product since it was merely the vendor was not valid since the sales act is in general terms and there is no sound reason for engrafting an exception on the general rule.

19. Poplar v Bourjois, Inc., 80 N.E. (2d) 334 (N.Y., 1948)⁶⁴

Action to recover damages for the loss of plaintiff's finger resulting from infection caused by pricking her finger on a box of cosmetics manufactured by defendant. The manufacturer of the cosmetics impleaded the manufacturer of the container.

61. The weight given to the fact that the child was not the actual purchaser is not apparent in the opinion.

62. The court noted, however, that privity would be necessary to support a claim based on warranty.

63. Evidence that others received similar injuries from the article would be admissible to negate the probability of causation through a particular allergy.

64. Applying Maryland law.

Held, judgment for plaintiff reversed. Under Maryland law, no recovery may be had against manufacturers for injuries caused to third persons with whom they have no direct dealings unless they are manufacturers of articles which in themselves are imminently and inherently dangerous when defectively made. A decorated cosmetics container may not be deemed an article imminently or inherently dangerous.

20. Free v. Sluss, 197 P. (2d) 854 (Cal., 1948)

Action to recover damages for breach of warranty against both the wholesaler and manufacturer of a new soap product. The plaintiff, a retail grocery dealer, had purchased one quantity of the product and it proved satisfactory but the second purchase was unmerchantable. The manufacturer admitted that he had manufactured the product which constituted the second sale without some of the necessary ingredients. The packages containing the product contained a guarantee of quality reading: "If Frederick's granulated soap does not meet with your entire approval your dealer will cheerfully refund the full purchase price upon return of the unused portion....Frederick Soap Co..." At the time of sale, the wholesaler told the plaintiff that the soap furnished was the "same soap as that previously supplied."

Held, judgment for defendants reversed and judgment directed to be entered for plaintiff. (1) The oral representations made by the defendant wholesaler at the time of sale constituted an express warranty of quality. (2) In holding the manufacturer also liable, the court stated: "...the 'guarantee of quality' printed upon each package of soap reached beyond the dealers to persons in the position of plaintiffs. It establishes the manufacturer's knowledge and intention that the goods should move through the usual channels of trade, and was a representation addressed to those who would deal in its product. It was under no obligation to make the guarantee, but having made it, it does not lie in its mouth to repudiate it when the condition of complete unsuitability for the market brings the guarantee into play."⁶⁵

21. Briggs v. National Industries, 207 P. (2d) 110 (Cal., 1949)

Action to recover damages for personal injuries sustained by plaintiff as the result of the use of a cold wave preparation manufactured by defendant. Some of the solution came in contact with plaintiff's face causing severe dermatitis. Recovery was sought on the ground that the preparation contained a chemical toxic known as thioglycollate and that defendant negligently failed to warn the public that great care should be taken in the application of the product. The evidence showed that the plaintiff was allergic and that the product had not proved unsafe to others.

Held, judgment for defendant affirmed. There was no evidence of knowledge on the part of the manufacturer of the dangerous character of the product, no evidence that many persons were susceptible to the product, and no evidence of prior instances of skin irritation caused by the product.

22. Pietrus v. J. R. Watkins Co., 38 N.W. (2d) 799 (Minn., 1949)

Action to recover damages for the loss of hair allegedly resulting from the use of a shampoo manufactured by defendant. The product was sold to plaintiff by defendant's agent, the label indicating that its intended use was as a hair shampoo. Plaintiff sued on the theory of breach of implied warranty in that the product contained an excessive alkali content unfit for use as a hair shampoo. There was no evidence as to the contents of the particular bottle used and no chemical analysis thereof. There was evidence showing that prior to the action defendant had been charged with a violation of the pure food and drug act and had been ordered to withdraw a quantity of the product from the market. The jury returned a verdict for \$20,000 in favor of plaintiff.

Held, affirmed. (1) The evidence reasonably supported a finding that the bottle purchased by plaintiff came from a quantity which contained an unsafe alkali content, and that this was the proximate cause of the resulting loss of hair. (2) In actions based on breach of an implied warranty of fitness in cases involving sale of defective drugs or foods, it is unnecessary to allege or prove that the manufacturer had actual knowledge of the contents thereof.

23. J. R. Watkins Co. v. Raymond, 184 F. (2d) 925 (Minn., 1950)

Action to recover damages for personal injuries to plaintiff allegedly resulting from the use of shampoo manufactured by defendant. Following the completion of a shampoo, plaintiff had a sensation of burning on the forehead and scalp. Later she lost her hair, eyebrows and eyelashes. Plaintiff alleged that the shampoo was carelessly, negligently and improperly compounded by defendant and contained poisonous and injurious materials and chemicals, causing it to be imminently dangerous and harmful to health. At the trial, dermatologists stated that plaintiff's condition as described by her was not and could not have been caused by defendant's shampoo. The jury returned a verdict of \$27,000 in favor of plaintiff and defendant appealed.

Held, reversed and remanded with directions to dismiss the action. There was no substantial evidence sustaining the vital claim that the defendant's shampoo contained poisonous chemicals or showing a causal connection between the use of the shampoo and the resulting injury.⁶⁶

24. Murphy Laboratories v. Emery Industries, 95 F. Supp. 651 (Pa., 1951)

Action to recover damages for breach of warranty in the sale of a soap ingredient. Plaintiff based his claim on an alleged warranty made by defendant's salesman that the oleic acid known as O-442 sold by the defendant chemical manufacturer to plaintiff for use in the manufacture of its pine jelly soap was the same as the oleic acid known as O-20 previously sold and that it would give satisfactory results whereas it caused a separation of plaintiff's soap rendering it unmarketable. No formal complaint was made to defendant of any dissatisfaction with his product until about six months after the first purchase by plaintiff.

65. It will be noted that the manufacturer's liability was actually premised on estoppel rather than warranty.
66. The court followed *De Vere v. Parten*, 23 N.W. (2d) 584 *infra* and distinguished *Pietrus v. J. R. Watkins Co.*, *supra*. The court stated that in the *Pietrus* case it was shown that all of the shampoo made by defendant during the period in question had been condemned by the Federal Food and Drug Administration because of its ingredients and it was in evidence that defendant had used some of the shampoo that had been thus condemned.

Held, judgment for defendant. (1) No warranty express or implied was given by defendant that the type of oleic acid furnished was the same as that previously furnished or that it would make satisfactory pine jelly soap when used in a formula which plaintiff admitted defendant did not know. (2) The cause of separation of plaintiff's soap was not the titre value or any defect in type of oleic acid furnished by defendant seller to buyer. (3) When the buyer discovered or should have discovered what it claimed was a breach of warranty it failed to give to seller the prompt notice required by the Pennsylvania sales act.⁶⁷

25. Bennett v Pilot Products Co., 235 P. (2d) 525 (Utah, 1951)

Action by a beauty operator to recover damages against the distributor of a permanent wave lotion and fixative for dermatitis resulting from the use of the distributor's products. The lotion containing ammonium thioglycollate, an ingredient common to most cold wave solutions and ordinarily harmless was used along with a powder fixative containing potassium bromate, also ordinarily harmless. It was shown that ammonium thioglycollate produced a reaction in but one allergic woman in 1,000 using it. Recovery was sought on the ground that defendant was negligent in distributing without warning a product unfit for the use for which it was intended and containing irritants dangerous to users.

Held, judgment for defendant affirmed. The evidence did not establish that defendant should have foreseen plaintiff's injury. In discussing the question of allergies, the court stated:

"We are sympathetic with appellant and her misfortune, but cannot require the merchant to assume the role of absolute insurer against physiological idiosyncrasy. To do so also would invest the elusive ordinary prudent man with a quality of foreseeability that would take him out of character completely. Every substance, including food which is daily consumed by the public, occasionally becomes anathema to him peculiarly allergic to it. To require insurability against such an unforeseeable happenstance would weaken the structure of common sense, as well as present an unreasonable burden on the channels of trade."

26. Fein v Bonetti, 111 N.Y.S. (2d) 840 (1952)

Action by a beauty parlor operator against the wholesaler, distributor and manufacturer of a hair dye to recover an amount paid to a customer for personal injury resulting from an application of the dye. In an original negligence action, the operator was sued successfully by the customer and settled a \$5,000 verdict for \$3,500. The recovery-over action for this sum was then brought against the three suppliers. The latter defended on the ground that the operator was negligent in applying the dye in a manner which was not recommended.

Held, judgment for plaintiff affirmed. The issue of contributory negligence on the part of the operator was properly left to the jury as a question of fact.

27. Phillips v Whelan Drug Co., C.C.H. 22, 286 (Pa., 1952)

Action against retail druggist to recover for personal injury sustained by plaintiff as a result of using a cosmetic bleaching cream sold by the defendant. Plaintiff purchased the cream after being assured by a cosmetician of the store that it was suitable for bleaching skin. Two applications resulted in a rash and residual scars. Recovery was sought for breach of warranty. Defendant contended that a retail vendor of an article of merchandise in common and general use is not liable to a customer for injuries caused by some latent defect in the article. The jury returned a verdict of \$400 and defendant moved for a new trial and judgment n.o.v.

Held, affirmed. The rule contended for by defendant has no applicability in warranty actions. A retailer is liable in a warranty action where the facts of the case establish that the buyer made known the purpose for which the article was required, relied upon the seller's skill and judgment, and suffered injury because the article bought was not fit for the purpose for which it was sold.

28. Bish v The Employers' Liability Assurance Corp., C.C.H. 22, 652 (1952)

Action against an insurance carrier to recover for personal injury sustained by plaintiff as a result of using a Toni home permanent set. The insurer of the manufacturer of the set was sued directly under a state statute purporting to allow direct actions against insurance companies.

Held, action dismissed. The statute was invalid to the extent that it operated against a foreign insurer under a policy executed in another state containing the usual "no action" clause.

29. Higbee v Giant Food Shopping Center, 106 F. Supp. 586 (Va., 1952)

Action against the manufacturer and retailer of a permanent wave preparation to recover for the temporary loss of plaintiff's hair as a result of using the product. There was evidence that the injury was caused by an excess of an alkali in the preparation. Recovery was sought against the manufacturer on the ground of negligence and against the retailer for breach of an implied warranty of wholesomeness. The retailer relied primarily upon the fact that the sale was of an original and sealed package which was neither inspected, recommended or warranted by the retailer. The jury awarded \$4,000 damages.

Held, judgment affirmed but damages reduced to \$1,500. In imposing an implied warranty upon the retailer, the court stated:

"To say there is no dependence of the buyer upon the retailer if the subject of the sale is a sealed product of another, is to ignore the most potent factor of every trader's success — the confidence and reliance of the public in him. Further, the retailer is not a mere conduit or an automaton in delivering products of another; he owes an obligation to his buyer. He is paid for assuming that obligation. While he cannot know what is in the package, neither can the buyer, and it is the seller who has brought the injurious article to the buyer. Moreover, the seller has recourse against the producer, and is generally better enabled to enforce such recoupment than is the consumer to obtain recovery of the manufacturer. Public policy requires that the buyer be allowed to seek reimbursement from the retailer."

67. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty, within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefore."

30. Worley v Procter & Gamble Mfg. Co., 253 S.W. (2d) 532 (Mo., 1952)

Action against the manufacturer of a dishwashing detergent for injury to the hands of a user of the product. The injury occurred while the product was being used for dishwashing purposes. Recovery was sought for breach of implied warranty. No showing was made that the product contained any substance harmful to the skin of a normal person. The manufacturer defended on the grounds that privity between the parties was lacking since the product was purchased through a middleman. It was also contended that the injury was due to an allergy.

Held, judgment for defendant. The court held that privity between the parties was not necessary since the product was labeled "kind to hands". This statement constituted an express warranty running from the manufacturer to an ultimate consumer. However, the court went on to hold that there was no proof that the product contained a harmful ingredient and, therefore, it was a matter of speculation whether the product of the manufacturer or an allergy of the user caused the injury complained of.

31. Marrero v Gluck, 118 N.Y.S. (2d) 785 (1952)

Action against a beauty parlor operator for injury sustained by a customer as a result of the application of a hair cream. The operator impleaded the supplier and the manufacturer of the cream as third-party defendants for breach of warranty and negligence.

Held, complaint of the operator against the supplier and the manufacturer dismissed. The operator failed to prove that the product was inherently dangerous or that the supplier or manufacturer was negligent (citing *Karr v Inecto*, 160 N.E. 398).

A dissent took the view that the supplier was subject to liability for breach of warranty and the manufacturer for negligence under the doctrine of *res ipsa loquitur*.

32. Marrero v Gluck, 122 N.Y.S. (2d) 197 (1953)

On appeal of the decision reported in 118 N.Y.S. (2d) 785 (1952) (case No. 31), held, reversed. The jury was justified in finding against the distributor for breach of warranty and against the manufacturer for negligence.

33. Shafer v Barbier, 259 S.W. (2d) 461 (Ky., 1953)

Action against a beautician and beauty salon owner by a patron to recover damages for facial burns allegedly sustained while the customer's eyebrows were being dyed. Recovery was sought on the ground of negligence. At the trial, evidence was produced showing the injury but there was no attempt to show the chemical contents of the dye.

Held, judgment for defendants affirmed. The court held that there was no proof that the dye contained any harmful ingredient which could have produced the injury.

34. Schilling v Roux Distributing Co., 59 N.W. (2d) 907 (Minn., 1953)

Action against a hair dye distributor for personal injuries sustained by a purchaser as a result of using a hair dye. Recovery was sought for breach of warranty. The purchaser had used the dye on prior occasions without injury after being given an initial patch test as directed on the label. On the occasion in question, the dye was used for retouching purposes and no patch test was given. The crucial issue at the trial was whether this patch test should have been given. Instructions accompanying the product entitled "The Preliminary or Patch Test" warned that there were people allergic to its use and that a patch test should be given "before contacting or using" and "before every application". A portion of the instructions which related specifically to retouching made no reference to patch tests. The trial court construed these instructions as not requiring a patch test for retouching purposes. Accordingly liability was imposed on the basis of inadequate directions for use.

Held, judgment for plaintiff affirmed. The court stated with respect to the interpretation placed on the directions for use on the labeling:

The court's determination that the instructions did not require a patch test prior to a retouching -- having in mind the rule which requires construction against the one who chose the words used -- is sufficiently sustained by the evidence. If a patch test was to be required before a retouching, it should have been a simple matter to so state in clear language.

Also involved in this case was the question whether or not a seller or manufacturer is liable for injuries resulting to one who is allergic. The court indicated that this question did not have to be determined since "defendant had warranted the dye to be safe if used in accordance with the instructions and . . . plaintiff, having so used the particular bottle involved herein, nevertheless was injured."

35. Frier v Procter & Gamble Distributing Co., 252 P. (2d) 850 (Kan., 1953)

Action against the manufacturer and distributor of a dishwashing detergent for injury to the hands of a user of the product. The injury occurred while the product was being used for dishwashing purposes. Recovery was sought for breach of implied warranty. The manufacturer and distributor defended on the ground that privity between the parties was lacking.

Held, judgment for defendants, on the ground that privity of contract was lacking.

36. Reed v Swift & Co., C.C.H. 22,322 (Mo., 1953)

Motion to dismiss a complaint alleging breach of warranty in the sale of a detergent by a manufacturer through a middleman to defendant consumer.

Held, motion denied. Although the court indicated that *Frier v Procter & Gamble Distributing Co.*, 252 P. (2d) 850, was a basis for dismissing the action for breach of warranty, the court allowed the plaintiff to amend the complaint and proceed on a negligence theory.

37. Krupar v Procter & Gamble Co., 117 N.E. (2d) 7 (Ohio, 1954) reversing 113 N.E. (2d) 605 (Ohio 1953)

Action against a soap manufacturer for personal injury sustained by a user of one of its bar soaps. The injury occurred because of a piece of wire which was imbedded in the soap. Recovery was sought for breach of implied warranty and for negligence. The manufacturer defended on the ground that no negligence on its part was shown and on the further ground that privity between the parties was lacking since the soap in question had been purchased through a retail dealer.^{67A} The court charged the jury under *res ipsa loquitur*. The jury returned a verdict for plaintiff.

Held, judgment for plaintiff reversed and judgment entered for defendant. The court held the doctrine of *res ipsa loquitur* did not apply since the soap was not within the exclusive control and management of the defendant.

38. Hardy v Procter & Gamble, C.C.H. 22,340 (C.A. 5th, 1954)

Action against a detergent manufacturer to recover for loss of sight allegedly caused by the use of a detergent manufactured and distributed by defendant. The injury arose when some of the detergent got into plaintiff's eyes as she was using it while washing surgical instruments in the course of her employment as a nurse. Recovery was sought on the grounds of breach of warranty and negligence in failing to warn of dangers inherent in the detergent's coming into contact with the human eye. Medical testimony was conflicting as to whether the sodium lauryl sulphate in the detergent was deleterious to the eye. The trial court directed a verdict for defendant and plaintiff appealed.

Held, judgment reversed. On the evidence considered as a whole, the court held that a jury could have found for either side; therefore, the case should have been submitted to the jury rather than being disposed of by the court as a matter of law.

67A. The Court of Appeals in 113 N.E. (2d) 605 (1953) as a part of its decision held that privity of contract was not necessary since the product was manufactured for the use of ultimate consumers and not for the use of middlemen. This point was not discussed in the opinion of the Supreme Court of Ohio.

Section 5. Product Liability Decisions Involving Household and Industrial Chemicals

1. Wellington v Downer Kerosene Oil Co., 104 Mass. 64 (1870)

Action to recover for personal injuries and property damage sustained by plaintiff as the result of an explosion of naphtha manufactured by defendants. The product was sold by defendants to a retail dealer as oil. The retailer resold it to plaintiff for illuminating purposes. While the plaintiff was using it in a lamp for this purpose, it ignited and exploded, burning and injuring his body and property. A statute prohibited the sale of naphtha under the name of oil and imposed civil liability in favor of any person suffering damage as a result of an illegal sale. The trial court directed a verdict for defendant and plaintiff excepted.

Held, exception sustained. Defendant violated a duty under the common law and under the statute. The court stated: "...It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault."⁶⁸

2. Standard Oil Co. v Tierney, 17 S.W. 1025 (Ky., 1891)

Action to recover damages for personal injuries sustained by plaintiff, a train conductor, from an explosion of naphtha shipped by defendant. The explosion occurred when plaintiff used a lantern near the drums of naphtha for the purpose of determining whether the drums were leaking. Recovery was sought on the ground that defendant was negligent in merely labeling the drums "unsafe for illuminating purposes" and designating the product on the bill of lading as "carbon oil" instead of naphtha. Defendant contended, in part, that the shipment was made in that manner pursuant to an agreement with the carrier, and that the latter as plaintiff's employer had the duty to warn that the product shipped was dangerous when used or handled near heat. The jury returned a verdict of \$25,000 in favor of plaintiff for the loss of the use of one arm, permanent facial disfigurement and other injuries.

Held, reversed on the ground that the damages awarded were excessive. However, the court in affirming the finding of negligence stated: "There was an implied, if not a positive, duty on the part of both corporations to notify those who handled this substance of its dangerous character, and no arrangement between them, ... by which dynamite was to be shipped as powder or naphtha as carbon oil, should protect the appellant from a violation of this duty it owed to the ... employees whose duty it was to keep it secure, and to handle it when necessary."

3. Weiser v Holzman, 73 Pac. 797 (Wash., 1903)

Action to recover damages for personal injuries sustained by plaintiff as the result of an explosion of a substance in a bottle manufactured by defendant under the name of "Champagne cider." Plaintiff was an employee of the actual purchaser of the preparation. Recovery was sought on the ground that the bottle contained no label warning of the dangerous contents.

Held, judgment for defendant on demurrer reversed. The court stated: "One who sells and delivers to another an article intrinsically dangerous to human life or health, such as a poison, an explosive, or the like, knowing it to be such, without notice to the purchaser that it is intrinsically dangerous, is responsible to any person who is, without fault on his part injured thereby."

4. Burk v Creamery Package Mfg. Co., 102 N.W. 793 (Iowa, 1905)

Action to recover damages for the death of plaintiff's son caused by the consumption of sulfuric acid sold by defendant. The poison had been sold by defendant in a jug to a creamery and there consumed by the deceased who thought it was buttermilk. The jug was not labeled "poison" as required by statute.

Held, judgment for plaintiff affirmed. The violation of the statute by defendant was negligence per se and the jury could properly find that this, rather than any intervening negligence of the creamery, was the proximate cause of the resulting death.

5. Clement v Crosby & Co., 111 N.W. 745 (Mich., 1907)

Action to recover damages for personal injuries occasioned by the inflammable nature of a compound that plaintiff was using to polish a gas range. The manufacturer was the principal defendant; the product was purchased through a retailer. Plaintiff alleged that the defendant knowing the inflammable nature of his product deceitfully sold it without any warning of the danger involved in its use.

Held, a cause of action was stated. The complaint charged deceit and for this form of action, privity of contract between manufacturer and purchaser was not necessary. The manufacturer failed to warn of the dangerous character of the product as he was required to do.

6. Welcho v Arthur J. Rosenbluth & Co., 71 Atl. 566 (Conn., 1908)

Action against the manufacturer of a liquid mixture called "Stoveline" to recover damages for the death of plaintiff's intestate caused when the mixture ignited and set fire to the intestate's clothing as she was applying it on a stove. The mixture, consisting of benzine, oils, turpentine and japan contained no label on the container showing its inflammability although there were detailed directions for use "on all iron work." Plaintiff sued on the theory that the defendant was negligent in failing to warn purchasers of the dangerous character of the preparation.

Held, judgment for plaintiff affirmed. The deceased was warranted in using the preparation on a stove due to the representations on the label that it could be used "on all iron work" and, therefore, the defendant had a duty to warn that the fumes of benzine contained in the preparation, mixing with air, were liable to form a highly explosive mixture which would explode when brought in contact with a flame.

68. Followed in Hourigan v Nowell, 110 Mass. 470 (1872)

7. Cunningham v C. R. Pease House Furnishing Co., 69 Atl. 120 (N.H., 1908)

Action to recover damages for personal injuries sustained by plaintiff as the result of an explosion of stove blacking, containing naphtha, purchased by plaintiff's mother from the defendant dealer. The explosion occurred when plaintiff used some of the blacking on a hot stove. At the time of the sale, defendant's employee had orally assured plaintiff's mother that the product could be used on warm stoves. After a judgment for plaintiff, defendant appealed on the ground that there was no liability for a false statement of fact honestly believed to be true.

Held, affirmed. A reasonable dealer in defendant's position would not have made such a representation without knowledge of its accuracy. Therefore, liability accrued by reason of a false representation of fact negligently made.

8. Peterson v Standard Oil Co., 106 Pac. 337 (Ore., 1910)

Action to recover damages for the death of plaintiff's intestate caused by an explosion of kerosene manufactured by defendant. The explosion occurred while the intestate was attempting to kindle a fire with the product. The product was sold to the intestate by a retailer. The manufacturer had labeled the drum "Water White Oil" and to the effect that the distillate would not burn under 120 degrees Fahrenheit, whereas it would (and did) explode at a comparatively low temperature. Plaintiff sued on the theory that defendant negligently labeled the drum and that this was the proximate cause of the resulting injury, and that defendant violated the statute requiring proper cautionary labels for gasoline and distillates.

Held, judgment for plaintiff affirmed. The violation of the statute constituted negligence per se.⁶⁹

9. Peaslee-Gaulbert Co. v McMuth's Adm'r., 146 S.W. 770 (Ky., 1912)

Action to recover damages for the death of plaintiff's intestate sustained as a result of an explosion of a dryer containing linseed oil, turpentine, and naphtha. The explosion occurred when the deceased held a lighted candle near to the liquid when it was being poured. The evidence showed that the dryer was not explosive or inflammable unless brought in contact with a lighted flame. The dryer was a standard product in general use and in accordance with the custom of industry was labeled only with a trade-name. Plaintiff sued the defendant, a wholesaler, on the theory of negligence in failing to label the product so as to show its dangerous properties.

Held, judgment for plaintiff reversed. There was no evidence that the defendant wholesaler knew that the dryer was an explosive or an imminently dangerous article of trade (assuming). The court distinguished the liability of the dealer and the manufacturer in such cases as follows:

"...the dealer who purchases and sells an article in common and general use in the usual course of trade and business, without knowledge of its dangerous qualities, is not under a duty to exercise ordinary care to discover whether it is dangerous or not....The merchant or dealer can only be made responsible in damages to a party who has no contractual relations with him when the article is imminently or inherently dangerous in the ordinary use for which it was intended or the use to which it may reasonably be expected the article will be put or applied, and when with knowledge of this fact he sells or puts it on the market without giving notice to the purchaser of its dangerous quality, or when he represents the thing as being safe for the use intended, when, in fact, it is not....But there is and should be a difference between the liability of the manufacturer and the liability of the dealer in this class of cases. The manufacturer should be and is held to a higher degree of care than the dealer in putting on the market dangerous compounds, because he knows or should be charged with notice of the quality and contents of the article that he manufactures; and, being the originator of it, should be required to give notice of the danger in its use, if it is dangerous."

10. Gately v Taylor, 97 N.E. 612 (Mass., 1912)

Action to recover damages for the death of plaintiff's intestate caused by an explosion of stove polish which occurred while deceased was applying it on a heated stove. The polish contained naphtha but was not labeled to show this. By statute the sale of naphtha under an assumed name was prohibited.

Held, judgment for plaintiff affirmed. The defendant was liable for failure to indicate the dangerous properties of his product both under the common law and under the statute. As a matter of law, the deceased was not contributorily negligent since stove polishes in common experience do not explode when applied to heated surfaces.

11. Thornhill v Carpenter-Morton Co., 108 N.E. 474 (Mass., 1915)

Action to recover damages for personal injuries from burns resulting from the ignition of an oil stain by a match lit by plaintiff's husband while he was applying the stain. The stain, containing volatile oil and benzine, was put on the market by defendant in cans labeled to represent defendant as its manufacturer. The sale to plaintiff's husband was made through a dealer. No notice of the inflammability of the product was given by label or otherwise. Recovery was sought on the ground of negligence.

Held, judgment for plaintiff affirmed. While no contractual relationship existed between the defendant and the plaintiff or her husband, the jury could find that the product was a highly inflammable fluid by reason of excessive benzine and that the defendant, who represented himself as the manufacturer, knew this and therefore had a duty to warn.

12. Kusick v Thorndike & Hix, Inc., 112 N.E. 1025 (Mass., 1916)

Action to recover damages for personal injuries to plaintiff caused by the explosion of a can of lime packed and sold but not manufactured by defendant. The explosion occurred while plaintiff's employer was opening the can with a knife.

⁶⁹. The court reviewed the conflict of opinion on the effect of statutory violations and strongly advocated the "negligence per se" theory. However, the court implied that the violation of a municipal ordinance would be only evidence of negligence.

Held, judgment for defendant affirmed. In the sale of such an article as lime, in the absence of evidence that it is intrinsically dangerous, the seller cannot be charged with negligence unless it be shown that he knew or ought to have known of its unsafe and harmful qualities. The case in bar was not a case of res ipsa loquitur since it could not be shown that according to common experience the explosion would not have occurred without fault on the part of the defendant.

13. Hallenbeck v. S. Wander & Sons Chemical Co., 189 N.Y.S. 334 (N.Y., 1921)

Action against a packer and distributor to recover damages for personal injuries sustained by plaintiff as a result of an explosion of chlorinated lime purchased from a retail druggist. The explosion occurred while plaintiff was attempting to open the can containing the lime. There was evidence that the can was air-tight and that the gas contained therein would be liable to explode.

Held, judgment for plaintiff affirmed. There was ample evidence that the material used in filling such cans, and with this particular brand, was dangerous, and liable to explode if the gas could not escape.

14. Genack v. Gorman, 194 N.W. 575 (Mich., 1923)

Action to recover damages for personal injuries sustained by plaintiff as the result of the explosion of a can of stove polish. The retailer and manufacturer of the product were joined as defendants. There was no label on the can or any warning showing dangerous ingredients that were explosive or combustible. At the close of plaintiff's proof, the defendant retailer received a directed verdict and the manufacturer appealed upon the denial of a similar verdict for him.

Held, judgment for plaintiff affirmed. The question of the negligence of the manufacturer in failing to warn others of the nature of his product was for the jury.

15. Gulf Refining Co. of La. v. Jinright, 10 F. (2d) 306 (Ala., 1925)

Action to recover damages for the death of plaintiff's intestate resulting from the use of kerosene produced by the defendant oil refining company. The evidence showed that the oil sold by defendant to a retailer as kerosene and resold as kerosene to a member of decedent's family exploded while deceased was attempting to use it for illuminating purposes. Recovery was sought on the ground that the oil would not test 120 degrees Fahrenheit as required by statute for illuminating oils.

Held, judgment for plaintiff affirmed. The violation of the statute constituted a sufficient showing of negligence to go to the jury.

16. Louisiana Oil Refining Corporation v. Reed, 26 F. (2d) 14 (La., 1928)

Action to recover damages for personal injuries sustained by plaintiff as a result of an explosion which occurred while he was performing work about the cleaning and dyeing machinery of his employer. Plaintiff's injury was attributed to the alleged fault of the defendant in falsely representing to plaintiff's employer that a solvent sold to him had a flash point between 96 and 105° F. whereas the product sold had a flash point of 45° F. with the result that it exploded at a temperature less than 50 degrees F. No relevant evidence was introduced at the trial showing the actual room temperature at the time of the explosion.

Held, judgment for the plaintiff reversed and new trial granted. Though it was a breach of duty for the defendant to furnish to plaintiff's employer, for use in the latter's business, a solvent having a flash point substantially lower than 96° F., that breach of duty did not give rise to a right of action in favor of plaintiff unless it was the proximate cause of injury to plaintiff. The burden was on the plaintiff to prove that the explosion and consequent injury to plaintiff were due to the flash point of the solvent being less than 96° F. A finding that the explosion was due to this would not be warranted in the absence of evidence tending to prove that the temperature at the time and place of the explosion was less than 96° F.

17. Louisiana Oil Refining Corporation v. Reed, 38 F. (2d) 159 (La., 1930)

After the case was reversed on the former appeal, 26 F. (2d) 14, supra, there was a second trial which resulted in judgment for plaintiff. Defendant appealed, raising various questions on matters of evidence and the instructions of the court and the defense that there was no privity of contract between plaintiff and defendant.

Held, judgment for plaintiff affirmed. Privity of contract was not essential since the defendant made negligent, false, or fraudulent misrepresentations.

18. Read Phosphate Co. v. Vickers, 11 Tenn. App. 146 (1930)

Action to recover damages for personal injuries to plaintiff caused by the explosion of a metal drum filled with sulphuric acid. The acid was sold by the defendant manufacturing company to the employer of plaintiff's intestate. The drum itself was supplied by the employer. Recovery was sought on the ground that defendant negligently poured hot acid into the metal container thereby accelerating the formation of gas and then closed the container without warning the buyer that this created a dangerous condition. The jury returned a verdict for \$4,500 in favor of plaintiff and defendant appealed, raising various questions as to matters of evidence and the court's instructions to the jury.

Held, affirmed. (1) The seller of an explosive substance must give the purchaser notice of its dangerous character or he will be liable for injuries resulting to innocent persons who are not themselves at fault, irrespective of privity of contract. The reaction of hot sulphuric acid on the steel drum caused the generation of gas which caused the explosion and the defendant gave no warning of the dangerous qualities of the acid under such conditions. (2) Questions as to whether sulphuric acid is inherently dangerous and whether plaintiff was guilty of contributory negligence were properly left to the jury.

19. Victory Sparkler & Specialty Co. v. Latimer, 53 F. (2d) 3 (Mo., 1931)

Action to recover damages for the death of plaintiffs' small child resulting from his consumption of an article of fireworks manufactured by defendant. The article was not labeled to show its poisonous ingredients, which included yellow phosphorous. Recovery was sought on the ground that the defendant was negligent in failing to give

warning to the retailer or purchaser of the dangerous character of the article by placing appropriate labels upon it or upon the container in which it was packed. The defendant contended that the article was used for a purpose other than that for which it was sold or intended.

Held, judgment for plaintiff affirmed. In refusing to follow the defendant's theory, the court stated:

"One who deals with children must anticipate the ordinary behavior of children, and, in considering whether or not the defendant was negligent in placing these articles in the channels of trade, it must be remembered that they were intended for the use and amusement of children, as well as others. In the hands of children they were imminently dangerous, and the injury might reasonably have been anticipated." 70

20. Ft. Wayne Drug Co. v Fleming, 175 N.E. 670 (Ind., 1931)

Action to recover damages for personal injuries sustained by plaintiff as a result of an explosion of benzol supplied by the defendant dealer. The plaintiff in making the purchase from defendant requested crude oil but was given benzol, a highly inflammable liquid. The explosion occurred while plaintiff was spraying the interior of a boiler and the benzol came in contact with an incandescent bulb illuminating the boiler. Recovery was sought on the ground that defendant negligently failed to label the can of benzol to indicate its dangerous character.

Held, judgment for plaintiff affirmed. The evidence was sufficient to support a finding of negligence in failing to label an imminently dangerous product and that this was the proximate cause of the injury complained of.

21. Reiss v Kirkman & Son, 273 N.Y.S. 7 (1934)

Action to recover damages for personal injuries sustained by plaintiff as a result of using a product for general cleaning purposes manufactured by defendant. The court granted defendant's motion for the discovery of a portion of the product, constituting the basis of the action, for the purpose of analysis. Plaintiff appealed from this order.

Held, order granting defendant's motion for discovery affirmed. In the course of the opinion the court said by way of dicta: "Of course the defendant knows the chemical content of its product, and no doubt by tests and otherwise has satisfied itself that no harmful matter has entered into its composition. If it is mistaken in its conclusion in this respect and has represented something for common use as harmless when in fact it may be poisonous and harmful to one using it in reliance on its harmless character as represented, then the defendant may be liable in damages. But, if some harmful substance has been introduced into the package since it left the control of defendant and without its fault, the rule would be otherwise."

22. Stone v Shaw Supply Co., 36 P. (2d) 606 (Ore., 1934)

Action to recover damages for personal injuries sustained by plaintiff, a boy ten years old, as the result of the ignition of a piece of yellow phosphorus. The phosphorus was sold by the defendant dealer to a 15 year old boy who, in turn, gave it to the plaintiff. The jury returned a verdict for defendant, and plaintiff appealed on the ground that it was negligence per se for defendant to violate a statute prohibiting the sale of any deadly poison "unless upon inquiry it were found that the purchaser was aware of its poisonous character."

Held, judgment for defendant reversed. The violation of the statute was negligence per se.

23. Genesee County Patrons Fire Relief Ass'n. v L. Sonneborn, 189 N.E. 551 (N.Y., 1934)

Action against the manufacturer of a waterproofing compound to recover damages for the destruction of a barn and personal property by fire caused when the fumes of the compound came in contact with the flames in a lantern. The plaintiffs, who carried fire insurance policies on the property destroyed, paid the loss and became subrogated to the rights of the insured against the defendant. It was conceded that the product was a secret preparation which contained 52% benzine and 6.7% kerosene, and was highly inflammable. Two of the containers shipped to the insured bore labels "do not use near flame," but one container did not. Plaintiff sued on the theory that defendant negligently failed to label his product to indicate its dangerous character.

Held, judgment for plaintiff affirmed. The evidence justified a finding that the preparation was an inherently dangerous commodity and that defendant was negligent in selling it to a dealer without notice of its dangerous quality when used in an inclosed structure near an open flame. Under such circumstances, privity of contract was unnecessary. A manufacturer may be liable under the "dangerous commodity" rule whether personal injury or property damage is involved. 71

70. See, Victory Sparkler & Specialty Co. v Price, 111 So. 437 (Miss., 1927) which reached an opposite decision on similar facts. Also, Henry v Crook, 195 N.Y.S. 642 (1922) holding a manufacturer of sparklers liable for injuries to a child, and Beznor v Howell, 233 N.W. 758 (Wis., 1930), holding a sparkler manufacturer not liable under similar circumstances.

71. Cases relied on in support of this principle were:

- (1) Skinn v Reutter, 97 N.W. 152 (Mich., 1903) (hogs sold with a dangerous and infectious disease - dealers liable on the ground that they committed a wrong imminently dangerous to human life, and were therefore liable for damage to property)
 - (2) Wellington v Downer Kerosene Oil Co., 104 Mass. 64, supra.
 - (3) Murphy v Sioux Falls Serum Co., 184 N.W. 252 (S.D., 1921) (defendant manufacturer sold a serum which contained poison which when used by a veterinarian, killed plaintiff's animals. It was decided that, as the substance was imminently dangerous, the defendant was liable for the property damage.)
 - (4) Anglo-Celtic Shipping Co. v Elliott & Jeffrey, 42 T.L.R. 297 (Eng.) (cleaning fluid manufactured by the defendants was used near a lighted candle by a third person not the defendants' vendee. An explosion occurred which resulted in the burning of plaintiff's ship. A recovery was permitted for the property damage.)
- Accord, Hunter v Allied Mills, 192 S.E. 356 (S.C., 1937) (dogs died from poisoned dog feed manufactured by defendant; manufacturer held liable)

24. Standard Oil Co. of Louisiana v Roach, 94 S.W. (2d) 63 (Tenn., 1935)⁷²

Action to recover damages for the death of plaintiff's daughter resulting from an explosion of kerosene manufactured by the defendant. The explosion occurred when the deceased poured some of the kerosene upon live coals in the cooking stove. The product was purchased from a retail dealer. Recovery was sought on the ground that the kerosene supplied was actually an admixture of kerosene and gasoline. The trial court denied defendant's motion for a directed verdict and defendant appealed.

Held, reversed. Under the evidence it was equally probable that the product was kerosene as that it was gasoline or some other highly volatile and dangerous substance. Therefore a jury verdict for plaintiff would be based on mere guess or conjecture.

25. Lenz v Standard Oil Co. of N.Y., 186 Atl. 329 (N.H., 1936)

Action to recover damages for personal injuries alleged to have been caused to the plaintiff by ethyl gasoline manufactured by the defendant corporation and sold to him by the co-defendant, a retailer. The gasoline came into contact with plaintiff's skin as he was using it and a severe streptococcus infection resulted. There was medical testimony to the effect that tetra ethyl of lead is an irritant and an active poison. The trial court granted nonsuits in favor of both defendants.

Held, affirmed. The court stated:

"It must be assumed that the defendant corporation was chargeable with knowledge of the chemical composition of the substance which it sold and of the harmful effects, if any, likely to result to human beings from contact with it....Nevertheless, some proof that ethyl gasoline in fact possessed potentialities of harm to human beings from external contact sufficient to call for protective action by the defendants was an essential element in the plaintiff's case. *Karr v Insecto, Inc.*, 247 N.Y. 360, 160 N.E. 398. The mere fact that the plaintiff suffered injury is not sufficient to justify such a conclusion....The fact that tetra ethyl of lead is an 'active poison' does not involve that external contact therewith is injurious to human beings. It is common knowledge that such contact with many materials, known to be poisonous if taken internally, may be entirely harmless. The extensive use of spraying materials to combat insect pests and plant diseases bears witness to this fact."⁷³

26. Parton v Phillips Petroleum Co., 107 S.W. (2d) 167 (Mo., 1937)

Action to recover damages for personal injuries caused by an explosion of kerosene which was sold to plaintiff by a filling station operator. The latter had purchased it from defendant. The evidence showed that the explosion occurred when plaintiff poured the liquid on newly kindled fire without looking to see if there was fire in the stove. Plaintiff sued on the theory that the liquid sold contained gasoline and kerosene.

Held, judgment on demurrer for defendant affirmed. Plaintiff was guilty of contributory negligence as a matter of law. The court stated: ".....the law is reasonably well settled that it is not contributory negligence per se to use kerosene in kindling a new fire. However, it is equally well settled that if in kindling a new fire the fuel is first ignited and the kerosene then applied by pouring it from the can, or if used in an attempt to replenish a dying fire by pouring the kerosene thereon from the can, such acts constitute negligence as a matter of law."⁷⁴

72. Other cases involving explosions of kerosene and kerosene contaminated with gasoline (other than those digested in Part II) include:

- (1) *Waters-Pierce Oil Co. v Deselms*, 212 U.S. 159 (1909)
- (2) *Titlow v Florence Trading Co.*, 170 Pac. 172 (Cal., 1917)
- (3) *Anderson v Standard Oil Co.*, 164 N.W. 169 (Iowa, 1917)
- (4) *Cohn v Saenz*, 211 S.W. 492 (Tex., 1919)
- (5) *Fairbanks, Morse & Co. v Gambill*, 222 S.W. 5 (Tenn., 1920)
- (6) *Pierce Oil Corporation v Taylor*, 227 S.W. 420 (Ark., 1921)
- (7) *McCarthy v Gulf Refining Co.*, 107 S.E. 92 (Ga., 1921)
- (8) *Ramsey v Standard Oil Co.*, 120 S.E. 331 (N.C., 1923)
- (9) *Marchants' Bank v Sherman*, 110 So. 805 (Ala., 1926)
- (10) *Gibson Oil Co. v Bush*, 1 S.W. (2d) 88 (Ark., 1928)
- (11) *Huckleberry v Missouri Pac. R. Co.*, 26 S.W. (2d) 980 (Mo., 1930)
- (12) *Paull v McBride*, 263 N.W. 877 (Mich., 1935)
- (13) *General Oil Co. v Crowe*, 187 S.E. 221 (Ga., 1936)
- (14) *Shermer v Crowe*, 186 S.E. 224 (Ga., 1936)
- (15) *Mordine v Saglin*, 81 P. (2d) 903 (Cal., 1938)
- (16) *Sinclair Refining Co. v Henderson*, 122 S.W. (2d) 580 (Ark., 1938)
- (17) *Gordy v Pan American Petroleum Corp.*, 193 So. 29 (Miss., 1940)
- (18) *Hodges v Ashurst*, 3 S.E. (2d) 99 (Ga., 1939)
- (19) *Pazdernik v Exide*, 291 N.W. 798 (Wis., 1940)
- (20) *Barbes v Murray*, 10 N.W. (2d) 123 (Wis., 1943)
- (21) *Chapman v Deep Rock Oil Corp.*, 77 N.E. (2d) 883 (Ill., 1948)
- (22) *Phillips v Doyle*, 207 P. (2d) 465 (Kan., 1949)
- (23) *Sinclair Refining Co. v Piles*, 221 S.W. (2d) 12 (Ark., 1949)

73. Citing with approval *Cliff v California Spray-Chemical Co.*, supra.

74. *Accord*, *Rigge v Standard Oil Co.*, 130 Fed. 199 (Minn., 1904); *Morrison v Lee*, 113 N.W. 1025 (N.D., 1907); *DuBois v Lufner*, 126 N.W. 147 (Iowa, 1910); *McLawson v Paragon Refining Co.*, 164 N.W. 668 (Mich., 1917); *Goode v Pierce Oil Corporation*, 286 S.W. 1009 (Ark., 1926). But see, *Dronette v Meaux Bros.*, 100 So. 411 (La., 1924); *Douglas v Daniel Bros. Coal Co.*, 22 N.E. (2d) 195 (Ohio, 1939); *Peplinski v Kleinke*, 299 N.W. 818 (Mich., 1941).

27. Fredendall v Abraham & Straus, Inc., 18 N.E. (2d) 11 (N.Y., 1938)
Action in warranty to recover damages for personal injuries allegedly sustained by a purchaser of a dry cleaning fluid from defendant. A "caution" displayed on the container stated that the fluid should be used in well ventilated, cool rooms. Plaintiff used the fluid in a small bathroom where the temperature was 83 degrees and where there was no cross draft. After she had been so engaged for forty-five minutes, she was made sick by the fumes of the fluid.
Held, judgment for plaintiff reversed. The plaintiff failed to use reasonable care in the use of the fluid and this default was an essential cause of her illness.
28. Manning Mfg. Co. v Hartol Products Corporation 99 F. (2d) 813 (Vt., 1938)
Action to recover damages for breach of warranty in the sale of kerosene by the defendant wholesaler to the plaintiff retailer. The kerosene exploded when used by a customer of plaintiff and the plaintiff made a settlement for the injuries resulting. The kerosene was defective in having a flash point at a lower temperature than the statutory requirement of 110° F.
Held, judgment for plaintiff affirmed. Under the uniform sales act, a sale of goods carries an implied warranty of merchantable quality and this merchantability includes compliance with the statutory requirements of law.
29. Gulf Refining Co. v Williams, 185 So. 234 (Miss., 1938)
Action to recover damages for personal injuries sustained by plaintiff as the result of an explosion of a drum of gasoline. Defendants, distributors of petroleum products, sold the drum to plaintiff's employer for use in farm tractors. The explosion occurred when plaintiff undertook to remove the bung cap during the course of its use.
Held, judgment for plaintiff affirmed. There was sufficient evidence to justify a jury finding that defendant was negligent regarding the condition of the container. The court stated: "The vendor of an inherently dangerous commodity, such as gasoline, is under duty to use cautious care to distribute the same in reasonably safe containers, the degree of care....to be commensurate with the danger, and the obligation of this duty is not dependent upon contractual relations, but extends to all who may lawfully use, or be in the vicinity of, the container..."
30. Pease v Sinclair Refining Co., 104 F. (2d) 183 (N.Y., 1939)
Action to recover damages for personal injuries sustained by plaintiff as a result of defendant's placing a kerosene label on a bottle filled with water. Defendant sent the bottle to plaintiff as part of a teacher's exhibit. The injury resulted when plaintiff opened the bottle marked "kerosene" and poured its contents on some sodium, when an explosion occurred and plaintiff was severely burned and suffered the loss of one eye. Kerosene is a recognized preservative of sodium metal, whereas sodium metal when combined with water is highly explosive. Defendant contended that there was no evidence of negligence on the part of defendant and that plaintiff's contributory negligence was established as a matter of law. The jury returned a verdict of \$24,000 in favor of plaintiff and defendant appealed.
Held, affirmed. (1) The plaintiff was not guilty of contributory negligence as a matter of law in failing to test the product by smell or otherwise prior to use. (2) There was sufficient evidence of negligence in defendant's failure to warn of the mislabeling of the chemical product.
31. White v General Chemical Co., 136 S.W. (2d) 345 (Mo., 1940)
Action to recover damages for personal injuries sustained by plaintiff while handling a drum of acid sold to his employer by the defendant manufacturer. The accident occurred when the plug blew out of the bung hole in the head of the drum, permitting the acid to spurt out and strike plaintiff, causing severe burns about his face, neck, and other parts of his body. Recovery was sought on the ground that defendant was negligent in selling a drum which was unsafe for the purpose intended, in that the plug, which was to be removed in order to draw off the acid from the drum, was so corroded that there were insufficient threads thereon to hold the plug reasonably secure in the bung hole. The jury returned a verdict for \$1,500 in favor of plaintiff, but the trial court sustained defendant's motion for a new trial upon the ground of error in the giving of instructions.
Held, order reversed and judgment for plaintiff reinstated. There was sufficient evidence for the jury to find that the defendant was negligent in furnishing a drum with a defective plug, and the jury was properly instructed on this issue.
32. Richman v Follman, 23 N.Y.S. (2d) 917 (1940) aff'd., 36 N.E. (2d) 908 (N.Y., 1941)
Action to recover damages for the death of plaintiff's intestate resulting from the explosion of a cleaning fluid sold him by the defendant dealer. The explosion occurred when the deceased was using the product while cleaning furniture. Two one-gallon cans of the fluid were found after the explosion in his apartment bearing the label "Dri-Clean" and "Keep Away From Fire." It was established on the trial that the cans contained nothing but benzene. Plaintiff sought to establish liability of the defendant for the accident on the theory of a violation of an Administrative Code provision prohibiting the sale without a permit of any inflammable mixture which emitted inflammable vapor below eighty degrees Fahrenheit, and another provision that inflammable mixtures for household use should be sold in containers labeled with the words, "Caution. Inflammable Mixture. Do not use near fire or flame."
Held, judgment for defendant. It was not shown that there was a causal connection between the violation of the provision of the Administrative Code and the accident which resulted in intestate's death.
33. Royd v Franchise Chemical Corporation, 37 F. Supp. 306 (N.Y., 1941)⁷⁵
Action to recover damages for the death of a 19 months old child resulting from the consumption of a shoe cleaner manufactured by defendant. The product, which was purchased by the parents of the deceased from a retail
5. Applying Pennsylvania law.

dealer, consisted of a mixture of 76% ethylene dichloride and 25% carbon tetrachloride and was known commercially as "Chlorosol." Recovery was sought on the ground that the defendant was negligent in failing to warn the public of the poisonous character of the product and in failing to label it "poison" under the pharmacy and poison law of Pennsylvania.

Held, summary judgment for defendant granted. (1) The cleaner was not a poison within the purview of the pharmacy law the purpose and intent of which is to regulate the compounding of prescriptions and the preparation and sale of drugs and other poisons incident to the practice of pharmacy, and not to regulate the sale of cleaning preparations. (2) The label on the product showed that the contents were to be used for cleaning purposes and not for human consumption. Under these circumstances, there was no common law liability involved since the product was not used for a purpose for which it was made or sold.⁷⁶

34. Sinclair Refining Co. v Tompkins, 117 F. (2d) 596 (Miss., 1941)

Action to recover damages for personal injuries resulting from an explosion of a liquid purchased as kerosene by plaintiff from defendant's agent. The explosion occurred when the plaintiff poured the supposed kerosene into her cookstove. The kerosene was actually contaminated with gasoline. The jury returned a verdict of \$7,500. The defendant appealed contending that it was error for the trial judge to refuse to charge the jury that as a matter of law the plaintiff was chargeable with negligence which contributed to her injury.

Held, judgment for plaintiff reversed. The plaintiff was negligent as a matter of law in pouring the liquid into the heated cookstove.

35. McClaren v G. S. Robins & Co., 162 S.W. (2d) 856 (Mo., 1942)

Action to recover damages for the death of plaintiff's intestate from carbon tetrachloride poisoning caused by inhaling fumes while using the chemical as a solvent to remove grease. Recovery was sought on the ground that defendant sold the chemical to the employer of plaintiff's intestate without proper labels on the container showing that the contents were poisonous. Upon the containers in question appeared the words: "G. S. Robins & Co., Carbon Tetrachloride," and upon each was a label which read: "Volatile Solvent, Use with Adequate Ventilation. Avoid Prolonged Breathing."

Held, verdict for defendant affirmed. (1) There was no violation of the statute requiring "Poison" labels on "arsenic, strychnine, corrosive sublimate, prussic acid or other substance....usually denominated as poisonous" since this did not apply to a cleaning solvent such as carbon tetrachloride under the rule of statutory construction "ejusdem generis." (2) The label on the container gave sufficient warning of danger in using carbon tetrachloride in confined, unventilated places. The label is used by other manufacturers of the product and has been approved by the Surgeon General of the United States.⁷⁷

36. Standard Oil Co. v Lyons, 130 F. (2d) 965 (Iowa, 1942)

Action to recover damages for the death of plaintiff's intestate resulting from the explosion of an asphalt compound manufactured by defendant. The product was purchased by the employer of the intestate from the defendant. The asphalt primer coat sold by defendant was a liquid containing 50% asphalt and 48% naphtha and having a flash point of about 30° F. The barrels containing the primer had labels identifying the product as a primer coat and the name of the manufacturer but did not show that the primer was volatile, inflammable or explosive. Recovery was sought on the ground of negligence of the defendant in failing to give adequate warning of the dangerous properties of his product.

Held, judgment in favor of plaintiff affirmed. The jury having found that the danger was not known to the immediate purchaser of the compound, nor to the plaintiff, and not being patent, it was the duty of the defendant to give warning of the danger in its use. If, under such circumstances, a warning is not given, a manufacturer of a dangerous product is liable for personal injuries received by one who uses the product in an ordinary and anticipated manner.

37. Landers v Safeway Stores, 139 P. (2d) 788 (Ore., 1943)

Action to recover damages for breach of warranty in the sale of a bleaching solution by the defendant dealer to the plaintiff. The solution contained 5.25% of sodium hypochlorite. Injury occurred when plaintiff immersed her hands in the solution while cleaning an article of clothing. At the trial, defendant's evidence showed that the product was harmless if used in accordance with directions. Plaintiff's evidence did not show that the product caused the injury or that in the prescribed diluted form it could or would cause it. There was evidence that on the previous day plaintiff had used another solution in undiluted form.

Held, judgment for plaintiff reversed. Since the undisputed evidence disclosed no poisonous or deleterious substance in the product when used as directed, the fact that plaintiff used the product and suffered injury thereafter was not sufficient to support a verdict for plaintiff. Although there was a warranty of merchantability there was no breach in the absence of proof of the proximate cause of the injury.

38. Commissioners of State Insurance Fund v City Chemical Corporation, 48 N.E. (2d) 262 (N.Y., 1943)

Action by the Commissioner of the State Insurance Fund against the defendant chemical corporation to recover the amount of a workmen's compensation claim paid by plaintiff on the ground that the defendant negligently delivered to the claimant's employer some inherently dangerous explosive substance in bottles labeled Pyruvic Acid. The claim arose when the bottle of acid supplied to the claimant's employer exploded when it was being opened by claimant injuring his eye. The evidence at the trial showed that the substance in the bottle was of an odor, color and consistency entirely unlike pure pyruvic acid. The defendant chemical corporation, a manufacturing

76. The court distinguished *Victory Sparkler & Specialty Co. v Latimer*, *supra*, on the ground that the cleaner was not made either for the amusement or use of children, and could not be taken internally without opening the bottle.

77. The weight attached by the court to the label approval by a government agency was expressly criticized in *Maize v Atlantic Refining Co.*, *infra*.

chemist, had removed the labels from the bottle which were originally placed there by its supplier, and pasted a label containing the name of City Chemical Corporation and the designation "Pyruvic Acid C P." The defendant pleaded the supplier who had purchased the bottled product in a foreign country. The trial court held that the City Chemical Corporation was not liable since it was a vendor and not a manufacturer and no negligence on its part was shown.

Held, judgments reversed and new trial granted as to both defendants. Although a mere dealer who vends a dangerous and mislabeled drug in its original package is not liable without proof of some real negligence on his part, the defendant chemical corporation by labeling held itself out as a manufacturer and therefore assumed the liability of a manufacturer. The manufacturer of a dangerous drug who labels it as a harmless drug is liable without proof of real negligence.

39. Saganowich v Hachikian, 35 A. (2d) 343 (Pa., 1944)

Action to recover damages for personal injuries sustained by plaintiff as a result of an explosion of an iron drum of liquid caustic soda purchased from defendant. Plaintiff was in the process of opening the drum when the plug suddenly "shot out" releasing some of the drum's contents under pressure. The evidence showed that the plug, which was supposed to be eased out by making half-turns, did not fit properly into the taphole of the drum because the threads did not catch and had not been properly fastened into the drum. The caustic soda was sprayed on plaintiff and as a result plaintiff lost the sight in one of his eyes. A verdict of \$12,000 was recovered and defendant appealed.

Held, affirmed. It was the duty of the defendant, as a supplier of chattels, to exercise reasonable care in making the drum of caustic soda safe for the use of those whom he supplied, and safe for those whom he should expect to be in the vicinity of its probable use. Sufficient evidence was produced from which the jury could reasonably have concluded that the defendant had negligently used a defective drum and plug, and that this breach of duty to plaintiff was the proximate cause of the accident.

40. E. I. DuPont de Nemours & Co. v Wright, 146 F. (2d) 765 (Ky., 1944)

Action to recover damages for the death of plaintiff's decedent as the result of the rupture and subsequent ignition of a drum of nitro-cellulose manufactured by the defendant and shipped to the employer of plaintiff's decedent. The drum, upon arrival at the consignee's plant, was skidded upon the rough concrete surface of a ramp causing a spark which ignited vapor released by a loosening of the head of the drum on the way down the ramp. The combustion was so violent that the drum was hurled 60 feet before striking and burning decedent. The car containing the shipment was placarded "Handle Carefully" and on each drum was posted a sign reading "Nitro-Cellulose, Caution, Do Not Use Near an Open Flame or Fire." Recovery was sought on the ground of negligence by defendant in failing to give notice to the consignee of the character of the drum (which was weaker than drums previously furnished)⁷⁸ and its tendency to spark upon friction with hard rough surfaces.

Held, judgment for plaintiff affirmed. The failure of defendant to notify its consignee that such containers could not be safely handled in the manner in which it was accustomed to handle the earlier galvanized drums, raised issues properly submitted to the jury as to whether such failure of notice constituted negligence, and whether, if so, such negligence was the proximate cause of the injury.

41. Kapp v E. I. DuPont de Nemours & Co., 57 F. Supp. 32 (Mich., 1944)

Action to recover damages for personal injuries sustained by plaintiff as a result of an explosion of "28% Aqua Ammonia" manufactured by the defendant. Plaintiff was injured while removing strings which secured the rubber stopper on a closed 5 gallon glass bottle of the ammonia. The violent release of gas pressure caused the explosion. Plaintiff sought to recover on the theory that the bottle had been stored by his employer near heat and that this was responsible for the explosion. The plaintiff contended that this would not have occurred if the bottle had been properly labeled to warn handlers of the product's propensities and as to proper methods of handling and storing. Under plaintiff's theory the bottle would have been labeled if the original drum had been labeled by the defendant manufacturer before the product was started in the chain of distribution.

Held, defendant's motion for a directed verdict sustained. The proof failed to show any causal connection between the failure of the defendant to label the drum and the failure of the immediate supplier of plaintiff's employer to label the bottle which exploded.

42. Maize v Atlantic Refining Co., 41 A. (2d) 850 (Pa., 1945)

Action to recover damages for the death of plaintiff's intestate from carbon tetrachloride poisoning caused by inhaling fumes while using a cleaning solvent to clean rugs. The container of the solvent which was manufactured by defendant and being used by the intestate bore on all four sides the words "Safety-Kleen" in one-half to three-quarter inch letters and on two narrow sides appeared the word "Caution" in one-quarter inch letters and the warning "Do not inhale fumes. Use only in well ventilated place," in one-eighth inch letters. Recovery was sought on the theory that the defendant manufacturer was negligent for failure to give more warning. The jury returned a verdict for plaintiff, and defendant appealed on the grounds, *inter alia*, that (1) he was not negligent, (2) intestate was contributorily negligent for failure to heed the warning on the label, and (3) there was no privity since defendant had sold the solvent to a third party for the third party's own use and not for resale.

Held, affirmed. (1) The question whether the manufacturer was negligent for failure to give more warning and whether the intestate was contributorily negligent for failure to heed the warning given was for the jury. (2) Privity of contract is not necessary to establish a manufacturer's liability for negligence.

78. The trial court refused to admit in evidence regulations of the Interstate Commerce Commission authorizing the use of the light steel drums for the transportation of explosives. On appeal, this was held to be immaterial evidence (or if material, its exclusion was not prejudicial) since the charge of negligence was not based upon the use of containers inadequate for transporting nitro-cellulose but upon failure to warn the consignee of the danger in rough handling of the containers after they were unloaded.

43. Sawyer v Pine Oil Sales Co., 155 F. (2d) 855 (La., 1946)

Action to recover damages for personal injuries caused by alleged dangerous and harmful ingredients in a cleansing agent manufactured by defendant. The injury occurred to plaintiff when some of the liquid splashed into her eye, as she was cleaning a sink. The packaged product contained label statements reading: "Will not injure the hands - It will not injure the skin, fabric, tile, marble or wood - For general household cleaning." Recovery was sought on the joint theory of a breach of an express and implied warranty of safety and merchantability and of negligence in the preparation of the product.

Held, judgment dismissing the complaint affirmed. The rationale of the court was stated as follows:

"The statements on the label do not amount to an express warranty against non-injury to the eye from the use of the cleansing agent, nor is there a warranty, implied or otherwise, that it was suitable for use in the eye, or that it would not hurt the eye if put therein; neither is there a warranty implied or otherwise, that the article would not splash in one's eye if used in such a manner as to cause it to splash. Ordinarily the failure to warn one of a fact of which he is already fully aware is not a breach of duty, and there is no contention made here that the plaintiff was not fully aware that the cleansing preparation was not intended for use in the eye, or that if it were sufficiently splashed it would likely splash upon the person of the one who caused it to splash. Certain it is that persons in the general use of benzene, household ammonia, lysol, naphtha, and other similar agents, are aware of the fact that painful consequences will result if they are used in such manner as to allow them to get into the eye, but these potential consequences do not result in a discontinuance of their use nor in the conclusion that they are unfit for the use to which they are intended to be put."

44. Frazier v Ayres, 20 S. (2d) 754 (La., 1946)

Action to recover damages for personal injuries to plaintiff and the death of his son from an explosion of a mixture of gasoline and kerosene. The defendant fuel jobber, in delivering gasoline and kerosene to a filling station retailer, negligently mixed the two products in the one tank of his customer. The retailer who had reason to know of the error, negligently sold eight gallons to plaintiff for domestic use. Plaintiff poured some of the fluid into his woodburning stove in order to start a fire.

Held, judgment for plaintiff. The negligence of the jobber extended to the plaintiff's family and the negligence of the retailer did not break the chain of causation.

45. De Vere v Patten, 23 N.W. (2d) 584 (Minn., 1946)

Action by an employee against her employer to recover damages for transverse myelitis allegedly sustained as a result of inhaling carbon tetrachloride vapors in the employer's premises. It was admitted that there was some carbon tetrachloride vapor in defendants' machine shop where plaintiff was employed. At the trial, plaintiff's expert witnesses testified that in their opinions the inhalation by plaintiff of carbon tetrachloride vapors was the cause of the transverse myelitis from which she was suffering, although they did not know whether the concentration to which plaintiff was exposed was of such a density as to be harmful and did not show that carbon tetrachloride might be an efficient cause of plaintiff's condition. Defendants' medical testimony was to the effect that virus is a common cause of transverse myelitis and that generally it is the cause where the disease cannot be traced to other known causes.

Held, judgment for defendants. Plaintiff failed to establish carbon tetrachloride poisoning as the cause of the disease from which she was suffering, because it appeared as a matter of law that the concentration to which she was exposed was harmless.

46. Dart v Pure Oil Co., 27 N.W. (2d) 555 (Minn., 1947)

Action to recover damages for the death of plaintiff's intestate killed in an explosion when he attempted to start a fire by pouring some "kerosene" on green firewood in a stove which was not completely cold. The fluid, purchased from defendant was in reality an explosive mixture of kerosene and gasoline. This was partially due to defendant's regular practice of using gasoline and kerosene cans interchangeably, contrary to a Minnesota statute. Defendant based his defense on the contributory negligence of the deceased. Plaintiff argued that contributory negligence was not a defense to a statutory tort action where defendant's act was intentional rather than negligent and, secondly, that the legislative intent was to protect kerosene users from their own inability to use adequate care.

Held, judgment for defendant reversed and a new trial granted. The evidence required a new trial on the issues of statutory negligence and contributory negligence. The latter would be a valid defense.

47. Ingey v E. F. Houghton & Co., 179 P. (2d) 807 (Cal., 1947)

Action to recover damages for personal injuries sustained by plaintiff when a quantity of liquid heat quench manufactured by defendant and sold to the employer of plaintiff exploded. There was evidence that the chemical was discolored due to the presence of a foreign substance and that the contamination occurred before the drum containing it left defendant's factory. There was a sharp conflict in the evidence with reference to the labels on the drum, but there was evidence that the particular drum or labels in question showed no warning whatsoever.

Held, judgment for plaintiff affirmed. (1) The evidence was clearly sufficient to support a finding that the contents of the drum when shipped contained impurities which defendants should have discovered, and that the explosions resulted from a contamination of the salt by some foreign substance. (2) Assuming that the contaminating was done in the plant of plaintiff's employer, the jury nevertheless could have found that the mixing, with the resulting explosion, was a direct consequence of defendant's negligence in failing to give an adequate warning of the dangerous nature of its products.

48. Blumetti v Carman & Co., 81 N.Y.S. (2d) 748 (1948)

Action to recover damages for personal injuries sustained by plaintiff as a result of the alleged improper handling of drums of caustic soda by defendant, a common carrier. The complaint alleged that the drums did not have any labels or other warning signs indicating that their contents were dangerous.

Held, motion to dismiss granted. There was no allegation that the defendant was aware of the fact that the drums which it was transporting as a common carrier contained caustic soda.

49. Kratz v American Stores Co., 59 A.(2d) 138 (Pa., 1948)

Action to recover damages for personal injuries sustained when a bottle of stove polish purchased from the defendant retail dealer exploded or caught fire and severely burned the plaintiff's wife. The bottle contained a label on which was the warning: "Caution: this polish contains naphtha, unsafe when exposed to heat or fire."

Held, judgment for defendant affirmed. The court stated the rule applicable to retail dealers as follows:

"In the absence of special circumstances, the retail vendor of an article of merchandise (other than food for human consumption) in common and general use, purchased by him in the usual course of trade and business from a reputable manufacturer or dealer, and resold by him in its original sealed package or container labelled with proper warnings and directions as to use, is not liable to a customer for injuries caused by some latent defect in the article."

50. Charles Lachman Co. v Hercules Powder Co., 79 F. Supp. 206 (Pa., 1948)

Action to recover for damage to plaintiff's carpets as the result of using a chemical compound, Dresinol 42, manufactured by defendant. The compound was designed for use with starch in making sizing for carpets. Plaintiff sought recovery on the ground of negligence. Defendant based its defense on a provision in the contract between the parties that the "Buyer assumes all risk and liability whatsoever resulting from the use of such materials" and "Seller makes no warranty of any kind, express or implied, except that the materials sold hereunder shall be of Seller's standard quality."

Held, motion for summary judgment in favor of defendant sustained. Although the defendant knew of the intended use of his product and could have discovered by tests that the material had a spontaneous ignition hazard, he effectively disclaimed liability. The court stated:

"It can be well understood why a manufacturer of chemicals would want to guard against liability arising from any and every use to which its products might be put and inserted the clause in question for that purpose."⁷⁹

51. Marler v Pearlman's R.R. Salvage Co., 52 S. E. (2d) 3 (N.C., 1949)

Action to recover damages for personal injuries sustained by plaintiff as the result of an explosion of a can of glue sold by defendant dealer. The explosion occurred when the contents of the can came in contact with the air, and the lid of the container flew up and hit plaintiff in the eye. Recovery was sought for negligence and breach of implied warranty.

Held, judgment of nonsuit in favor of defendant affirmed. There was insufficient evidence to carry the case to the jury on either theory.

52. Kramer v R. M. Hollingshead Corp., 75 A. (2d) 861 (N.Y., 1950)

Action to recover damages for personal injuries sustained by plaintiff as the result of an explosion of a solvent "Motor-Tune-Up" manufactured by defendant. The explosion occurred when the plaintiff poured some of the solvent into the engine of his automobile. Plaintiff did not procure a chemical analysis of the remaining portion of the contents of the can, and did not show any explosive properties of the product, relying on the doctrine of res ipsa loquitur. The trial court entered judgment for \$438.50 for plaintiff, and defendant appealed.

Held, reversed. The doctrine of res ipsa loquitur did not apply since the explosion did not take place within the can containing the solvent but within the motor of the automobile which was under the sole control of plaintiff.

53. Alston v J. L. Prescott Co., 76 A. (2d) 686 (N.J., 1950)

Action to recover damages for personal injuries sustained by plaintiff when the rubber stopper in a bottle of laundry fluid, containing sodium hypochlorite, was suddenly expelled by internal pressure and a large portion of the liquid was ejected from the bottle, and entered plaintiff's eyes. The defendant manufactured and bottled the product. The jury returned a verdict of \$1,500 for plaintiff and defendant appealed.

Held, affirmed. The plaintiff presented a prima facie case which was properly submitted to the jury since the rule of res ipsa loquitur applied.

54. Pabellon v Grace Line, Inc., 94 F. Supp. 989 (N.Y., 1950)

Action by a seaman against a shipowner to recover damages for personal injuries sustained as a result of an explosion occurring when the seaman mixed together a quantity of caustic soda, a washing powder, a quantity of oxalic acid, and a quantity of cleanser. The shipowner filed a third party complaint against the companies who supplied the cleaning products. It was alleged that these companies were liable for breach of warranty and for negligence in not properly labeling the products to show their dangerous and explosive nature when mixed.

Held, the third party complaint failed to state a cause of action under either theory of recovery. (1) No cause of action in contract was stated since the Uniform Sales Act (adopted in New York) specifically precludes implied warranties as to fitness of a product for any particular purpose where the product is sold under its patent or trade name. (2) No cause of action for negligence was stated since the cleaners and detergents manufactured and supplied by the third party defendants were not "inherently dangerous" and their use for their intended purpose would not cause injury. Each product was sufficient in itself and was not intended for mixture with others in order to accomplish its purpose. (see case no. 56)

79. Cited with approval in Fairbanks, Morse & Co. v Consolidated Fisheries Co., 190 F. (2d) 817, 825 (Del., 1951)

55. Richardson v DeLuca, 53 S. (2d) 199 (La., 1951)

Action to recover damages for personal injuries sustained by plaintiff as the result of an explosion of a net preservative solution purchased from and manufactured by the defendants. The product contained about sixty per cent pine tar and forty per cent benzol, and was labeled in large letters "Keep away from fire or heat." The cause of the explosion was not determined. There was evidence that the product was used near heat. Recovery was sought on the ground that defendants gave no adequate warning of the combustible qualities of the product. Defendants relied upon the cautionary statement on the label as well as oral warnings made by the dealer at the time of sale that no one should smoke while the solution was being used.

Held, judgment for plaintiff reversed and action ordered dismissed. The labels on the product and the oral warnings made by the dealer constituted sufficient notice of the danger incident to the use of the product.⁸⁰

56. Pabellon v Grace Line, Inc., 191 F. (2d) 169 (1951)

On appeal from 94 F. Supp. 989, supra, held, reversed. Upon the allegations in the pleadings, there was at least a possibility of liability against the suppliers for breach of warranty and against all of the defendants for negligence. The mere fact that a product has a trade name does not in itself preclude an implied warranty of fitness or merchantability from arising.

57. Gall v Union Ice Co., 239 P. (2d) 48 (Cal., 1951)

Action to recover for the death of plaintiffs' husband and father which resulted from injuries received when he was hit by the head of a bursting sulphuric acid drum while working as an army inspector in the defendant ice company's plant. The manufacturer of the sulphuric acid and the distributor were joined as party defendants with the owner of the plant where the explosion occurred. Recovery was sought on the ground of negligence upon the theory that the drum which exploded contained no warning label showing the danger of leaving the drum in the sun and unvented. The manufacturer showed its custom in placing such warning labels on all drums containing sulphuric acid, but it was disputed whether the particular drum in question was so labeled. From a judgment in the sum of \$100,000 in favor of plaintiffs, the three defendants appealed (the owner of the plant later abandoned its appeal.).

Held, affirmed.

(1) There was sufficient evidence to support the finding that there was no label on the drum at the time of delivery to the plant and, therefore, both the manufacturer and distributor could be held liable for negligence. Moreover, there was evidence to support the finding that any negligence of the plant employees was not the sole proximate cause of the accident.

(2) Damages were not excessive in view of the life expectancy of the deceased, his earning capacity and the life expectancy of his family.

(3) There was no error in excluding a contract between the distributor and the owner of the plant disclaiming liability for "damage to persons and property" since this would not justify the supplier in failing to perform its duty towards third persons.

58. Kieffer v Blue Seal Chemical Co., 196 F. (2d) 614 (N.J., 1952)

Action against manufacturer to recover for personal injury sustained by plaintiff as a result of using a cleaning mixture manufactured by defendant. The mixture contained sodium hydroxide, powdered metal aluminum and nitrate. The injury occurred when the mixture exploded while the plaintiff was using it in cleaning drains in his plumbing business. There was evidence that the batch of the mixture used by plaintiff contained more aluminum than was ordinarily used in the formula. Recovery was sought on the ground that the defendant was negligent in placing a dangerous product on the market without any warning of its properties.

Held, judgment for plaintiff affirmed. The failure to label the product with a warning constituted negligence.

59. Kieffer v Blue Seal Chemical Co., 107 F. Supp. 288 (N.J., 1952)

On a motion for a new trial in 196 F. (2d) 614 supra, the court held that a jury verdict of \$250,000 against the manufacturer was not excessive under the particular circumstances of the case. The court noted that the plaintiff suffered: (a) a total loss of earning capacity, (b) great mental and physical pain, and (c) grotesque disfigurement. The plaintiff was a 36 year old plumber with five dependents.

60. Saporito v Purex Corp., 243 P. (2d) 910 (Cal., 1952)

Action against manufacturer to recover for personal injury sustained by plaintiff as a result of using a bottle of cleaning fluid manufactured by defendant. The fluid was a solution of sodium hypochlorite. The injury occurred when the bottle exploded while being opened by plaintiff. Recovery was sought on the ground of negligence. From a judgment for plaintiff, defendant appealed on the bases that the evidence was insufficient to invoke the doctrine of res ipsa loquitur and that, without the application of that doctrine, the evidence was insufficient to support a finding of negligence.

Held, affirmed. The doctrine of res ipsa loquitur was properly applicable although the accident occurred after the defendant had relinquished control of the instrumentality causing the injury since there was sufficient proof that the condition of the instrumentality had not been changed after it left the defendant's possession.

61. B. M. Heede, Inc. v Roberts, 103 N.E. (2d) 419 (N.Y., 1952)

Action against manufacturers to recover for economic loss sustained by plaintiff arising out of the purchase of a quantity of dibutyl phthalate from the defendants. Plaintiff contended that the material delivered under the contract between the parties did not meet the commercial standard. The decisive issue at the trial was whether the material conformed to the contract specification reading: "Material: Dibutyl Phthalate...Specification: Offtest - Pale Yellow, as per sample." The trial court excluded expert testimony by the defendants that this specification had an accepted trade meaning. Judgment was awarded to plaintiff, and defendants appealed on the ground that the exclusion of this evidence was prejudicial error.

Held, reversed. The exclusion of evidence explanatory of a contract specifications clause which bears an accepted trade interpretation is error.

80. Opinion adopted in companion case, Crochet v DeLuca, 53 S. (2d) 203 (La., 1951)

62. Black v Bennett, 55 N.W. (2d) 795 (Mich., 1952)

Action against a manufacturer to recover for personal injury to plaintiff as a result of using an embalming fluid manufactured by defendant. The fluid contained carbolic acid. The injury occurred while plaintiff, an embalmer, was in the process of embalming a human body when a hose connection of the equipment used slipped off causing the fluid to spray into plaintiff's face. Recovery was sought on the ground that the defendant was negligent in furnishing him unusually potent fluid without informing him of its chemical composition. The court held that plaintiff was guilty of contributory negligence as a matter of law in using the equipment with full knowledge of the risk involved.

Held, affirmed.

Section 6. Product Liability Decisions Involving Miscellaneous Products
(including Contaminated Food, Explosives, Seeds, and Other Articles of a Non-Chemical Nature)⁸¹

1. Swain v Schieffelin, 12 N.Y.S. 155 (1890)

Action to recover damages arising from the sale of a food substance by the defendant ingredient-supplier to the plaintiff, an ice cream manufacturer. Plaintiff used a compound called "carlat red", for imparting color to his ice cream, purchased by him for that purpose from defendant. Plaintiff's customers who used the cream became sick and manifested symptoms of arsenical poisoning. Plaintiff suffered a loss of business because of this, and was compelled to destroy the ice cream colored with the substance. The evidence showed that the "carlat red" contained a small proportion of arsenic, and that only those persons who ate cream with which it had been mingled were made sick. Experts testified that the quantity of arsenic in the portion sold to plaintiff was too small to produce injurious results and that the sickness was to be attributed to other poisonous substances in the milk used.

Held, that a verdict for plaintiff should not be set aside as unsupported by evidence.

2. Swain v Schieffelin, 31 N.E. 1025 (N.Y., 1892)

On appeal from Swain v Schieffelin, *supra*, the question was confined to the proper measure of damages. The court, in affirming judgment for plaintiff, held that plaintiff was entitled to recover the value of the ice cream destroyed and the damage occasioned by the loss of customers caused by the sale of the poisonous cream.

3. Marsh v Usk Hardware Co., 132 Pac. 241 (Wash., 1913)

Action to recover damages for personal injuries sustained by plaintiff as a result of a premature explosion of a charge of blasting powder. The explosion occurred while plaintiff was loading it into a drill hole in a manner which he was led by representations made by the defendants to believe to be safe. The representations with special claims of safety were publicized through trade circulars by the defendant manufacturer and made orally by the defendant dealer at the time of sale to plaintiff. The jury returned a verdict of \$20,000 in favor of plaintiff and both defendants appealed.

Held, affirmed. One who sells to a dealer an explosive with an affirmative representation or guaranty as to its safety is responsible to any person injured thereby without fault on his part, independent of any contractual relation between the parties. The dealer was liable on the same principle, knowledge of the falsity of the representation being imputed.

4. Newell v Reid, 155 N.W. 352 (Mich., 1915)

Action to recover damages for the death of two of plaintiff's cows alleged to have been caused by eating bran purchased from defendants (dealers) which contained arsenic. From a verdict and judgment for plaintiff, defendants appealed on the ground that there was insufficient evidence that the cows died from arsenic poisoning. The evidence tended to prove that both cows were fed bran from a package purchased from defendants and both died, exhibiting symptoms of arsenical poisoning. The remainder of the contents of the package was screened and a portion of the material was submitted to a chemist, who found upon an analysis that it contained arsenic.

Held, affirmed. There was sufficient evidence to support the finding of the jury.

5. Manglesdorf Seed Co. v Busby, 247 Pac. 410 (Okla., 1926)⁸²

Action to recover damages for breach of warranty in the sale of a quantity of seeds by the defendant dealer to the plaintiff. The seeds sold were different from the kind ordered. At the trial, the court refused to admit in evidence a portion of the invoice of the sale reading ".....we give no warranty, either expressed or implied, nor will we be responsible for the crop."

Held, judgment for plaintiff reversed. The court erred as a matter of law in excluding the evidence of disclaimer offered by defendant upon the issue of implied warranty.

6. Davis Co. v Bertrand Seed Co., 271 Pac. 123 (Cal., 1928)

Action to recover damages for breach of warranty against the seller of garden seeds on the ground that the seed was not of the variety ordered. Both parties were wholesale dealers in seeds. After a verdict for plaintiff, defendant appealed on the ground that the contract of sale between the parties contained a disclaimer reading: "....we give no warranty, expressed or implied, as to description, quality, productiveness, or any other matter of any seeds we send out, and we will be in no way responsible for the crop."

Held, judgment for plaintiff reversed. The disclaimer in the sales contract precluded any warranty, express or implied, as to the description of the seed.

7. Pine Grove Poultry Farm v Newtown By-Products Mfg. Co., 162 (N.E. 84 (N.Y., 1928)

Action to recover damages for the death of plaintiff's poultry caused by adulterated poultry feed manufactured by defendant and sold to plaintiff through a retail dealer. The feed contained five particles of steel wire.

81. These decisions are included in this Manual for the purpose of supplementing the decisions relating to products of a chemical nature and are not intended to be exhaustive of the cases in this field. The decisions relating to seeds, for example, are illustrative of the effect of disclaimers in sales and the principles of law therein would be equally applicable to the sales of pesticides or fertilizers. In the digested decisions relating to food contaminated with arsenic or other matter may be found the principles which would be analogically applicable to food containing pesticidal residues or to adulterated chemicals in general.

82. Followed and opinion adopted in Manglesdorf Seed Co. v Williams, 247 Pac. 413 (Okla., 1926)

Plaintiff sued on the theory that defendant had violated the statute prohibiting the sale of any concentrated commercial feeding stuffs containing any substances injurious to the health of animals. Defendant defended on the ground that privity of contract was essential.

Held, judgment for defendant reversed. The violation of the statute was negligence per se and privity between the manufacturer and purchaser was not required.

8. Gray v. Gurney Seed & Nursery Co., 231 N.W. 940 (S.D., 1930)

Action to recover damages for breach of warranty in the sale of corn seeds by the defendant dealer to the plaintiff. Recovery was sought on the ground that defendant had mailed plaintiff a catalogue which described the seed corn as follows: "This corn matures well to the northern part of South Dakota, and can be grown in the same district as Minnesota 13, but will outyield it.....We claim that it will outyield any variety that will mature in the same time on the same ground." Plaintiff contended that this representation was false.

Held, no cause of action was stated. (1) Under the uniform sales act, defendant expressly warranted (a) that the corn matured well to the northern part of South Dakota; (b) that it can be grown in the same district as Minnesota 13; (c) that it will outyield Minnesota 13. The claim that it would outyield any variety that would mature in the same time on the same ground purports to be a statement of the seller's opinion only and does not constitute a warranty. (2) However, the complaint failed to allege when the corn was planted, or that it was planted on plaintiff's farm, or that the place where it was planted was south of the north line of the latitude in which the corn was allegedly warranted to mature, nor was there any direct allegation that the seed purchased from defendant was the same corn as that which was described as warranted.

9. Schfranek v. Benjamin Moore & Co., 54 F. (2d) 76 (N.Y., 1931)

Action to recover damages for personal injuries sustained by plaintiff while using a powdered ceiling decoration product manufactured by defendant under the trade name "Muresco." The purchase was made from a retail dealer. Plaintiff alleged that he was stirring the powder with his finger when his finger was cut by some glass which was intermixed with the powder.

Held, complaint dismissed. The product was not dangerous per se and did not have to be used in the way in which the alleged defect would probably cause injury. Under such circumstances, an ultimate user who purchases from a retail dealer has no right of action against a manufacturer.

10. Larson v. Farmers' Warehouse Co., 297 Pac. 753 (Wash., 1931)

Action to recover damages for breach of warranty in the sale of hay by the defendant dealer to the plaintiff. The hay contained lead arsenate and caused the loss of three of plaintiff's cows.

Held, judgment for plaintiff affirmed. Under the uniform sales act, the defendant was liable on an implied warranty that the hay sold to plaintiff was not only of the kind and quality ordered but was generally free from deleterious substances, poisonous to stock.

11. Lumbrazo v. Woodruff, 175 N.E. 525 (N.Y., 1931)

Action by a farmer to recover damages for breach of warranty by a dealer in seeds. The defendant sold to plaintiff a quantity of Japanese onion sets which proved unproductive. Plaintiff sued on the theory that the seeds were of an inferior grade or quality. The sales contract contained a disclaimer of warranty clause reading: "We give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds set out, and will be in no way responsible for the crop."

Held, judgment for plaintiff reversed. The disclaimer was effective under the uniform sales law. The court stated:

"Neither party was obligated to enter into this contract, and there is no public policy which prevents adult persons of sound mind making such agreements as they please, not prohibited by statute, or contrary to natural justice and good morals."

12. Phillips v. Sharp, 185 N.E. 562 (Ohio, 1932)

Action to recover damages for breach of warranty in the sale of seeds by the defendant dealer to the plaintiff. Plaintiff contended that defendant expressly represented at the time of sale that the seed purchased was of a specified type, whereas it was not. Defendant denied the warranty and relied upon a disclaimer upon the paper bag containing the seed that "we sell no seeds, with warranty, express or implied, in any respect and will not be in any way responsible for the crop."

Held, judgment for plaintiff reversed, since the damages allowed were excessive. Under the evidence, the weather was adverse during the season when the seed was planted and therefore damages should have been adjusted accordingly. There was, however, sufficient evidence of an express warranty of description under the uniform sales law and the written disclaimer and the custom of non-warranty in the seed industry could not prevail against this.

13. Rocky Mountain Seed Co. v. Knorr, 20 P. (2d) 304 (Colo., 1933)

Action to recover the purchase price of a quantity of alfalfa seed sold by the plaintiff dealer to the defendant. Defendant counterclaimed on the ground that the seed furnished was sweet clover instead of alfalfa. The jury returned a verdict for defendant on his claim. Plaintiff appealed on the ground that on all invoices, tags, and labels accompanying the sale, the following disclaimer appeared: "We give no warranty, express or implied, as to description, quality, productiveness or any other matter of any seeds, bulbs or plants we send out, and will not be in any way responsible for the crop."

Held, judgment for defendant affirmed. The disclaimer was not applicable since defendant's cause of action was grounded not on breach of warranty but for breach of contract to deliver what was purchased.

14. Smith v. S. S. Kresge Co., 79 F. (2d) 361 (Mo., 1935)

Action to recover damages for personal injuries sustained by plaintiff as a result of the ignition and explosion of water waving combs purchased from defendant. The combs were composed of camphor, nitrocellulose, and

a filler of casein. Recovery was sought on the ground that defendant was negligent in failing to warn the plaintiff of the inherently dangerous character of the celluloid combs when used in the ordinary and customary manner in proximity to heat.

Held, judgment for defendant affirmed. The rule applicable to the retailer of an article inherently dangerous to the life, limb, and health of the user thereof, is that he must know the dangerous character of the article before he can be liable for actionable negligence. Nothing in the record showed that the defendant knew, or by the exercise of ordinary care could have known that the combs were made from inflammable material and were dangerous. (See also, Farley v Edward E. Tower & Co., 171 N.E. 639, supra.)

15. Binion v Sasaki, 41 P. (2d) 585 (Cal., 1935)

Action for damages for negligence in selling vegetables impregnated with arsenic and upon an alleged warranty that they were fit for human consumption. Plaintiff's husband purchased the vegetables from the defendants; his wife, the plaintiff, ate them and became ill.

Held, judgment for defendants affirmed. There was no evidence of negligence and the warranty, if any, went to the purchaser only.

16. Sierocinski v E. I. DuPont de Nemours & Co., 25 F. Supp. 706 (Pa., 1938)

Action to recover damages for personal injuries to plaintiff caused by the premature explosion of a dynamite cap manufactured by defendant. The sole allegation of negligence in the complaint read: "the said explosion and the injuries to the plaintiff resulting therefrom, were caused solely by the carelessness and negligence of the defendant in manufacturing and distributing a dynamite cap which, when handled in the usual and proper manner, exploded."

Held, plaintiff did not make a sufficient statement of claim against the manufacturer. Negligence is not to be imputed to a defendant merely from the fact of an explosion of gunpowder or dynamite manufactured by him. *Res ipsa loquitur* was inapplicable.

17. Treacy v F. W. Woolworth Co., 1 N.Y.S. (2d) 919 (1938)

Action to recover damages for personal injuries sustained by plaintiff when certain celluloid water-waving combs caught fire or exploded in her hair as she was in the process of drying it with an electric lamp. Recovery was sought on the joint theory of implied warranty and negligence. The court charged the jury that there was no duty on the part of defendant dealer to inspect the combs and no liability if inflammable combs crept into a shipment and were placed on sale without his knowledge.

Held, judgment for defendant reversed (memorandum opinion).

18. Rasmussen v Benson, 280 N.W. 890 (Neb., 1938)

Action to recover damages for personal injuries and property damage arising from the sale of a sack of bran poisoned with arsenic. Defendant had held a farm sale and sold a portion of a sack of the poisoned bran to plaintiff's intestate. This sack was not labeled "poison" and plaintiff's intestate fed the bran to his dairy cows and other live stock. As a result, five of his ten cows died and five were so poisoned as to be rendered unfit for further dairy purposes. A hog and some chickens also died. As a result of the mental shock caused by the poisoning of his live stock, the subsequent loss of his dairy business, and the fear of communicating the poison to his dairy customers, plaintiff's intestate became fatally ill and died. A verdict for \$3,500 in favor of plaintiff was returned, and defendant appealed on the basis that even if the recovery for property damage were correct, it was error to permit recovery for the sickness and death of plaintiff's intestate.

Held, affirmed. The personal damages as well as the property damages were foreseeable consequences of defendant's negligence. (Two justices dissented on the grounds that the personal injuries sustained were not foreseeable, and that the defendant owed the deceased no legal duty as to his physical safety that was breached by his negligent act.)

19. Noone v Fred Perlberg, Inc., 49 N.Y.S. (2d) 460 (1944), affirmed without opinion, 60 N.E. (2d) 839 (N.Y., 1945)

Action against defendant manufacturer to recover damages for personal injuries sustained by plaintiff when the skirt of her net evening gown, which had been treated with nitrocellulose, ignited and enveloped her in flames. The dress was purchased by plaintiff from a retailer. The jury returned a verdict in the plaintiff's favor, on the ground that the treatment of the netting with nitrocellulose rendered it inherently dangerous for its intended use.

Held, affirmed. The court stated:

"The rule in this State is now settled that when a manufacturer sells an inherently dangerous article for use in its existing state, the danger not being known to the purchaser and not patent, and notice is not given of the danger or it cannot be discovered by reasonable inspection, the manufacturer is legally liable for personal injuries received by one who used the manufactured article in the ordinary and expected manner." (citing cases and Restatement, Torts, sec. 395 et seq.)

20. Dempsey v Virginia Dare Stores, 186 S.W. (2d) 217 (Mo., 1945)

Action to recover damages for personal injuries sustained by plaintiff when a fuzzy lounging robe, purchased from defendants, caught fire. The robe was composed of viscose rayon, a highly inflammable material. Recovery was sought on the ground that defendants failed to warn plaintiff of the inflammable nature of the robe.

Held, judgment for defendants affirmed. Since persons of ordinary intelligence would know of the inflammable quality inherent in the robe, plaintiff must also have known and, therefore, defendants had no duty to warn.⁸³

83. The court distinguished Noone v Fred Perlberg, Inc., supra, on the ground that the rayon involved in that case was nitro-cellulose which is very highly inflammable.

21. Henderson v Berce, 50 A. (2d) 45 (Me., 1946)

Action to recover damages for breach of warranty in the sale of seed potatoes by defendant to the plaintiff. It was conceded that there was a varietal mixture in the seed sold. Defendant contended that the seed met the requirements of the applicable seed law and was inspected and certified by officials of the state department of agriculture.

Held, judgment for plaintiff. (1) The statute, although complied with, did not alter the normal rights for breach of warranty. Under the uniform sales act, where there is a sale of goods by description, there is an implied warranty that the goods shall correspond with the description. (2) The ordinary rule of damages applying to a warranty of personal property is the difference between the actual value of the articles sold and their value if they had been such as warranted.

22. Campo v Scofield, 95 N.Y.S. (2d) 610 (1950)

Action to recover damages for personal injuries sustained by plaintiff as a result of operating an onion topping machine manufactured by defendants. Recovery was sought on the joint theory of implied warranty and negligence on the ground that the machine was negligently designed and manufactured and was in a defective and imminently dangerous condition. The trial court overruled defendant's motion to dismiss the complaint and defendant appealed.

Held, reversed. No cause of action was shown on the theory of implied warranty since there was no privity of contract between the plaintiff and the defendant; no cause of action was shown in negligence since any defects in the machine of the type alleged to exist must have been obvious and patent to plaintiff.

23. Eades v Spencer-Adams Paint Co., 60 S.E. (2d) 543 (Ga., 1950)

Action to recover for pecuniary loss sustained by plaintiff as the result of using defective paint manufactured by defendant. The paint was purchased from a retail dealer. Plaintiff alleged that defendant was negligent in selling the paint as meeting federal specifications when it did not, causing plaintiff's work on a government building to be cancelled by the federal inspector. Damages were requested in the amount of \$1,090.35 including wages, personal labor, the purchase price of the paint and other incidental expenses. Defendant demurred on the ground of lack of privity.

Held, a good cause of action was shown. The trend of the cases in Georgia is to allow recovery on the part of a consumer or user of a product, if through failure to exercise ordinary care on the part of a manufacturer or some one not in privity with the user the product is imperfect, defective, or not as represented when placed on the market, and damage to the consumer or user is proximately caused thereby.

24. Green v Equitable Powder Mfg. Co., 94 F. Supp. 126 (Ark., 1950)

Action to recover damages for personal injuries sustained by plaintiff as the result of a delayed explosion of dynamite. Plaintiff was engaged in blasting power line post holes and was using dynamite caps purchased by his employer from the defendant, which caps were designed to be detonated by electricity. Plaintiff sued for breach of the warranty of fitness of purpose and merchantability and for negligence. It was alleged that defendant impliedly warranted that the detonation caps would explode and detonate the dynamite instantaneously whereas the caps actually detonated the dynamite in a delayed manner. It was alleged in support of the negligence theory that defendant was negligent in delivering delayed action caps to plaintiff's employer instead of instantaneous caps with knowledge that such caps when used as intended might result in personal injuries.

Held, defendant's motion to dismiss as to the cause of action based upon the alleged breach of warranty sustained; the motion to dismiss as to the cause of action based upon negligence overruled. The court stated:

"The law of Arkansas is that the ultimate consumer, who buys from an intermediate retailer and not directly from the manufacturer, cannot recover from the manufacturer in an action based upon breach of warranty, but only upon proof of negligence....the Arkansas law on this point remains unaffected by the Sales Act."

25. Green v Equitable Powder Mfg. Co., 95 F. Supp. 127 (Ark., 1951)

After the action reported in 94 F. Supp. 126, supra, plaintiff filed an amended complaint seeking to impose the liability of a manufacturer as well as that of a mere dealer upon the defendant on the ground that the defendant and the actual manufacturer were so closely associated as to constitute in law one company. Defendant motioned to dismiss.

Held, motion overruled (except insofar as any allegations of liability due to breach of warranty were concerned). (1) The "inherently dangerous" exception resorted to in negligence cases does not modify the requirement of privity of contract to maintain a suit on warranty and therefore the conclusions reached in 94 F. Supp. 126 on this question are affirmed.⁸⁴ (2) When the manufacturer and seller are in truth one organization, a plaintiff has the right to proceed against the defendant as both seller and manufacturer.

26. McAleavy v Lowe, 49 N.W. (2d) 487 (Wis., 1951)

Action to recover damages suffered by plaintiff in feeding to his herd of pigs screenings sold by the defendant feed dealer and procured by the dealer from the defendant distributor. A postmortem of a lot of the pigs disclosed quantities of mercury in all the tissues. A sample of the screenings taken from plaintiff's farm contained 1.47 milligrams of mercury per 100 grams, which under the evidence was a toxic level of mercury sufficient to have a deleterious effect on animal life. The evidence was completely silent as to how this mercury got into the screenings. Plaintiff sought recovery on the ground that the defendants had violated the provisions of the livestock feed law which prohibited under criminal penalties the sale of any feeds mixed or adulterated with any substance injurious to the health of livestock.

Held, judgment for plaintiff affirmed. The violation of the statute in question constituted negligence per se and rendered both defendants liable although they were not shown to have been responsible for the presence of the mercury in the screenings and did not have any knowledge of its presence.

84. The court disapproved the rule in principle but was bound by the prevailing state law.

27. Marosi v J. W. Robinson Co., 238 P. (2d) 78 (Cal., 1951)

Action to recover for personal injuries sustained by plaintiff while preparing to fill a rose sprayer with an insecticide solution. The injury occurred when the plaintiff turned the handle of the plunger on the sprayer to release the air pressure and then removed the plunger from inside the brass cylinder within the tank. The cylinder exploded from the tank and struck him. Recovery was sought against the manufacturer of the sprayer and the company which sold it to plaintiff's aunt on the ground that the tank was negligently designed. Expert testimony on both sides was in conflict as to the design. At the close of plaintiff's evidence the trial court granted a nonsuit as to the defendant who sold the sprayer. At the close of the trial the jury returned a verdict for \$11,721 against the manufacturer, which was set aside by the court on the ground that the evidence was insufficient to justify the verdict. From an order granting a new trial, plaintiff appealed.

Held, affirmed. The order granting the new trial was not an abuse of discretion and therefore should not be disturbed.

28. Ringstad v I. Magnin & Co., 239 P. (2d) 848 (Wash., 1952)

Action against a retailer for injuries sustained by plaintiff when a summer cocktail robe purchased from defendant allegedly burst into a sheet of flame when the robe came into casual contact with the burner of an electric stove while the plaintiff was preparing food in her kitchen. Recovery was sought on the ground of negligence in failing to test the material used in the manufacture of the fabric for resistance to heat and in failing to warn of the inherent danger of explosive ignition and on the ground of a breach of an implied warranty of fitness. The trial court sustained a demurrer to the complaint and plaintiff appealed.

Held, reversed.

(1) In the absence of any allegation that defendant as the vendor of a chattel manufactured by a third person knew or had reason to know that the garment sold was likely to be dangerous, no cause of action in negligence was stated. However, a cause of action in warranty was stated.

(2) Although one cannot recover in warranty for damage caused by improper use of the article warranted, the propriety of the use in question presented a question of fact for the jury.

(3) The sufficiency of the notice of the breach given by defendant four months after the occurrence presented a question of fact for the jury.

29. Mauro v Great A & P Tea Co., C.C.H. 22, 276 (N.Y., 1952)

Action against dealer to recover for personal injury sustained by plaintiff as the result of the flaming up of an orange food extract purchased from the defendant. The flaming up occurred when plaintiff poured some of the extract into a spoon over a pot on a stove and a portion dribbled down the side of the pot into contact with the flame on the stove. Plaintiff contended that defendant was negligent in failing to label the product "inflammable." The product was labeled "90% alcohol."

Held, judgment for defendant. The labeling of the product with the statement "90% alcohol" was adequate notice and warning of its contents and the quality of its contents.

30. Park v Moorman Mfg. Co., 241 P. (2d) 914 (Utah, 1952)

Action against manufacturer to recover for the loss of poultry arising out of the sale of a poultry feed concentrate by the defendant to the plaintiff, a poultryman. At the time of sale, defendant's salesman stated that the feed had been used before and had never given less than a 65% egg yield and that it would produce similar results for plaintiff. The use of the feed actually caused a loss of poultry and egg production. Recovery was sought for breach of warranty. From a jury verdict for plaintiff, defendant appealed on the grounds that no express warranty was made by the salesman, that the salesman had no authority to make the warranty, and that the measure of damages was incorrectly applied.

Held, affirmed. On the question of the warranty the court stated that the salesman's representation of productivity constituted an express warranty which was binding on the manufacturer. (See the opinion for an extended factual discussion of the issue on damages.)

31. Cohan v Associated Fur Farms, 53 N.W. (2d) 789 (Wisc., 1952)

Action by a mink breeder against a food processor and a mink feed dealer to recover for the loss of mink allegedly caused by the consumption of contaminated pork livers. The food processor sold the livers to the feed dealer as an ingredient for use in feeding his own mink and for resale to other breeders. The dealer mixed the livers with other substances and sold a quantity of the final feed product to the plaintiff. The feed used by the dealer for his own purposes resulted in the loss of a number of mink and he recovered for this in a breach of warranty action against the processor. The feed used by the plaintiff allegedly caused a similar loss and plaintiff then brought suit against the dealer for breach of warranty. The dealer impleaded the processor as the one primarily liable and the plaintiff amended his complaint seeking recovery against both the dealer and the processor. The processor demurred to the complaint as to the plaintiff on the ground that privity of contract was lacking and moved for summary judgment against the dealer on the ground that the prior action between the parties was res judicata. The dealer moved for summary judgment against the plaintiff on the ground that two years had elapsed before notice of the breach of warranty was given. The court dismissed plaintiff's complaint against the processor; granted the processor's motion for summary judgment against the dealer, and, denied the dealer's motion for summary judgment against the plaintiff.

Held, (1) The judgment dismissing plaintiff's complaint against the processor is reversed with leave to amend. No cause of action for breach of warranty was stated against the processor since privity was lacking. However, leave should be granted to amend the complaint to state a cause of action in negligence.

(2) The summary judgment for the processor against the dealer is affirmed. The judgment obtained in the prior action by the dealer for the loss of his own mink was res judicata since damages for the loss of his customers' mink could have been included in the same action.

(3) The order denying the dealer's motion for summary judgment against the plaintiff is affirmed. Numerous questions of fact were involved.

32. Postell v Boykin Tool & Supply Co., 71 S.E. (2d) 783 (Ga., 1952)

Action against a paint dealer to recover for economic loss sustained by plaintiff arising out of the use of paint purchased from the defendant. The paint when applied failed to adhere to walls and in consequence the plaintiff had to expend further sums to remove it in order to apply new paint. Recovery was based upon an alleged warranty made by defendant at the time of sale, in recommending the product on the basis of the manufacturer's representations and his experience with it, that he would "stand behind it."

Held, judgment for plaintiff. The statement made by the defendant at the sale constituted an express warranty.

33. Blissenbach v Yanko, 107 N.E. (2d) 409 (Ohio, 1951)

Action against a druggist and a vaporizer manufacturer to recover for personal injury sustained by plaintiff's infant daughter. The injury occurred when the vaporizer upset, while being used in the treatment of the child, and the contents spilled upon the child's arms and body. Plaintiff charged the manufacturer with negligently manufacturing and marketing a vaporizer with a loose and easily removable lid which would come off if and when the vaporizer was overturned. The druggist was charged with negligently failing to warn the plaintiff of the removable lid.

Held, judgment for both defendants. The negligence of the plaintiff in the use of the vaporizer was the sole proximate cause of the injuries suffered by her child.

34. Dincher v Marlin Firearms Co., 198 F. (2d) 82 (Conn., 1952)

Action against a rifle manufacturer to recover for personal injuries sustained by a child when the rifle back-fired while being used. The cause of the injury was alleged to have been the negligence of the manufacturer in making the rifle with too much headspace between the face of the bolt and the rear space of the barrel. The rifle was placed on the market in 1946, purchased by plaintiff's cousin from a retailer in 1949, and the injury occurred in 1950. Action in the courts was brought in 1951. From the granting of a summary judgment in favor of defendant on the ground that the action was barred by the one year statute of limitations governing negligence cases, the plaintiff appealed on the grounds (a) the statute did not begin to run until the date of the injury, and (b) the six-year statute governing contract actions was applicable.

Held, affirmed. (1) Since the statute of limitations related to "the date of the act or omission complained of," the statute commenced to run when the manufacturer placed the product on the market and not when the injury occurred. (2) The statute governing contract actions was not applicable since there was no privity of contract between the manufacturer and the injured party.

35. Willey v Fyrocas Co., 251 S.W. (2d) 635 (Mo., 1952)

Action to recover damages for the death of plaintiff's husband as a result of an explosion of propane gas. Recovery was sought on the ground that an automatic safety valve on a hot water heater was negligently constructed and this caused propane gas to escape and explode. Joined as defendants were the manufacturer of the heater, the manufacturer of the safety valve, the wholesaler, and the retail dealer who sold and installed the heater in the home of the injured parties. The evidence showed that the dealer customarily tested each heater at the time of installation and this was urged by the manufacturers as a basis for relieving them of liability.

Held, under proper instructions each of the defendants, with the exception of the wholesaler, could be properly held liable (disposition made on a point of erroneous instructions). The wholesaler was not liable since he neither knew nor had reason to know that the heater was defective and therefore imminently dangerous when put to the use for which it was intended. On the question of testing, the court said:

"The retailer's duty to test or his negligence in making tests certainly does not discharge the manufacturer's duty to also test and inspect and is not a defense to the manufacturer's negligence in constructing the article or in failing to properly test and inspect it."

TABLE OF CASES ARRANGED UNDER THE
SPECIFIC CHEMICALS AND CHEMICAL PRODUCTS INVOLVED

The following table arranges the chemical-products liability decisions annotated and digested in this Manual under the specific chemicals and chemical products which were involved in each case. Wherever possible, the decisions have been listed under the name of the specific chemical involved as well as the common name of the chemical product, and, in some instances, under the class of products to which the specific chemical or chemical product belongs. Chemicals or products which are listed under a class designation are underscored.

ACETANILIDE

Knoefel v Adkins, 81 N.E. 600 (Ind., 1907)

ALCOHOL, WOOD

(See "Wood Alcohol")

ALMOND, OIL

(See "Oil of Bitter Almonds")

ALPHANAPHTHYLISTHIO CYANATE

Orr v Shell Oil Co., 177 S.W. (2d) 608 (Mo., 1943)

AMMONIA (AQUA)

Kapp v E. I. DuPont de Nemours & Co., 57 F. Supp. 32 (Mich., 1944)

ANILINE DYE

Bianchi v Denholm & McKay Co., 19 N.E. (2d) 697 (Mass., 1939)

Elizabeth Arden, Inc. v Brown, 107 F. (2d) 938 (Pa., 1939)

Zirpola v Adam Hat Stores, Inc., 4 A. (2d) 73 (N.J., 1939)

ANIMAL FEED

Newell v Reid, 155 N.W. 352 (Mich., 1915)

Pine Grove Poultry Farm v Newtown By-Products Mfg. Co., 162 N.E. 84 (N.Y., 1928)

Blanchard v Kronick, 169 N.E. 438 (Mass., 1929)

Rasmussen v Benson, 280 N.W. 890 (Neb., 1938)

Brown v Bigelow, 88 N.E. (2d) 542 (Mass., 1949)

McAleavy v Lowe, 49 N.W. (2d) 487 (Wis., 1951)

ARSENIC

Swain v Schieffelin, 12 N.Y.S. 155 (1890)

Newell v Reid, 155 N.W. 352 (Mich., 1915)

Midland Valley R. Co. v Rippe, 161 Pac. 233 (Okla., 1916)

Missouri, K & I Ry. Co. v Rose, 160 Pac. 734 (Okla., 1916)

Heinemann v Barfield, 207 S.W. 58 (Ark., 1918)

Tucker v Graves, 88 So. 40 (Ala., 1920)

Brady v Sutter Butte Canal Co., 278 Pac. 505 (Cal., 1929)

Moogres v Runsey, 36 P. (2d) 15 (Okla., 1934)

Binion v Sasaki, 41 P. (2d) 585 (Cal., 1935)

Rasmussen v Benson, 280 N.W. 890 (Neb., 1938)

Hammond Ranch Corp. v Dodson, 136 S.W. (2d) 484 (Ark., 1940)

(See also, "Calcium Arsenate," "Calcium Arsenic," "Lead Arsenate")

ARSENIC TRIOXIDE

Lenk v Spezia, 213 P. (2d) 47 (Cal., 1949)

Doe v Saracyn Corp., 82 A. (2d) 811 (Conn., 1951)

ASPHALT

Standard Oil Co. v Lyons, 130 F. (2d) 965 (Iowa, 1942)

ATROPINE

Boeck v Katz Drug Co., 127 P. (2d) 506 (Ka., 1942)

BELLADONNA

Thomas v Winchester, 6 N.Y. 397 (1852)

Smith v Hays, 23 Ill. App. 244 (1887)

BENZINE

Wolcho v Arthur J. Rosenbluth & Co., 71 Atl. 566 (Conn., 1908)

Thornhill v Carpenter-Morton Co., 108 N.E. 474 (Mass., 1915)

Genesee County Patrons Fire Relief Ass'n. v L. Sonneborn, 189 N.E. 551 (N.Y., 1934)

Richman v Follman, 23 N.Y.S. (2d) 917 (1940) aff'd., 36 N.E. (2d) 908 (N.Y., 1941)

BENZOL

Ft. Wayne Drug Co. v. Flemion, 175 N.E. 670 (Ind., 1931)
Richardson v. De Luca, 53 S. (2d) 199 (La., 1951)
Crochet v. De Luca, 53 S. (2d) 203 (La., 1951)

BICARBONATE OF SODA

David v. McKesson & Robbins, Inc., 300 N.Y.S. 635 (1937)

BICHLORIDE OF MERCURY

Moran v. Dake Drug Co., 134 N.Y.S. 995 (1912)
Eckerd's, Inc. v. McGhee, 86 S.W. (2d) 570 (Tenn., 1935)
Marigny v. Dejoie, 172 So. 808 (La., 1937)

BLEACHING SOLUTIONS

Landers v. Safeway Stores, 139 P. (2d) 788 (Ore., 1943)

BLOOD PLASMA

Parker v. State, 105 N.Y.S. (2d) 735 (1951)

BLUE VITRIOL

Hawkins v. Pemberton, 51 N.Y. 198 (1872)

BORAX

Patterson v. Orangeburg Fertilizer Co., 108 S.E. 401 (S.C., 1921)
Hubbard Fertilizer Co. of Baltimore City v. American Trona Corp., 120 Atl. 522 (Md., 1923)

CALCIUM ARSENATE

Sherwin-Williams Co. of Texas v. Offenhauser, 42 S.W. (2d) 859 (Tex., 1931)
Miles v. A. Arena & Co., 73 P. (2d) 1260 (Cal., 1937)
Ballard & Ballard Co. v. Jones, 21 S. (2d) 327 (Ala., 1945)

CALCIUM SULPHIDE

Alcaro v. Jean Jordeau, Inc., 138 F. (2d) 767 (N.J., 1943)

CALOMEL

Willson v. Faxon, Williams & Faxon, 101 N.E. 799 (N.Y., 1913)
Corona Coal Co. v. Sexton, 105 So. 716 (Ala., 1925)

CALOMINE LOTION

Singer v. Oken, 87 N.Y.S. (2d) 686 (N.Y., 1949)

CAMPHOR SOLUTION

Hruska v. Parke, Davis & Co., 6 F. (2d) 536 (Mo., 1925)

CARBOLIC ACID

Trumbaturi v. Katz & Besthoff, 158 So. 16 (La., 1934)
Bennett Drug Stores v. Mosely, 20 S.E. (2d) 208 (Ga., 1942)

CARBOLINEUM

Kramer v. Carbolineum Wood Preserving Co., 177 Pac. 771 (Wash., 1919)
Yormack v. Farmers' Cooperative Ass'n of N.J., 78 A. (2d) 421 (N.J., 1951)

CARBON DISULPHIDE

Fitzgerald v. Brooklyn Institute of Arts and Sciences, 162 N.Y.S. 625 (1916)

CARBON TETRACHLORIDE

Boyd v. French Chemical Corp., 37 F. Supp. 306 (N.Y., 1941)
McClaren v. G. S. Robins & Co., 162 S.W. (2d) 856 (Mo., 1942)
Maize v. Atlantic Refining Co., 41 A. (2d) 850 (Pa., 1945)
DeVere v. Parten, 23 N.W. (2d) 584 (Minn., 1946)

CAUSTIC SODA

Kohlman v. Jefferson Bottling Co., 192 So. 113 (La., 1939)
Saganowich v. Hachikian, 35 A. (2d) 343 (Pa., 1944)
Blumetti v. Carman & Co., 81 N.Y.S. (2d) 748 (1948)
Pabellon v. Grace Line, Inc., 191 F. (2d) 169 (N.Y., 1951), reversing 94 F. Supp. 989 (N.Y., 1950)

CHLORINATED LIME

Hallenbeck v. S. S. Wander & Sons Chemical Co., 189 N.Y.S. 334 (N.Y., 1921)
(See also, "Lime")

CHLORINE

Litton v. Travelers Ins. Co., 88 F. Supp. 76 (La., 1950)

CHROME GREEN

Jones v. George, 61 Tex. 345 (1884)

CITRIC ACID

Edelstein v. Cook, 140 N.E. 765 (Ohio, 1923)

CLEANING COMPOUNDS

Reiss v. Kirkman & Son, 273 N.Y.S. 7 (1934)

Sawyer v. Pine Oil Sales Co., 155 F. (2d) 855 (La., 1946)

Pabellon v. Grace Line, Inc., 191 F. (2d) 169 (N.Y., 1951), reversing 94 F. Supp. 989 (N.Y., 1950)

CLEANING FLUIDS

Fredendall v. Abraham & Straus, Inc., 18 N.E. (2d) 11 (N.Y., 1938))

Richman v. Follman, 23 N.Y.S. (2d) 917 (1940) aff'd., 36 N.E. (2d) 908 (N.Y., 1941)

Maize v. Atlantic Refining Co., 41 A. (2d) 850 (Pa., 1945)

Alston v. J. L. Prescott Co., 76 A. (2d) 686 (N.J., 1950)

CLOTHING

Gerkin v. Brown & Sehler Co., 143 N.W. 48 (Mich., 1913)

Flynn v. Bedell Co., 136 N.E. 252 (Mass., 1922)

Bradt v. Hollaway, 136 N.E. 254 (Mass., 1922)

Zirpola v. Adam Hat Stores, Inc., 4 A. (2d) 73 (N.J., 1939)

Ross v. Porteous, Mitchell & Braun Co., 3 A. (2d) 650 (Me., 1939)

Barrett v. S. S. Kresge Co., 19 A. (2d) 502 (Pa., 1941)

Payne v. R. H. White Co., 49 N.E. (2d) 425 (Mass., 1943)

Noone v. Fred Perlberg, Inc., 49 N.Y.S. (2d) 460 (1944), aff'd. without opinion, 60 N.E. (2d) 839 (N.Y., 1945)

Dampsey v. Virginia Dare Stores, 186 S.W. (2d) 217 (Mo., 1945)

Longo v. Touraine Stores, 66 N.E. (2d) 792 (Mass., 1946)

Ringstad v. I. Magnin & Co., 239 P. (2d) 848 (Wash., 1952)

COD LIVER OIL

Leonard v. Carleton & Hovey Co., 119 N.E. 674 (Mass., 1918)

COLD CREAM

Graham v. Jordan Marsh Co., 67 N.E. (2d) 404 (Mass., 1946)

COLORING INGREDIENTS

Swain v. Schieffelin, 12 N.Y.S. 155 (1890)

COMBS

Farley v. Edward E. Tower & Co., 171 N.E. 639 (Mass., 1930)

Smith v. S. S. Kresge Co., 79 F. (2d) 361 (Mo., 1935)

Treacy v. F. W. Woolworth Co., 1 N.Y.S. (2d) 919 (1938)

COPPERAS

Kennedy v. Plank, 97 N.W. 895 (Wis., 1904)

COSMETICS

(See cases cited in Section 4 of Part II)

CRESOL

Smith v. Payne, 206 Pac. 715 (Utah, 1922)

CROTON OIL

Hansford's Adm'x. v. Payne & Co., 74 Ky. 380 (1875)

CRYOLITE

Jeapes v. Holtz, 211 P. (2d) 925 (Cal., 1949)

CYANAMID

North American Fertilizer Co. v. Combs, 212 S.W. (2d) 526 (Ky., 1948)

CYANIDE GAS

Harder v. Maloney, 26 N.W. (2d) 830 (Wis., 1947)

2,4 - DICHLOROPHENOXYACETIC ACID

Burns v. Vaughn, 222 S.W. (2d) 365 (Ark., 1949)

Chapman Chemical Co. v. Taylor, 222 S.W. (2d) 820 (Ark., 1949)

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