appendices not included

IN THE COMMON PLEAS COURT OF STARK COUNTY, OHIO

FRANKLIN HUMPHREY, et al	:	
	:	
Plaintiffs	:	
	:	CASE NO. 114693
vs.	:	
	:	(Judge Young)
MICHIGAN SILO CO. and	:	
	:	
MONSANTO COMPANY	:	
	:	
Defendants	:	

TRIAL BRIEF OF MONSANTO COMPANY

Harry W. Schmuck
First National Bank Building
Canton, Ohio 44702
Attorney for Plaintiffs,
Franklin and Marilyn Humphrey

Black, McCuskey, Souers & Arbaugh,
and Dan M. Belden
1200 Harter Bank Building
Canton, Ohio 44702
Attorneys for Defendant,
Michigan Silo Company, Inc.

Jacob F. Hess, Jr., and
Amerman, Burt & Jones Co., L.P.A.
250 Peoples-Merchants Trust Bldg.
Canton, Ohio 44702
Attorneys for Defendant,
Monsanto Company

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STATEMENT OF THE CASE

Franklin and Marilyn Humphrey own and operate a dairy farm in Columbiana County with a herd ranging over the years to 99 head.

Michigan Silo Co., founded in 1909 and incorporated in 1916, manufactured, erected and repaired farm silos. Initially, production facilities were located in Charlotte, Michigan, White Marsh, Maryland, and Massillon, Ohio. Concrete Silo Co., with silo production facilities in Bloomfield, Indiana, and Monteagle, Tennessee, was later acquired by Michigan Silo Co. and was acquired and operated as a subsidiary of Michigan Silo Co. After acquisition of Concrete Silo Co., headquarters for the entire operation were in Bloomfield, Indiana.

In a corporate reorganization in 1966, the management of the Massillon plant was provided the opportunity to and did acquire the assets of the Massillon plant. At that time, the defendant in this action, Michigan Silo Company, Inc., was organized in Massillon with the Massillon plant assets as an Ohio corporation to manufacture, erect and repair farm silos.

The territory served by the Massillon plant of the Michigan Silo Co. and by the defendant, Michigan Silo Company,

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Inc., included all of Ohio, western Pennsylvania, and parts of New York, West Virginia and Maryland. Silos manufactured by the Massillon plant before and after the corporate reorganization were of the concrete stave type.

Among the many chemical products manufactured by Monsanto Company is a series called Aroclors. Some of these are polychlorinated biphenyls which have been manufactured, sold and used for various purposes since approximately 1930.

In 1951 Michigan Silo Co. constructed a 12 x 45 silo and in 1957 a 16 x 45 silo on the Humphrey farm. On construction, the interior of the 12 x 45 silo was coated with wax. When the 16 x 45 silo was constructed in 1957, Michigan Silo Co. coated the interior with a formulation which Michigan Silo Co. called "Cumar".

Michigan Silo Company, Inc., recoated the entire interior of the 16 x 45 silo with "Cumar" in the fall of 1967 and coated the entire interior of the 12 x 45 silo with "Cumar" in the spring of 1968.

The formula for "Cumar" was developed by J. Robert Spraul during the summer of 1941 at the request of Walter Brassert of Concrete Silo Company in Bloomfield, Indiana. Mr. Spraul was then a candidate for his Ph.D. degree in Chemistry at Indiana

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University and had just completed his Ph.D. thesis which reported work he had undertaken to find suitable coatings to be used on concrete stave silos. This work had been carried on under a fellowship granted by Concrete Silo Company.

The "Cumar" formula was developed by Mr. Spraul as a variation of the general systems which he had found to be best during his thesis work.

Mr. Brassert was an inventor in his own right and held several patents relating to silo construction and coatings.

The stated purpose of "Cumar" on new construction was to provide a sealant to retain the moisture in the joint mortar during the curing of the mortar and to protect the mortar from the silage to prevent the mortar from curing with silage acid. On reapplication, the stated purpose of "Cumar" was to protect the mortar from the silage acid. On recoating, "Cumar" was in 1966 and thereafter used over the entire interior surface rather than just on the mortar joints for cosmetic reasons to eliminate the patchwork effect when used just on the joints and for whatever protection it might provide for the entire surface.

"Cumar" had been used on the interiors of new construction and recoating of silo interiors at least since 1948 throughout the entire territory served by the old Michigan

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Silo Co. and was used by Michigan Silo Company, Inc., through the 1969 fall construction season. No "Cumar" was used by Michigan Silo Company, Inc., in 1970 or thereafter because of the matters with which this suit is concerned. Other interior coatings such as wax and epoxy have also been used by Michigan Silo Company, Inc., at various times.

The "Cumar" used by the Massillon plant of Michigan Silo Co. was at first mixed by Mr. Brassert in Indiana and shipped to the Massillon plant. In 1958 the personnel at the Massillon plant received the formula and mixing instructions from Mr. Brassert, and thereafter all "Cumar" was mixed locally.

"Cumar" consists of the following ingredients according to the formula used by Michigan Silo Company, Inc., on the Humphrey silos:

40 lb..... Paradene No. 2 dark flaked
40 lb..... R-16-A Neville resin flaked
20 lb..... Aroclor 5460
70 lb..... Aroclor 1254
20 lb..... Clay
25 lb..... Parlon
13 gal..... Xylol
5 gal..... S. C. Solvent - 100
8 gal..... S. C. Solvent - 3

Aroclor 1254 is a material containing a mixture of polychlorinated biphenyls. Aroclor 5460 is a polychlorinated terphenyl and is not involved in this action.

The Aroclor 1254 used by Michigan Silo Co. until 1962 was purchased from Monsanto Company. Thereafter, the Aroclor 1254

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used by Michigan Silo Co. and Michigan Silo Company, Inc., was purchased from Ohio Solvent & Chemical Company of Cleveland, which is a distributor of Monsanto products but has no corporate connection with Monsanto.

The Foods, Dairies and Drugs Division of the Ohio Department of Agriculture has since the mid-1960's conducted a routine monitoring program for the detection of chlorinated hydrocarbon pesticide residues in milk. As a part of this program, in January, 1970, an analysis of a bulk delivery of milk to Beverly Farms, Inc., of Alliance, Ohio, was made, and it was believed that DDT, a chlorinated hydrocarbon pesticide, was found. On January 13, 1970, individual samples from each of the 27 producers who had contributed to the bulk were analyzed. The Food, Dairies and Drugs Division (FDD) believed that it found 0.12 ppm (parts per million) in the Humphrey milk, which was one of the 27 individual samples analyzed. The results of this finding were reported on February 24, 1970, and on February 27, 1970, the following notice was served upon Mr. and Mrs. Humphrey:

> "Upon investigation made on the 27 day of February, 1970, by Glenn Diekman, an Inspector of the Department of Agriculture of Ohio, you were found to be in violation of Section 3717.31 Revised Code of Ohio, in the following particulars, to-wit: Milk produced and sold by you contained pesticide residue. You are hereby ordered to discontinue the sale of such milk until laboratory examinations reveal that this

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residue is at or below legal tolerance Section 3717.31."

On March 1, 1970, individual samples from the 76 producing cows of the Humphrey herd were obtained and analyzed for DDT by FDD, and various residue levels of DDT were reported found. Two bulk tank samples were also analyzed, and DDT residue in each was reported found.

On March 1, 1970, a silage sample was obtained and analyzed by FDD, and a residue of 0.17 ppm of DDT was reported.

On March 11, 1970, a silage sample from the 12 x 45 silo was obtained and analyzed by FDD, and a residue of 1.3 ppm "Araclor 1254" was reported "detected".

On March 16, 1970, individual samples from the 76 producing cows were obtained and analyzed by FDD, and various levels of "Araclor 1254" residue were reported.

The reports that it was "Araclor 1254" rather than DDT present in the Humphrey milk and silage were the result of cooperative work among the U. S. Food and Drug Administration, Ohio State University and the FDD. That is, the FDD personnel were of the opinion that residues of DDT were found in the milk and silage, and after consultation with the other two agencies, they were told that the residues were "Araclor".

The analytical technique used in determining the presence and quantity of chemical residues such as DDT and polychlorinated

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biphenyls requires a great deal of skill and judgment in the operation of highly sophisticated equipment involving gas chromatography with confirmation by mass spectral analysis. Interpretation of the results of the application of such technique requires the formation and expression of an opinion of an expert nature.

The report by FDD personnel that "Araclor" had been found was not through the independent technique, analysis, and opinion of FDD personnel. The report by FDD personnel was based upon analytical work and opinions of others in the U. S. Food and Drug Administration and at Ohio State University. FDD does not have a mass spectrometer.

After the "Notice" of February 27, 1970, was served, testing of the Humphreys' milk continued and they did not market milk until mid-July, 1970, when they were advised that the Aroclor residue level in their milk was below 0.2 ppm.

On September 5, 1970, the Humphreys were again served with a notice by FDD in the following form:

> "Upon investigation made on the 28 day of August, 1970, by Glenn Diekman, an Inspector of the Department of Agriculture of Ohio, you were found to be violating Section 3717.31 Revised Code of Ohio, in the following particulars, to-wit: Milk produced containing chemical residue. You are hereby ordered to discontinue the sale of such milk until laboratory reveals that this residue is at or below legal tolerance."

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For a period of some months thereafter, the Humphreys were told by FDD that they could not market any milk. Then, milk from individual cows in the herd was analyzed, and as the Aroclor level in the milk of each cow dropped to 0.2 ppm, the milk from that cow was permitted by FDD to be marketed. The last group of cows was released in June of 1971.

The FDD claims as the basis for its action in ordering the ban on sale of milk by the Humphreys an "internal guideline for initiating legal action against milk in interstate commerce" at "0.2 ppm polychlorinated biphenyls, on a whole milk basis", which was communicated to FDD by the U. S. Food and Drug Administration. This was communicated to FDD on three occasions, by telephone on March 24, 1970, by letter dated June 8, 1970, and by teletype received July 31, 1970. Such communications are hearsay in nature.

The Director of the Department of Agriculture has neither attempted to nor obtained a court order seeking an embargo or destruction of the Humphreys' milk.

It is clear that the "internal guideline" communicated by FDA to FDD was not a "regulation" adopted by FDA in accordance with U. S. statutory procedures requiring notice and hearing. There is no federal statutory authority for adoption of such an "internal guideline" for the regulation of interstate

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commerce. The "internal guideline" has no official character or legal effect whatsoever.

It is also clear that there has not been adopted a "regulation" in accordance with Ohio statutes to regulate polychlorinated biphenyl residues in milk, and the Director of the Ohio Department of Agriculture merely used the unofficial "internal guideline" communicated to him by FDA.

Neither the Director of the Ohio Department of Agriculture, nor the FDD which is within his department, has undertaken any independent investigatory work as a basis for setting an unofficial "internal guideline" or "regulation" as the basis for action by the State of Ohio.

No milk has ever been banned from interstate shipment or seized in interstate shipment by FDA because of polychlorinated biphenyl residues. No state other than Ohio has banned the sale of milk because of polychlorinated biphenyl residues.

There is no evidence that milk containing polychlorinated biphenyl residues as reported by FDD may be harmful. No one has ever been reported harmed by drinking milk from cows fed from silage from silos, the interior of which were coated with "Cumar", during all of the time "Cumar" was used by Michigan Silo Co. or Michigan Silo Company, Inc.

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Polychlorinated biphenyl is a chemical expression used to describe a family of chemicals produced by the introduction of chlorine to biphenyl. Depending upon the amount of chlorination, the products may be liquids, resins or solids.

Polychlorinated biphenyls of various chlorinations, called Aroclors by Monsanto Company, were first manufactured commercially in the United States in approximately 1930. Industrial use grew steadily after their introduction. The major uses of polychlorinated biphenyls derive from their nonflammability, high dielectric constant and plasticizing abilities. Uses have included applications as dielectric fluids in capacitors and transformers and as hydraulic fluids, lubricants and as heat transfer fluids. Polychlorinated biphenyls have been widely used as plasticizers and solvents in adhesives, sealants, paints and printing inks, pesticide formulations, and microencapsulation of dyes for carbonless duplicating paper.

When Monsanto sold Aroclor 1254 to Michigan Silo Co. and to Ohio Solvent & Chemical Company, when "Cumar" was applied to the Humphrey silos, and thereafter, Monsanto did not foresee and had no reason to foresee that its product would appear in the Humphreys' milk. Monsanto had no knowledge that such would occur until this incident. As John Stackhouse, Director of the Ohio Department of Agriculture has testified, his department had

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no reason to look for polychlorinated biphenyls in milk before January of 1970. In his opinion, Monsanto should not have foreseen that PCB would be found in the Humphreys' milk or that the State would exclude the milk from the market for that reason until sometime "in March or April perhaps May of 1970" when it is claimed that the product was actually found in the milk.

The action by the State of Ohio was the cause of the loss claimed by the Humphreys. The cause of such loss cannot legally be attributed to Monsanto Company.

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ISSUES

I. The immediate cause of the loss claimed by the Humphreys was the issuance to them by the Ohio Department of Agriculture of the two notices by which they were ordered to discontinue the sale of their milk. The Humphreys have the burden of proof as to three critical issues as to this action of the State:

A. Legality of the action of the State.

B. Justification for the action of the State.

C. The effect of the failure of the State to petition the court for an order for condemnation of the milk.

II. If Monsanto Company must respond for damages to the Humphreys, in addition to proof of damages, the Humphreys must prove every element of a cause of action against Monsanto Company based upon one of the following:

A. Negligence.

B. Strict liability - an action in tort based upon breach of duty assumed by the manufacturer of a chattel by reason of the manufacturer's implicit representation of good and

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merchantable quality and fitness for intended use when the manufacturer sells the product.

C. Breach of a contractual liability.

III. The Humphreys have the burden of proof of damages in the following claimed areas:

A. Loss of profits in business.

B. Damage to fixtures.

C. Damage to personal property.

D. Related expenses.

IV. Affirmative defenses asserted by Monsanto Company include the following:

1. Failure to state a claim upon which relief can be granted.
2. Illegality of federal or state regulatory system.
3. Supervening and/or intervening acts.
4. Absence of proximate cause, i.e. remote cause.
5. Unavoidable accident.
6. Unforeseen and unforeseeable consequences.
7. Failure of the plaintiffs to challenge the action by the State.
8. Assumption of risk.

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9. Contributory negligence.

10. Failure of the plaintiffs to minimize or mitigate their loss.

11. Statute of limitations.

V. Matters of evidence to be encountered include the following:

A. Requirement for and qualification of opinions of experts.

B. Qualification of official records.

C. Qualification of business records.

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APPLICABLE LAW

I. The immediate cause of the loss by the Humphreys was the issuance to them by the Ohio Department of Agriculture of the two notices by which they were ordered to discontinue the sale of their milk.

A. The Humphreys must prove that the action by the State was legal.

The two notices served on the Humphreys cited Section 3717.31, R. C.[1], the applicable part of which states:

> "No person shall sell...adulterated milk, or milk to which water or any foreign substance has been added..."

The notices specifically ordered that the sale of milk be discontinued until "this residue is at or below legal tolerance." All of the testimony will indicate that the action by the State was based upon a residue level rather than the mere presence of a residue, and in fact and in law the residue claimed to have been found was not a "foreign substance...added" to the milk. Therefore, the action by the State could only have been based

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NOTE: Parenthetical page references are to the appendix to this brief where the full text of the matter cited appears.

1. (P. 101)

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upon the assertion that the milk was "adulterated".

Adulterated milk is defined in Section 3717.01, R. C.[2], which deals only with content by per cent of water fluid, solids and fats, and by its own terms does not apply to Section 3717.31, R. C. Adulterated food is defined in Section 3715.59, R. C.[3], and by its own terms, this section applies only to prosecution under portions of Chapter 3715, including Section 3715.52, R. C.

Perhaps the State was in error and should have cited Section 3715.52, R. C., which prohibits the "sale...of any food... that is adulterated". In any event, whether the State intended the basis of the notice to be a dictionary definition of "adulterated" under Section 3717.31, R. C., or the statutory definition under Section 3715.59, R. C., it is the burden of the Humphreys to establish that their milk was adulterated.

The Food, Dairies and Drugs Division personnel from January 8, 1970, until mid-March, were of the opinion that DDT residue was present in the milk. Thereafter they were of the opinion that the residue of Aroclor 1254 was present.

Neither one of these residues is an "added substance" under Section 3715.59, R. C., or Section 3717.31, R. C. It is alleged that the source of the residue was the silo coating, material from which transferred from the silo wall to the silage, was ingested by the cows, and was excreted with the milk.

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2. (P. 101)

3. (P. 101)

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In a startlingly similar case, the Lucas County Court of Appeals held that mercury residue in fish resulting from ingestion of mercury by the fish is not an "added substance".

Fouke & Reynolds vs. Great Lakes Co.[4]
(1972) 33 Ohio App. 2d 273 (m.c.o. 9/8/72)

Residue of DDT, a chlorinated hydrocarbon pesticide, in fish resulting from ingestion of DDT by the fish is not an "added substance".

U. S. vs. Vita Food Products of Ill., Inc.[5]
(1973) Case No. 70 C 2246 (D. C., Ill.)

There is no evidence that Monsanto Company, Michigan Silo Co., or Michigan Silo Company, Inc., intended Aroclor 1254 to become a component of or otherwise to affect the characteristics of milk, and there is no evidence that anyone expected it to become a component of or otherwise to affect the characteristics of milk until it was reported discovered in January, 1970, long after it was sold by Monsanto and applied by Michigan Silo Company, Inc., to the Humphrey silos.

Because any residue of Aroclor 1254 which may have been found in the Humphrey milk is not an "added substance", it was the burden of the State to show that the quantity found would ordinarily render it injurious to health before the milk could be legally claimed to be adulterated. (The same is true with

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4. (pp. 102-112)

5. (pp. 113-125)

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the DDT the State personnel believed they found.) That is, mere presence of Aroclor 1254 residue does not legally adulterate the milk. Rather, there must be a quantity of Aroclor 1254 which ordinarily renders it injurious to health.

This necessity of the government carrying this burden as to quantity was upheld by the U. S. Supreme Court in a case involving the deliberate addition of a poisonous substance to flour.

In U. S. vs. Lexington Mill Co.[6], (1914) 232 U.S. 399, 58 L. Ed. 658, 34 S. Ct. 337, the court held at page 402 (232 U.S.):

> "In order to bring an article of food within its condemnation, it must be shown that its consumption would injure the health of the consumer."

The court rejected the charge of the trial court that:

> "It is the character - not the quantity - of the added substance, if any, which is to determine this case."

At page 412 (232 U.S.), the court quoted from the Congressional Record as follows:

> "As to the use of the term 'poisonous', let me state that everything which contains poison is not poison. It depends on the quantity and the combination. A very large majority of the things consumed by the human family contain, under analysis, some kind of poison, but it depends upon the combination, the chemical relation which it bears to the body in which it exists as to whether or not it is dangerous to take into the human season."

At page 412 (232 U.S.), the court quoted an English case report reversing a conviction as follows:

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6. (pp. 126 - 140)

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"In my opinion, if the justices convicted the appellant of an offense...on the ground that the ingredient mixed with the article of food was injurious to health, - that the sulphate of copper was injurious to health, and not on the ground that the peas by reason of the addition of sulphate of copper were rendered injurious to health, the conviction is clearly wrong."

It is the burden of the Humphreys, therefore, to demonstrate the legality of the orders prohibiting them from selling milk with reliable evidence that the quantity of the residue claimed to have been found would ordinarily render the milk injurious to health. It is proof of the effect of quantity rather than proof of the mere presence that is critical to their case. This is because:

"all substances when administered to man or animal at sufficiently high concentrations and exposure time may prove injurious." (Our emphasis)

Toxic Substances, Annual List, 1971, P. VI
U. S. Department of Health, Education and Welfare, Health Services and Mental Health Administration.

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B. The Humphreys must prove that the action by the State was justified.

FDD personnel made no independent attempt to establish that the quantity of DDT residue reported found would ordinarily render the milk injurious to health. After they were of the opinion that the residue that was being found was Aroclor 1254, they made no independent attempt to establish that the quantity believed reported found would ordinarily render milk injurious to health. Instead, they relied solely upon a so-called "internal guideline" communicated to them by the U. S. Food and Drug Administration, first by telephone, as the basis for their determination that the quantity of residues believed found ordinarily rendered the milk injurious to health and as the basis for the action they took.

The authority to adopt regulations regarding residue levels in foods is vested in the public health council as provided in Section 3715.69, R. C.[7]. Such regulations as may be proposed can only be adopted in accordance with the administrative procedure act after notice, hearing and opportunity for appeal. No regulation pertaining to residues of Aroclor 1254 has been adopted in Ohio.

There is no authority in the statutes or in the case law

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7. (P. 101)

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for the use of a so-called "internal guideline" or other such type of enforcement technique or for the use and application of a federal "internal guideline", sometimes referred to as an "interim" or "administrative guideline", as proof of violation of a food adulteration statute.

There is no federal statutory authority for the use by the federal government or by any state government of an "internal guideline" as proof of violation of a food adulteration statute. As used by the federal government, the "internal guideline" is merely an administrative decision, as opposed to regulatory action, as to the level of residue in food which, when exceeded, the federal government will proceed with an enforcement action. An "internal guideline" in no way establishes proof of violation of a food adulteration statute. When the government, by administrative decision, has determined that the "internal guideline" has been exceeded and proceeds with enforcement action, the government must still prove, by a preponderance of the evidence (or beyond a reasonable doubt in a criminal prosecution), that the food is adulterated.

In the parallel case of Fouke & Reynolds vs. Great Lakes Co.[4], the FDD personnel attempted to use the federal "internal guideline" as to mercury in the fish as evidence to prove that

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4. (pp. 102-112)

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the fish were adulterated and that an order should be issued for the destruction of the fish. The court at page 275 stated:

> "Much evidence was adduced concerning the interim guideline of the food and drug administration of the Department of Health, Education and Welfare, which provides that .5 parts per million of mercury in fish may be harmful, and its significance and importance, and establishing that the Ohio department of agriculture was following the guideline concerning the sale and distribution of commercial fish."

The court clearly rejected this as any indication that the fish was adulterated under the Ohio statute because it did not constitute evidence that the quantity of mercury in the fish "ordinarily renders it injurious to health".

Because of this, any evidence of a federal "internal guideline" as to Aroclor 1254 must be excluded, and any attempt to use the federal "internal guideline" as to Aroclor 1254 as justification for the orders issued to the Humphreys must be denied as immaterial and irrelevant. It is strongly urged that when the matter is raised, the court will consider the matter other than in the presence of the jury.

The only evidence expected by way of justification of the State orders that the Humphreys not sell their milk is that the State relied upon the federal "internal guideline" as to Aroclor 1254. Without this, and without proper scientific evidence that the amount of residue reported found rendered the milk

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"ordinarily injurious to health", there was no justification of the orders issued by the State.

No matter how well-intentioned the FDD personnel might have been, their conduct must be measured in terms of legality with respect to the Humphreys before the Humphreys have a cause of action against Monsanto Company. Monsanto Company cannot be held to respond to a loss by the Humphreys through inappropriate action by FDD personnel merely because it was a Monsanto product against which the FDD personnel took such action.

It is, therefore, the burden of the Humphreys to prove the validity of the action by the FDD personnel in that they had the legal authority to act and that their action was justified. Failing to meet this burden, the Humphreys cannot prevail against Monsanto Company.

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C. The action of the State was invalid and ineffective because the State did not petition the court for an order for condemnation of the milk.

The notices served by the FDD representative ordered that the Humphreys discontinue the sale of their milk. Verbally, the Humphreys were ordered to dump their milk, and they did. This procedure is not in accordance with that provided in Section 3715.55, R. C.[9], which is clear in its terms and mandatory in its directions.

This section requires that when the director of the department of agriculture finds or has probable cause to believe that any food is adulterated, he shall affix a tag to it and warn against removal of it. The section next provides that when an article so embargoed has been found to be adulterated, the director shall petition the court for an order of condemnation. Finally, only if the court finds that the embargoed article is adulterated shall it be ordered destroyed, such order, of course, being issued by the court rather than by the director.

The procedure followed with respect to the Humphreys' milk was highly irregular and an entirely improper act by the State. The director made a determination that the milk was

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9. (P. 100)

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adulterated (although on an erroneous basis) and ordered an embargo. However, he failed to seek and did not obtain a court order for destruction of the milk. Instead, he took it upon himself to order the destruction of the milk. He applied his own standards rather than seeking a judicial determination as to whether the milk was adulterated.

Monsanto certainly cannot be compelled to respond to the Humphreys' loss resulting from such a procedure that is not only <u>without</u> statutory authority but also completely contrary to a specific, clear, mandated course of action.

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II. If Monsanto Company must respond for damages to the Humphreys, in addition to proof of damages, the Humphreys must prove every element of a cause of action against Monsanto Company in negligence, strict liability, or breach of contract.

A. Negligence.

In a products liability case, the plaintiff may pursue an action in tort grounded upon negligence without privity of contract between plaintiff and manufacturer.

Lonzrick vs. Republic Steel Corp.[10]
(1966) 6 Ohio St. 2d 227, 218 N.E. 2d 185

If a negligence theory is pursued, traditional concepts and requirements for proof are present. These are existence of a duty owing by the defendant to the plaintiff; defendant's failure to discharge that duty; and injury to the plaintiff proximately resulting from such failure. There must be an unreasonable risk to another established by affirmative evidence tending to show that such conduct falls below the standard represented by the conduct of reasonable men under the same or similar circumstances.

39 O. Jur. 2d 492, Negligence, Sec. 9

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10. (pp. 141-166)

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There must be reasonable anticipation or foreseeability of the consequences of one's negligent acts for there to be liability for negligence. There is no liability for negligence unless the injury which results could reasonably have been foreseen in light of the attending circumstances.

Id., 494, Sec. 11

Relating these concepts to the manufacture of a product indicates that the plaintiff must show that the manufacturer failed to exercise reasonable care in the design, production, or release without adequate warning of the product.

Proof of negligence in design requires proof that the manufacturer had a duty to discover the defect and that the manufacturer failed to discover the defect. Proof that the injury would not have occurred if the product had been designed differently is not sufficient. On the other hand, proof that the product was used for some time before it produced an injury indicates that there was no breach of duty to use due care in the design of the product.

Proof of negligence in the manufacture of the product requires evidence that the manufacturer used other than careful production methods. It should be noted that a change in production methods following the claimed loss is not evidence of negligence in production methods.

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Proof of negligence in failing to give adequate warning upon release of the product requires that the plaintiff must prove that the manufacturer knew, or by the exercise of reasonable care should have known, of the potential danger, and that the manufacturer in the reasonable course of his business should have been able to foresee the possible damages that might result from foreseeable uses in the absence of adequate warning. The duty to warn is present when the manufacturer knew or should have known that the product is dangerous when used as alleged.

There is no duty to warn merely because the product might conceivably cause some injury, where there is only a remote possibility of injury, where there is only the general or some possibility of injury, or where the particular type of injury has never occurred previously.

The manufacturer is not an insurer.

The product involved in this action is Aroclor 1254, which has been produced and sold since approximately 1930. The product has been put to many uses. The use to which the product has been put by Michigan Silo Co., and its successor, Michigan Silo Company, Inc., is as a plasticizer in the "Cumar" formulation.

The evidence will show that the product was designed as

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a plasticizer, and as such it has functioned well for many years. The Humphreys cannot show that the product was produced negligently in that production was other than in accordance with the design specifications. The only claim of negligence is, therefore, that Monsanto Company failed to warn that the State of Ohio might ban the sale of milk of the Humphrey herd in 1970, thereby causing a loss. The Humphreys must produce evidence that at the time the product was sold by Monsanto Company to Ohio Solvents & Chemical Company Monsanto Company knew or should have known that the use to which it was put by Michigan Silo Company, Inc., would result in the action by the State of Ohio, and, of course, that the action by the State was legal and justified as discussed above.

It also should be said that burden of proof of proximate cause parallels that of proof that Monsanto Company knew or should have known the consequence claimed by the Humphreys.

The foregoing principles are discussed generally in 63 Am. Jur. 2d, Products Liability, Section 25 et seq.

Of extreme significance in this matter of warning is the complete absence of any duty to warn with respect to a product which is not in fact dangerous.

Id., Sec. 44

The Humphreys must establish that any Aroclor 1254 which they claim was found in their milk is in fact dangerous before

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they can establish negligence of Monsanto Company in failing to warn or otherwise. It is not sufficient to make out a case against Monsanto Company simply by showing that the State found Aroclor 1254 and ordered that the milk not be sold. Mere proof that the State issued such an order does not meet the strict requirement of proof that what was found is in fact and law dangerous. Neither does proof that the State acted under color of a federal "internal guideline" establish proof that the Aroclor 1254 claimed found in the milk is dangerous, either at the time the State acted or at the time Monsanto Company sold the product to Ohio Solvents & Chemical Company.

An interesting case dealing with beryllium, a substance known to be toxic, is Heck vs. The Beryllium Corporation, (1967) 424 Pa. 140, 226 A. 2d 87[11], which held in the first syllabus:

> "Trial court properly held that defendant corporation, whose plant emitted beryllium and which knew of toxicity of beryllium but did not know the toxicity level until the Atomic Energy Commission issued tentative recommendations, was not negligent prior to time that such recommendations had been issued."

There is as yet no evidence that the Aroclor 1254 claimed found in the Humphrey milk is toxic or otherwise harmful. If the "internal guideline" has any standing, which we dispute, of course, it does not attach liability to Monsanto Company

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11. (pp. 167-171)

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because the knowledge of its existence was not acquired until after the sale of the Aroclor 1254 by Monsanto Company to Ohio Solvents & Chemical Company.

Another interesting case dealing with a substance first thought to be beneficial but later learned to be poisonous after harm was caused is La Porte vs. U. S. Radium Corp., (N.J. D.C. 1935) 13 F. Supp. 263[12], which held that the defendant could not be charged with the burden that it should have known of the danger to employees painting watch dials with radium until the scientific and medical world and the defendant knew about the industry, which, in this case, was after the harm was caused. The court held specifically that all of the learning of the scientific and medical world acquired after the harm was caused is not relevant to proving a cause of action against the defendant.

Again, there is no evidence that the amount of Aroclor 1254 claimed found in the Humphrey milk is harmful. The Humphreys must prove that it is harmful. The Humphreys must also prove that Monsanto Company knew or should have known not only that such be the case but also that the State would act as it did, based upon the status of information within the medical and scientific world at the time the product was sold to Ohio Solvents & Chemicals Corporation to establish negligence on the part of Monsanto Company.

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12. (pp. 172-186)

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B. Strict Liability.

Strict liability is an action in tort based upon breach of a duty assumed by the manufacturer of a chattel by reason of the manufacturer's implicit representation of good and merchantable quality and fitness for intended use when the manufacturer sells the product.

The establishment of this principle in the Ohio law occurred in Lonzrick vs. Republic Steel[10]. However, it does not apply to work and materials supplied in the initial construction or later repair of a farm silo because a farm silo is a real property structure.

In Mitchem vs. Johnson (1966), 7 Ohio St. 2d 66[13], decided two weeks after Lonzrick, the court held at page 69:

> "A contract to furnish labor and materials is not a sale of the finished product if the finished product is not personal property."
>
> "...the builder is not an insurer."
>
> "...there is no absolute warranty implied by law against the builder..."

The court held in syllabus 2:

> "An implied warranty...will not be imposed upon the vendor who constructed it..."

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10. (pp. 141-166)

13. (pp. 187-194)

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The same result occurred in Cox vs. Shaffer, (1972) Pa. Superior Court No. 238, CCH Product Liability, Para. 6937[14], in which the court held that the plaintiff did not have an actionable claim under the strict liability doctrine against the builder of a silo to recover for the death of her decedent, who was asphyxiated by lethal fumes after entering the silo. The court held that a silo constructed in place on the employer's land is not the sale of a "product" within the meaning of the doctrine.

The evidence is clear that Michigan Silo Co., in constructing, and Michigan Silo Company, Inc., in later applying "Cumar" to the two Humphrey silos, constituted the furnishing of labor and materials to a real property structure. There was no sale of a "product" to the Humphreys within the meaning of the doctrine of strict liability.

Strict liability in tort will be discussed in the event it is raised by counsel for the Humphreys.

Application of the doctrine as set forth in Lonzrick requires proof, by the required degree, of the following:

1. That the product was defective.
2. That the product was defective at the time the manufacturer sold it.

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14. (P. 195)

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3. That the defect caused an injury while the product was being used for its ordinary intended purpose.

4. That the defect was the direct and proximate cause of the plaintiff's injury.

5. That the plaintiff's presence was in a place which the manufacturer could reasonably anticipate.

The doctrine of strict liability as adopted in Ohio stems from the Restatement of Torts, 2d, Section 402 A, which provides the following:

> "402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer.
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

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Ohio has not accepted the doctrine of absolute liability by adopting this doctrine of strict liability. Absolute liability was expressly rejected in Lonzrick at page 237:

> "Some argue that to allow recovery in the kind of case now before the court means that the court is imposing absolute liability upon the defendant. That is not so."

The doctrine of strict liability does not, of course, make the manufacturer an insurer of his product. Of critical importance is the requirement that the Humphreys produce credible evidence that the Aroclor 1254 was sold in a defective condition and unreasonably dangerous when it was sold by Monsanto Company to Ohio Solvents & Chemical Company. At issue is what is meant by and what is necessary to prove "defective condition" and "unreasonably dangerous".

We refer to the previous discussion of "defect" in this regard, particularly with respect to that of warning and the necessity that the product be proved dangerous for there to be a requirement of warning. Strict liability carries this one step farther in that the product must be proved to be unreasonably dangerous. Again, use of an "internal guideline" as the claimed basis for the order not to sell milk does not establish that the Aroclor 1254 claimed found in the Humphreys' milk was either "defective" or "unreasonably dangerous".

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An essential requirement of proof in a strict liability case is that the product, if defective, "may be expected" by the manufacturer to cause harm.

Restatement of Torts, 2d, Sec. 402 A, Comment d.

There must be proof that the manufacturer "has reason to anticipate that danger may result from a particular use".

Id., Comment h.

The product must be unreasonably dangerous.

Id., Comment i:

> "The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from overconsumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous."

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Specifically with respect to the requirement of a warning, the lack of which would provide a cause of action, the Restatement in Comment j states:

> "the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger." (Our emphasis)

The Humphreys must prove that Monsanto Company knew, or under the circumstances should have known, that as used in "Cumar" Aroclor 1254 would be found in the milk as claimed, that such amount would be unreasonably dangerous, and that Ohio would order that the milk not be sold because of some "internal guideline" of which no one knew. None of this is established merely by proof that Aroclor 1254 was found as claimed.

Stated another way, strict liability requires that it be shown by the Humphreys not only that the product was defective for its intended use, but also that the product was so dangerous that a prudent manufacturer would never have marketed the product had he known of its condition.

63 Am. Jur. 2d, 134, Strict Liability.

The Humphreys must prove that Monsanto Company had reason to anticipate that danger may result.

Id., 136.

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This requires that the Humphreys first prove that the Aroclor 1254 claimed found does in fact constitute a danger. The embargo levied by Ohio does not prove this.

It can be said that the action by the State was an accident. That is, the action taken by the State was not foreseeable by anyone, was without legality or justification, was an action taken by no other state or federal regulatory agency, and was action taken without any demonstration that harm had been caused during the long period during which Aroclor 1254 was used to the time of the embargo or since.

That such an accident might happen does not make Aroclor 1254 as claimed found in the milk unreasonably dangerous.

Id., 139.

If the Humphreys should be able to produce evidence that the amount of Aroclor 1254 claimed found in the milk is harmful and that the action by the State was legal and justified, to prevail against Monsanto Company they must show as the basis for a cause of action in strict liability that foresight on the part of Monsanto Company could have avoided the action by the State because strict liability does not exist as to harmful effects when no developed skill or foresight can avoid them.

Lartigue vs. R. J. Reynolds Tobacco Co.[15]
(C.A. 5, La.) 317 F. 2d 19

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15. (pp. 196 to 217)

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In Ross vs. Philip Morris & Co.[16], (C.A. 8, Mo.) 328 F. 2d 3, the court also held the manufacturer's implied warranty does not cover substances in manufactured products, the harmful effects of which no human skill or foresight could afford knowledge. In Ross, the court also rejected the theory of absolute liability in connection with strict liability theory.

The sale of Aroclor 1254 by Monsanto Company to Ohio Solvents & Chemical Company must be shown to be the proximate cause of the loss claimed by the Humphreys. Such a showing can only be made upon proof of the legality and justification of the action by the State. This in turn can only be shown upon proof that Monsanto Company was negligent or responsible under the theory of strict liability, the latter of which does not apply because a contract to erect or repair a silo is not within the doctrine of strict liability.

Evidence only of the finding of claimed Aroclor 1254 long after the sale and action by the State based upon some "internal guideline" not adopted by the State in accordance with required administrative procedures does not establish the sale by Monsanto Company as the proximate cause of the claimed loss.

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16. (pp. 218-231)

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C. Breach of a Contractual Liability.

There is neither claim nor evidence of a contractual relationship between the Humphreys and Monsanto Company upon which a cause of action for breach of express warranty can be founded.

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III. The Humphreys have the burden of proof of damages in the following claimed areas:

A. Loss of profits in business.

B. Damage to fixtures.

C. Damage to personal property.

D. Related expenses.

Profits lost on account of the interruption of an established business may be recovered if the plaintiff makes it reasonably certain by competent proof what the amount of the loss actually is. However, anticipated profits are considered too remote, uncertain and speculative. Profits are subject to many contingencies causing fluctuations and uncertainties.

16 O. Jur. 2d 118, Damages, Sec. 98.

In the case of claimed destruction of silos, where restoration is impractical, the measure of damages is the difference between the reasonable value of the silos immediately before the damage and the reasonable value of the silos immediately after.

Id., 87, Sec. 69.

If restoration or repair of the silos is practical, the measure of damages is the reasonable cost of repair unless such cost exceeds the reasonable value of the silos prior to the injury.

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Id., 86, Sec. 68.

The measure of damages applicable to total destruction of a growing crop is the value of the crop at the time and place of destruction. The measure of damages for injury to or partial destruction of such a crop is the difference in value between the value of the crop immediately before and immediately after the injury.

Id., 88, Sec. 70.

In Ohio the measure of damages for an injury to personal property is the difference in the market value of the property immediately before and immediately after the injury.

Id., 91, Sec. 73.

Evidence of cost of repairs is subject to the limitation that the cost of repairs must be less than the diminution in market value due to the injury, and the repairs must never exceed the value of the property itself as it was before the injury.

Id., 93, Sec. 74.

All loss or damage claimed must, of course, be directly related to and stem from some actionable conduct of Monsanto Company for there to be responsibility on the part of Monsanto Company.

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V. Matters of Evidence.

Several matters of evidence will be encountered in this matter. These include the requirement for and qualification of experts; the qualification for admission of official records; and the qualification of business records.

A. Opinions of Experts.

Expert opinion evidence is required where the inquiry pertains to a highly technical question of science or art or to a particular professional or mechanical skill.

Jones vs. Hawkes Hospital of Mt. Carmel
175 O. S. 503, 170 N. E. 2d 592

Matters of causation involving a scientific inquiry must be established by the opinions of expert witnesses competent to express such opinions, and in the absence of such expert opinions, it is error to refuse to withdraw that issue from the consideration of the jury.

Darnell vs. Eastman
23 Ohio St. 2d 13, 261 N. E. 2d 114

An expert has no right to base his opinion on the opinions or conclusions of another expert. His opinion must be based upon evidence in the record.

21 O. Jur. 2d 436, Evidence, Sec. 426

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Dillow vs. Young
6 Ohio St. 2d 221, 217 N. E. 2d 868

"The opinion of a medical expert witness that a direct causal relationship existed between the plaintiff's inhalation of a particular substance and the chronic emphysema from which he suffered is inadmissible in the absence of evidence of the physical properties of that substance and their propensity to produce the injury claimed. If the witness knew such facts of his own knowledge, that knowledge should have been disclosed in his testimony preceding the hypothetical question. If not, those facts should have been otherwise proved and contained in the hypothesis upon which the opinion was based."

The court in Dillow stated at page 225:

"The words, 'poisoning,' 'dangerous,' 'toxicity,' 'toxic,' and the phrase, 'noxious fumes known to have some pulmonary effects,' merely invite further inquiry. Under what circumstances, to what extent and in what degree are the substances comprising 'Garb-O' poisonous, dangerous, toxic, or noxious? What effects, if any, does a given concentration produce? What conditions does it aggravate? How long do they persist? The evidence supplies no answer to these questions."

B. Official Records.

Section 2317.42, R. C., Official Reports Admitted as Evidence

"Official reports made by officers of this state, or certified copies of the same, in a matter within the scope of their duty as defined by statute, shall, in so far as relevant, be admitted as evidence of the matters stated therein."

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Such a record to be admissible, however, must be made and kept by a person whose duty it was to make and keep it. A record of a public officer can only be competent evidence of those matters which he is authorized or required by law to make matters of record.

Until proof has been adduced that the record or report offered was kept under authority of law, the record is not admissible.

Not all officers are considered to be within the rule. It has been held that port wardens are not officers within the meaning of the general rule, and entries in their books showing the condition of goods upon their arrival are not admissible under this rule.

Records of investigations and inquiries conducted either voluntarily or pursuant to requirement of law, by public officers, containing matters involving the exercise of judgment and discretion, expressions of opinion, and conclusions are not admissible in evidence as public records.

21 O. Jur. 2d 628, Evidence, Sec. 608

While a statute authorizing employees of the federal bureau of agricultural economics to make certificates as to the grade of agricultural products, such certificates are not considered public records and admissible as such to prove that the

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products were not up to the standard claimed where the inspector himself is not called upon to testify.

Goldman vs. Fox Sons & Co.
6 O. L. Abs. 581

C. Business Records.

Section 2317.40, R. C., Records as Evidence.

"As used in this section 'business' includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

"A record of an act, condition, or event, in so far as relevant, is competent evidence if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.

"This section shall be so interpreted and construed as to effectuate its general purpose to make the law of this state uniform with those states which enact similar legislation."

This section does not make competent otherwise incompetent evidence.

21 O. Jur. 2d 588, Evidence, Sec. 573

An official record containing a self-serving declaration is not admissible under Section 2317.40, R. C.

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Better Homes Equip. Co. vs. Nixon
72 O. L. Abs. 329, 134 N. E. 2d 850

The matters entered in the record must not be based on hearsay. Mere self-serving statements or statements of opinion or speculation are not admissible.

21 O. Jur. 2d, 603, Evidence, Sec. 586

To sustain a conviction for selling intoxicating liquor, the state must, if the beverage is not well known, introduce evidence as to its intoxicating effect.

Mazzeo vs. Board of Liquor Control
73 O. L. Abs. 94

It is expected that the Humphreys will attempt to introduce certain records and files from the Ohio Department of Agriculture, Food, Dairies and Drugs Division. Many of these are analogous to certain parts of hospital records. Reports of results of analysis by gas-liquid chromatograph, with electron capture detector, will be sought to be introduced. The machine, called GLC, produces a chromatogram which is examined by an analyst, who then forms an opinion as to what he has observed. This technique is rather like reading an x-ray.

Other parts of the State record are simply recorded hearsay.

The rules with respect to admissibility of the recorded opinions of what is shown by x-rays should be applicable to the

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recorded opinions of the results of the GLC work, and such opinions can only be allowed to go to the jury when presented by the person whose opinions they are.

Hospital records are admissible in evidence in so far as there is compliance with the requirements and conditions of Section 2317.40, R. C., with respect to observable facts. Recorded opinions, however, are not admissible as part of the hospital record.

Lewis vs. Woodland, 101 O. App. 442, 140 N.E. 2d 322

This principle has been restated many times and as late as 1969 in Dorsten vs. Lawrence, 20 O. App. 2d 297.

In addition to the requirement that the person who expressed the opinion must appear and testify, the x-ray, or in this case the chromatogram, must be produced and put in evidence to be available for cross-examination.

Mehochko vs. Gold Seal Co.[17]
66 Ill. App. 2d 54, 213 N.E. 2d 581, 19 A.L.R. 3d 1003

The requirements for preliminary proof for the introduction of x-rays as summarized in 5 A.L.R. 3d 307 are as follows:

1. That the x-ray is of what it purports to be.
2. That the condition of the person or object was the same at the time it was taken as at the time in controversy.

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17. (pp. 232-236)

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3. That the x-ray machine was dependable and operating properly at the time the x-ray was taken.

4. That the operator of the machine possessed the necessary skills to take a correct and accurate picture.

5. Evidence as to the manner in which the picture was taken.

These same requirements should be applicable to the preliminary proof of GLC chromatograms.

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