

MONSANTO TRIAL' BRIEF

IN THE COMMON PLEAS COURT OF STARK COUNTY, OHIO

FRANKLIN HUMPHREY, et al

Plaintiffs

vs.

MICHIGAN SILO CO. and

MONSANTO COMPANY

Defendants

CASE NO. 114693

(Judge Young)

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

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities Cited	ii
Statement of the Case	1
Issues	12
I. Action by the State	12
A. Legality	15
B. Justification	20
C. Lack of court order	24
II. Necessity of cause of action against Monsanto Company	26
A. Negligence	26
B. Strict liability - implied warranty of manufacturer	32
C. Contractual liability	40
III. Burden of proof of damages	41
IV. Affirmative defenses	13
V. Matters of evidence	43
Appendix	100

TABLE OF AUTHORITIES CITED

	Brief Page	Appendix Page
Section 3717.31, R.C.	15,16	101
Section 3717.01, R.C.	16	101
Section 3715.59, R.C.	16	101
Section 3715.52, R.C.	16	
Fouke & Reynolds vs. Great Lakes Co., (1972) 33 O. App. 2d 273 (m.c.o. 9/8/72)	17,21,22	102-112
U.S. vs. Vita Food Products of Ill., Inc., (1973) Case No. 70 C 2246 (D.C., Ill.)	17	113-125
U.S. vs. Lexington Mill Co., (1914) 232 U.S. 399, 58 L. Ed. 658, 34 S. Ct. 337, Page 402 (232 U.S.)	18 18	126-140
Id., Page 412 (232 U.S.)		
Toxic Substances, Annual List, 1971, P. VI, U.S. Department of Health, Education and Welfare, Health Services and Mental Health Administration	19 20 24	101 100
Section 3715.69, R. C.		
Section 3715.55, R. C.		
Lonzrick vs. Republic Steel Corp., (1966) 6 Ohio St. 2d 227, 218 N.E. 2d 185	26,32, 33,34,35	141-166
39 O. Jur. 2d 492, Negligence, Sec. 9	26	
Id., 494, Sec. 11	27	
63 Am. Jur. 2d, Products Liability, Section 25 et seq.; Id., Sec. 44	29	
Heck vs. The Beryllium Corporation, (1967) 424 Pa. 140, 226 A. 2d 87	30	167-171
LaPorte vs. U. S. Radium Corp., (N.J. D.C. 1935) 13 F. Supp. 263	31	172-186
Mitchem vs. Johnson (1966), 7 Ohio St. 2d 66	32	187-194
Cox vs. Shaffer (1972), Pa. Superior Court No. 238, CCH Product Liability, Para. 6937	33 34,36,37	195
Restatement of Torts, 2d, Sec. 402-A	37	
63 Am. Jur. 2d 134, Strict Liability	37	
Id., 136	38	
Id., 139		
Lartigue vs. R. J. Reynolds Tobacco Co., (C.A. 5, La.) 317 F. 2d 19	38	196-217
Ross vs. Philip Morris & Co., (C.A. 8, Mo.) 328 F. 2d 3	39	218-231
16 O. Jur. 2d 118, Damages, Sec. 98	41	
Id., 87, Sec. 69	41	
Id., 86, Sec. 68	42	
Id., 88, Sec. 70	42	
Id., 91, Sec. 73	42	
Id., 93, Sec. 74	42	

TABLE OF AUTHORITIES CITED

(Continued)

	Brief Page	Appendix Page
Jones vs. Hawkes Hospital of Mt. Carmel, 175 O. S. 503, 170 N. E. 2d 592	43	
Darnell vs. Eastman, 23 Ohio St. 2d 13, 261 N. E. 2d 114	43	
21 O. Jur. 2d 436, Evidence, Sec. 426	43	
Dillow vs. Young, 6 Ohio St. 2d 221, 217 N. E. 2d 868	44	
Section 2317.42, R. C.	44	
21 O. Jur. 2d 628, Evidence, Sec. 608	45	
Goldman vs. Fox Sons & Co., 6 O. L. Abs. 581	46	
Section 2317.40, R. C.	46, 48	
21 O. Jur. 2d 588, Evidence, Sec. 573	46	
Better Homes Equip. Co. vs. Nixon, 72 O. L. Abs. 329, 134 N. E. 2d 850	47	
21 O. Jur. 2d, 603, Evidence, Sec. 586	47	
Mazzeo vs. Board of Liquor Control, 73 O. L. Abs. 94	47	
Lewis vs. Woodland, 101 O. App. 442, 140 N. E. 2d 322	48	
Dorsten vs. Lawrence, 20 O. App. 2d 297	48	
Mehochko vs. Gold Seal Co., 66 Ill. App. 2d 54, 213 N. E. 2d 581, 19 A.L.R. 3d 1003	48	232-236
5 A.L.R. 3d 307	48	

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,

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

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

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

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

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

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."

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

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. *True?*

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.

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

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.

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

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.

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.

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

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

1. (P. 101)

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.

2. (P. 101)

3. (P. 101)

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

4. (pp. 102-112)

5. (pp. 113-125)

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:

6. (pp. 126 - 140)

"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.

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

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

4. (pp. 102-112)

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

"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.

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

9. (P. 100)

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 without statutory authority but also completely contrary to a specific, clear, mandated course of action.

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

10. (pp. 141-166)

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.

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

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

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 87¹¹, 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

11. (pp. 167-171)

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. 263¹², 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.

12. (pp. 172-186)

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 Steel¹⁰. 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 66¹³, 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..."

10. (pp. 141-166)

13. (pp. 187-194)

The same result occurred in Cox vs. Shaffer, (1972) Pa. Superior Court No. 238, CCH Product Liability, Para. 6937¹⁴, 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.

14. (P. 195)

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."

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".

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."

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.

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

15. (pp. 196 to 217)

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.

16. (pp. 218-231)

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.

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.

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.

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

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."

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^{ES} 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

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.

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

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.

17. (pp. 232-236)

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.

3715.55. Proceedings when violations suspected or found.

(A) Whenever the director of agriculture or the board of pharmacy finds or has probable cause to believe, that any food, drug, device, or cosmetic is adulterated, or so misbranded as to be dangerous or fraudulent, within the meaning of sections 3715.01 and 3715.52 to 3715.72, inclusive, of the Revised Code, he shall affix to such article a tag or other appropriate marking, giving notice that such article is, or is suspected of being, adulterated or misbranded and has been detained or embargoed, and warning all persons not to remove or dispose of such article by sale or otherwise until permission for removal or disposal is given by the director or the board of pharmacy or the court. No person may remove or dispose of such detained or embargoed article by sale or otherwise without such permission.

(B) When an article detained or embargoed has been found by the director or the board of pharmacy to be adulterated or misbranded, he shall petition the municipal or county court in whose jurisdiction the article is detained or embargoed for an order for condemnation of such article. When the director or the board of pharmacy has not found within ten days that an article so detained or embargoed is adulterated or misbranded, he shall remove the tag or other marking.

(C) If the court finds that a detained or embargoed article is adulterated or misbranded, such article shall, after entry of the decree, be destroyed at the expense of the claimant thereof, under the supervision of the director or the board of pharmacy, and all court costs, fees, storage, and other proper expenses shall be taxed against the claimant of such article or his agent; provided, that when the adulteration or misbranding can be corrected by proper labeling or processing of the article, the court, after entry of the decree and after such costs, fees, and expenses have been paid and a good and sufficient bond, conditioned that such article shall be so labeled or processed, has been executed, may by order direct that such article be delivered to the claimant thereof for such labeling or processing under the supervision of the director or board of pharmacy. The expense of such supervision shall be paid by the claimant. Such bond shall be returned to the claimant of the article on representation to the court by the director or board of pharmacy that the article is no longer in violation of sections 3715.01 and 3715.52 to 3715.72, inclusive, of the Revised Code, and that the expenses of such supervision have been paid.

(D) Whenever the director finds in any room, building, vehicle of transportation, or other structure, any meat, sea food, poultry, vegetable, fruit, or other perishable articles which are unsound, or contain any filthy, decomposed, or putrid substance, or which may be poisonous or deleterious to health or otherwise unsafe, such articles are declared to be a nuisance, and the director shall forthwith condemn or destroy the same, or in any other manner render the same unsalable as human food. (129 v 582. Eff. 1-10-61. 127 v 821)

Penalty, 3715.99 (A).

3715.59. Adulterated food.

Food is adulterated within the meaning of sections 3715.01 and 3715.52 to 3715.72, inclusive, of the Revised Code, if:

(A) It bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such food shall not be considered adulterated if the quantity of such substance in such food does not ordinarily render it injurious to health.

(B) It bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 3715.62 of the Revised Code.

(C) It consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food.

(D) It has been produced, processed, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome, or injurious to health.

(E) It is the product of a diseased animal or an animal which has died otherwise than by slaughter, or that has been fed upon the uncooked offal from a slaughterhouse.

(F) Its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

(G) Any valuable constituent has been, in whole or in part, omitted or abstracted therefrom.

(H) Any substance has been substituted wholly or in part therefor.

(I) Damage or inferiority has been concealed in any manner.

(J) Any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is.

(K) It is confectionery, and it bears or contains any alcohol or nonnutritive article or substance except harmless coloring, harmless flavoring, harmless resinous glaze not in excess of four-tenths of one per cent, harmless natural wax not in excess of four-tenths of one per cent, harmless natural gum, and pectin; provided, that this division shall not apply to any confectionery by reason of its containing less than one-half of one per cent by volume of alcohol derived solely from the use of flavoring extracts, or to any chewing gum by reason of its containing harmless nonnutritive masticatory substances.

(L) It bears or contains a coal-tar color other than one from a batch which has been certified under authority of the "Federal Food, Drug and Cosmetic Act." (129 v 582. Eff. 1-10-61. 127 v 819)

Penalty, 3715.99 (A).

3715.69. Regulations and enforcement.

The authority to adopt regulations for the enforcement of section 3715.58, divisions (E), (G), (H), and (I) of section 3715.60, division (A) (2) of section 3715.64, and section 3715.67 of the Revised Code is vested in the director of agriculture. The authority to adopt regulations for the enforcement of sections 3715.01 and 3715.52 to 3715.72, inclusive, of the Revised Code, excluding section 3715.58, divisions (E), (G), (H), and (I) of section 3715.60, division (A) (2) of section 3715.64, and section 3715.67 of the Revised Code, is vested in the public health council, provided that such regulations are first proposed for adoption by the director or the board of pharmacy. The regulations adopted in so far as practicable shall conform with those promulgated under the "Federal Food, Drug and Cosmetic Act." (129 v 582. Eff. 1-10-61. 127 v 819)

Penalty, 3715.99 (A).

MILK

3717.01 Definition of adulterated milk.

In all prosecutions under sections 3717.01 to 3717.13, inclusive, of the Revised Code, if milk is shown upon analysis to contain more than eighty-eight and one-half percent of water fluid, less than eleven and one-half percent of solids, or three percent of fats, it is adulterated. (131 v H 420, H 952. Eff. 7-1-66)

3717.01 former GC 12716

CROSS REFERENCES

Fees and fines; rotary fund, 917.23.

OJur 2d: 24, Food § 28, 29, 30

ADULTERATION, LABELING AND PACKAGING

3717.31 (12717). Sale of adulterated milk or milk from diseased cows.

No person shall sell, exchange, deliver, or have in his custody or possession with intent to sell or exchange, or expose or offer for sale or exchange milk from diseased or sick cows, adulterated milk, or milk to which water or any foreign substance has been added, or milk from cows fed on wet distillery waste or starch waste, or from cows kept in a place which has been declared to be in an unclean or unsanitary condition by certificate of any duly constituted board of health or duly qualified health officer within the county in which said place is located.

Penalty, 3717.99(B).

CROSS REFERENCES

Duty of dairymen in case of contagious disease in his family, 3707.35.

OJur 2d: 24, Food § 29

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, }

City of Columbus. }

Frank Reynolds, etc.,
Appellee,

vs.

Great Lakes Terminal Warehouse Co.
et al.,
Appellants.

19⁷² TERM

To wit: September 8, 1972

No. 72-445

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS

for LUCAS County

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

FOR YOUR
INFORMATION
ONLY
NOT FOR FILING

COSTS:

Motion Fee, \$20.00, paid by Attorney General

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

*Witness my hand and the seal of the Court
this.....day of..... 19.....*

.....Clerk

FOUKE & REYNOLDS, D. B. A. REYNOLDS FISHERIES, APPELLEES,
v. GREAT LAKES TERMINAL WAREHOUSE CO. ET AL.,
APPELLANTS.

[Cite as Fouke & Reynolds v. Great Lakes Co.
(1972), 33 Ohio App. 2d 273.]

Pure Food and Drug Law—R. C. 3715.01 et seq.—Adulterated food—Fish—R. C. 3715.59—Mercury contamination—Fish not “adulterated,” when—Evidence—Burden of proof—Director of department of agriculture—Rules—Authority.

1. Mercury consumed by fish in their natural habitat is not an “added substance” within the meaning of R. C. 3715.59.
2. In order for fish to be condemned, pursuant to R. C. chapter 3715, for being adulterated with mercury, it must be proved by a preponderance of the evidence that the quantity of the mercury ordinarily renders it injurious to health.

(Nos. 7182, 7183—Decided April 18, 1972.)

APPEALS: Court of Appeals for Lucas County.

Mr. Joseph L. Newman and Mr. Sheldon Rosen, for appellees.

Mr. William J. Brown, attorney general, and Mr. Robert M. Weinberger, for appellant director of Ohio department of agriculture.

BROWN, J. This is an appeal from an order of the Court of Common Pleas of Lucas County in two companion cases involving fish belonging to plaintiffs, appellees herein, embargoed by defendant Gene R. Abercrombie, the director of the department of agriculture and an appellant herein, pursuant to R. C. 3715.55. The trial court found the fish described in the complaint not to be “adulterated” and not subject to condemnation under the pro-

visions of R. C. 3715.55, et seq. It ordered the fish released to plaintiffs.

Defendant director of agriculture claimed the fish to be adulterated within the meaning of R. C. 3715.55 and 3715.59.*

Samples of the fish tested for mercury content levels, in May 1971, exhibited mercury levels in six separate lots ranging from .69 to 1.5 parts per million. Dr. Kolbye, a physician and expert in public health, from the bureau of foods, United States Department of Health, Education and Welfare, construing his testimony most favorable to defendant, in substance, testified that fish containing levels of mercury above .5 parts per million are a danger to health.

The trial judge who decided this case filed a memorandum opinion in which he made a thorough and excellent analysis of the facts adduced and the law applicable thereto. Although the trial judge pointed out that there was no proof that the fish contained any poisonous or deleterious substance which could render the fish injurious to health, there was some evidence relating thereto. However, we do find that the trial court did not err in finding that the defendant director did not sustain his burden of proof.

*The pertinent part of R. C. 3715.55 provides: "(A) Whenever the director of agriculture * * * has cause to believe, that any food * * * is adulterated * * * as to be dangerous * * * within the meaning of Sections 3715.01 and 3715.52, inclusive of the Revised Code, he shall affix to such article a tag or other appropriate marking, giving notice that such article is, or is suspected of being, adulterated * * * and has been detained or embargoed * * *."

"(B) When an article detained or embargoed has been found by the director * * * to be adulterated * * * he shall petition the municipal or county court in whose jurisdiction the article is detained or embargoed for an order for condemnation of such article * * *."

The pertinent part of R. C. 3715.59 provides: "Food is adulterated within the meanings of Sections 3715.01 and 3715.52 to 3715.72, inclusive, of the Revised Code, if:

"(A) It bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such food shall not be considered adulterated if the quantity of such substance in such food does not ordinarily render it injurious to health * * *."

The trial judge granted the relief sought by plaintiffs in their complaints—possession of the fish—and dismissed the counterclaim of defendant Gene Abercrombie which sought destruction of the fish. We affirm.

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 this guideline concerning the sale and distribution of commercial fish.

Dr. Kolbye, the defendants' chief expert and main witness, could cite no report or record of any person being injured or harmed in the United States from eating fish containing mercury at any level, not even in 1970 when fish taken from Lake St. Clair and the St. Clair River were found contaminated with mercury in excess of .5 parts per million. The mercury poisoning of inhabitants of Minamata Bay, Japan, eating raw fish several times a day, every day of the week, is an episode so dissimilar factually that it is inapposite to the present case and should be disregarded.

The mercury found in the fish in these two cases is not an "added substance" to the fish, within the meaning of R. C. 3715.59(A), because it comes as a substance natural to the fish. *Allen v. Grafton*, 170 Ohio St. 249, paragraph 4 of the syllabus, and the dissenting opinion, at page 261.

When a substance such as mercury is not an "added substance," then as a consequence of the language in R. C. 3715.59, the director of agriculture must prove by a preponderance of the evidence that the quantity of mercury in such fish "ordinarily renders it injurious to health."

The defendant director has failed to sustain this burden of proof. Therefore, the trial judge was eminently correct in the judgment rendered.

It might further be observed that there is neither a state statute nor a rule or regulation of any state agency which sets a standard that mercury, per se, in fish causes it to be adulterated within the meaning of R. C. 3715.55 et seq.

However, pursuant to R. C. 3715.58, the director of agriculture has lawful power to promulgate regulations fixing and establishing for fish or any other food a reasonable definition and standard of quality, and that would include regulations pertaining to mercury content. This procedure, the director of agriculture did not choose to follow.

Under R. C. 3715.58, rules and regulations must be adopted strictly in accordance with R. C. chapter 119, the administrative procedure act, which provides, in detail, for public notice of a hearing concerning the adoption of a rule; for reasonable efforts toward informing those affected by such hearing (R. C. 119.03); and for an appeal from the adoption of any rule by a party adversely affected to the Court of Common Pleas of Franklin County (R. C. 119.11), to determine that such regulation is reasonable and neither arbitrary nor discriminatory. (*Weber v. Board of Health*, 148 Ohio St. 389; 1 Ohio Jurisprudence 2d 482, Admin. Law and Proc., Section 80.) This route would also afford the plaintiffs protection for their interests through judicial review.

If the route of rule-making procedure, pursuant to R. C. 3715.58, had been traveled by the director of agriculture, subject to review by the courts as provided by law, all parties would have certain and, therefore, better guidelines and standards to follow; then, more stability would be restored to the commercial fishing industry.

For the reasons discussed, the judgment of the Court of Common Pleas of Lucas County is affirmed.

Judgment affirmed.

POTTER, P. J., and WILEY, J., concur.

WILLIAM FOUKE (72-0288)

and

FRANK REYNOLDS (72-0289)

Plaintiffs

vs.

GREAT LAKES TERMINAL
WAREHOUSE COMPANY, et al.,

Defendants.

Case Nos. 72-0288
72-0289

MEMORANDUM

Between April 19, 1971 and May 10th, 1971, the plaintiffs stored with the defendant, Great Lakes Terminal Warehouse Company, various lots of fish more particularly white bass, approximating Sixty-Five Thousand (65,000) pounds for the purpose of resale in a season when the price would be higher.

The said white bass vary in size, and were caught by the plaintiffs, duly licensed commercial fishermen, in Lake Erie.

The said fish were sampled when taken to storage and found after analysis by the laboratory in Reynoldsburg, operated by the Department of Agriculture, to contain less than 0.5 parts per million mercury, except those lots stored on and after May 7, 1971, which were not examined initially.

At a subsequent re-examination one fifty-sixth of an ounce of raw flesh, bone, and skin of said fish, on six separate analyses, each analysis showed various readings ranging from 0.69 to 1.15 ppm of mercury.

Another, re-examination of similar samples, taken from the lots in storage, in August of 1971, showed a different set of

... per parts per million, different from the findings of May, 1971, some of which were below 0.5 ppm.

The defendant; Gene R. Abercrombie, Director of the Ohio Department of Agriculture; claims no interest or title in the white bass, but asserts a right to the condemnation and destruction of the fish on the basis that the fish contain mercury levels which may render them injurious to health.

The defendant; Gene R. Abercrombie, Director of the Ohio Department of Agriculture; claims that the fish are adulterated, within the meaning of Section 3715.55 of the Revised Code of Ohio.

The defendant; Gene R. Abercrombie, Director of the Ohio Department of Agriculture; has not adopted or promulgated any rule or regulation concerning what effect mercury has on fish, pursuant to Section 3715.58 of the Revised Code of Ohio. He at the time of trial stipulated that he presently accepts the interim guideline of the Food and Drug Administration of the Health, Education, and Welfare Department of the United States of America which says that 0.5 ppm of mercury in fish may be harmful.

Section 3715.59 of the Revised Code of Ohio provides (see Exhibit "B") in various sections the determination as to whether food is adulterated.

There has been submitted no proof or evidence that the fish contain any poisonous or deleterious substance which may render the fish injurious to health. The testimony adduced at the trial proved that except for an incident at Minamata Bay on an island in the Sea of Japan in 1953, no persons in the world have been injured by eating fish. The Japanese tolerance for total mercury content in fish has been set at 1.0 ppm, as has the Swedish tolerance, twice as

Not even in 1970 when the fish taken in the St. Clair River and Lake St. Clair were found to be contaminated with mercury in excess of 0.5 ppm, were there any reports or records of any person being injured or harmed from eating those fish taken from Lake St. Clair or the St. Clair River.

Wm A recent treatise indicated that mercury was found in a specimen fish which is in the Smithsonian Institute. Quite obviously, mercury has existed in fish from time immemorial. At trial, testimony was adduced to the effect that mercury, in the air as a free agent, exists. Mercury is found in the ground, and as such, we may assume that the vegetables we eat contain a certain amount of mercury.

A careful review of all of the paragraphs of Section 3715.59 of the Revised Code of Ohio which defines when food is adulterated, fails to show that the fish in question are adulterated.

Further, a review of the testimony shows no evidence was adduced that would grant to the Director of Agriculture the right to seek condemnation and/or destruction of the fish under the provisions of the statute.

Jean A. Podmore, in May of 1971, had been a chemist at the laboratory at Reynoldsburg, for two (2) years. She testified as to the testing method and procedure. Interesting to note is her testimony that if the sample of one fifty-sixth of an ounce was not clear, she threw that sample away and began with another sample. She further testified that the method used in the laboratory at Reynoldsburg was not the same method used in Canada. Certainly her testimony can only be considered as to procedure followed, which varied with Canadian procedure, and which may vary with other laboratories.

Deputy Director, Bureau of Foods and Pesticides, BF-2 in charge of the Bureau Overview of Mercury and Fish Program, Food and Drug Administration of the Department of Health, Education, and Welfare, United States of America.

The witness testified that while he himself has never participated in the examinations or experiments, he did visit Minamata and did see the results. His testimony further was that the regulatory provisions of Sweden is 1.0 ppm, with a recommendation that the fish consumption of humans be limited to one meal per week. It is interesting to note that he feels the sporting fisherman need have no restrictions as to his consumption of fish but that the rest of the population should be restricted.

The studies submitted in the various plaintiff's joint exhibits demonstrate that the injuries attendant from a heavy consumption of raw fish by the inhabitants of Minamata Bay, near the plant, were identified as the results of actual ingestion of an organic form of mercury, identified as methyl mercury. Yet these identifications, the basis for Dr. Kolbye's conclusions are in contrast to the Swedish studies that showed that while inorganic mercury compounds did not pass through the membranes as does methyl mercury, the Swedish studies indicate that all mercury found in fish does not mean that the organic mercuric compound, methyl mercury, exists, but that it may exist. It is fundamental that the tests do not find methyl mercury but test for mercury, an unstable element, which exists in its "solid" state as a fluid. No evidence has been presented here that any of the fish in the warehouse contained methyl mercury. This testimony is that there may be a possibility

compound, exists.

In the special report to the Secretary's Pesticide Advisory Committee, Department of Health, Education, and Welfare, of November, 1970, of which committee, Dr. A. C. Kolbye, Jr., was a member of the study group the testimony of Dr. A. C. Kolbye, Jr., can be succinctly stated exactly as it appears in the report at Page 6; namely, "The major conclusion derived from these and other findings was that it seems unlikely that we will find overt mercury poisoning from the consumption of fish or other food products, as normally marketed in this country. This is not to say that there may not be a few individuals, who because of high consumption of contaminated fish may have signs of mercury poisoning."

Further let it be said that he has not now nor has the FDA adopted any regulation, it has adopted only an "interim guideline." (Similarly the Ohio Department of Agriculture has not adopted a regulation but has followed the FDA guideline). After all these studies that Dr. A. Kolbye, Jr., has participated in, at no time has a regulation been adopted as was done in cigarettes or recently in the matter of the lead content in paint. The most that Dr. Kolbye, Jr., would say is that certain segments of the population that ate mercury contaminated fish might sustain some injury depending on the amount and frequency of ingestion.

The only conclusion possible is the presumption of regularity in the testing procedure, which Dr. A. Kolbye, Jr., claimed made it verifiable and repeatable. His response to the hypothetical question, then cannot be sustained as fact or evidence since the evidence in this case showed there must and did exist error. The findings were

not verifiable and repeatable since each re-examination disclosed different results. Thus the toxicity of these fish has not been shown.

In summation, there is no real probative evidence that the white bass held in storage are poisonous or deleterious, and certainly there is no probative evidence that the usual and ordinary consumption of these white bass by the populace in Ohio will ordinarily render such consumption injuries to health.

Since the Director of Agriculture has failed to prove that these fish are adulterated and further has failed to prove they are ordinarily injurious to human life, the counterclaim of the Director must be denied and the prayer of the plaintiffs for a preliminary injunction be granted forthwith.

Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
VITA FOOD PRODUCTS OF ILLINOIS,)
INC., a corporation, AND)
LAWRENCE T. SCHWEIG,)
an individual,)
)
Defendants.)

NO. 70 C 2246

MEMORANDUM OPINION AND ORDER

The proceedings upon which the following opinion is rendered are based upon a Complaint for Injunction filed by the United States of America under Section 302(a) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 332(a), (hereinafter referred to as the Act), which invests this Court with jurisdiction to enjoin and restrain violations of Section 301 of the Act, 21 U.S.C. 331.

Defendant, Vita Food Products of Illinois, Inc., is an Illinois corporation. Defendant, Lawrence T. Schweig, is vice-president of the corporation.

The government alleges that the defendant receives after shipment in interstate commerce, articles of food consisting of fish, known as chubs, and distributes them for human consumption and that these chubs are adulterated within the meaning of 21 U.S.C. 342(a)(2)(C) in that they contain food additives, namely the chemical substances, DDT, derivatives of DDT, and dieldrin, which are unsafe within the meaning of 21 U.S.C. 348(a). The government further alleges that the above-named additives and their use and intended use are not in conformity with a regulation or exemption issued pursuant to 21 U.S.C. 348(a), "since the total amount of DDT and its derivatives present in said smoked chub is at a level in excess of the interim limit of 5 parts per million which was established by the Food and Drug Administration for all fish pursuant to an announcement to the public on April 22, 1969 and which is still in effect, and since the presence of dieldrin in smoked fish is not permitted by any regulation or exemption issued pursuant to 21 U.S.C. 348(a)."

The government contends that the defendants violate 21 U.S.C. 331(a) in that they introduce and cause to be introduced and deliver and cause to be delivered for introduction into interstate commerce smoked chubs which are adulterated within the meaning of 21 U.S.C. 342(a)(2)(C) and that defendants violate 21 U.S.C. 331(k) in that they cause chubs, while held for sale after shipment in interstate commerce and containing the above-named chemical substances, to be prepared, packed and distributed as smoked chubs, which acts result in the smoked chubs being adulterated within the meaning of 21 U.S.C. 342(a)(2)(C).

A hearing was held pursuant to 21 U.S.C. 335 on September 16, 1969 regarding the interstate shipment of smoked chubs which were alleged to contain the aforementioned chemical substances in excess of the amounts of 5 parts per million of DDT or derivatives or which contained dieldrin in excess of .3 ppm.

I

In effect, the government's theory is that the chubs involved herein are adulterated within the meaning of 21 U.S.C. 342(a)(2)(C) because DDT and dieldrin are "food additives" under the Act and second since "their use and intended use are not in conformity with a regulation or exemption" they are "unsafe" as a matter of law under the terms of 21 U.S.C. 348(a).

Defendants' position is "that any traces of DDT and dieldrin in its smoked fish are not "food additives within the Act", and that the government's mode of procedure "seriously perverts the elaborate statutory scheme established by Congress to ensure the safety of food and food additives and that defendants are not now and have not in the past sold any "adulterated" smoked fish."

Defendants contend that the government has tried to establish adulteration as a matter of law because it is unable to establish adulteration as a matter of fact and in so doing has ignored the statute.

21 U.S.C. 342(a)(1) states as follows:

"A food shall be deemed adulterated -
if it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2)(A) if it bears or contains any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; (iii) a color additive; or (iv) a new animal drug) which is unsafe within the

meaning of Section 346 of this Title, or (B) if it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of Section 346(a) of this Title, or (C) if it is, or it bears or contains, any food additive which is unsafe within the meaning of Section 348 of this Title."

21 U.S.C. 348(a) states as follows:

"A food additive shall, with respect to any particular use or intended use of such additives, be deemed to be unsafe for the purposes of the application of clause (2)(C) of Section 342(a) of this Title, unless -

(1) it and its use or intended use conform to the terms of an exemption which is in effect pursuant to subsection (i) of this section; or
(2) there is in effect, and its use or intended use are in conformity with, a regulation issued under the section prescribing the conditions under which such additive may be safely used. While such a regulation relating to a food additive is in effect, a food shall not, by reason of bearing or containing such an additive in accordance with the regulation, be considered adulterated within the meaning of clause (1) of Section 342(a) of this Title."

DDT is a chemical pesticide which has been used since the early 1940's to control mosquitoes and other pests. Recently, the use of DDT has been reduced by approximately 80% in the United States (tr. 219) and as of January 1, 1972, due to an order of the Environmental Protection Agency, the use of DDT will be almost eliminated. DDT and its derivatives are found in virtually all living tissue. Studies show that these concentrations (8-10 parts per million) in man (tr. 180) are decreasing (tr. 863-66; 1185-86).

Dieldrin is a far more mysterious substance than DDT although like DDT it finds its way into certain organisms. The most that can be said of dieldrin at this juncture is that its effect has not been fully demonstrated.

On April 22, 1969, a "guideline" characterizing 5 ppm as the maximum amount of DDT permissible in fish shipped in interstate commerce was issued in the form of a press release by the F. D. A. In part the release stated:

"Residues of DDT (including derivatives) in fish shipped in interstate commerce will be limited to 5 parts per million (ppm) under an interim guideline announced today by the Food and Drug Administration.

"The interim limit has been established primarily because of high residues of DDT and its derivatives found in coho salmon from Lake Michigan.

"This guideline is intended to protect the public from excessive levels of DDT in fish while a full scientific review is completed," Food and Drug Commissioner Herbert H. Ley, Jr., M. D. explained. "It also gives the fishing industry a specific standard. Fish carrying residues higher than 5 ppm will be subject to seizure.

"The F. D. A. has asked the National Academy of Sciences - National Research Council to nominate a panel of experts to carry out the review of DDT residues in fish. The 5 ppm interim limit may be changed as the result of that study, Dr. Ley said."

In ruling on the statutory basis for the F. D. A.'s authority to issue its interim enforcement guideline the Court in U. S. v. City Smoked Fish Co., et al. (E.D. Mich., Memo. Op. 33669, pg. 6, 1976) said:

"Plaintiff concedes that this guideline is neither a 'regulation' which the Act empowers it to issue, nor any other species of administrative rule recognized by any relevant or pleaded statute. This guideline is not published in the Code of Federal Regulations, nor apparently in any other published compilation of administrative rules.

"Since there is no statutory authority to issue such an interim enforcement guideline, it follows that defendants' violation of law, if any, must be of the statute itself, in this case The Food, Drug and Cosmetic Act."

The Court therein found such violation of the statute. However, I find myself in disagreement with that decision and instead find that DDT and dieldrin are not "food additives" within the meaning of the Food, Drug and Cosmetic Act of 1939.

I have come to this conclusion after a careful analysis of the statute, the 1959 "Food Additives Amendment" and its legislative history and purpose.

I find it necessary to quote at this point from that legislative history:

"* * * This bill, if enacted, will require the processor who wants to add a new and unproven additive to accept the responsibility now voluntarily borne by all responsible food processors of first proving it to be safe for ingestion by human beings.

"* * * * *

"The second flaw in existing law which has proved detrimental to consumers, the processors, and to our national economy and which this bill seeks to remove is a provision which has inadvertently served to unnecessarily proscribe the use of additives that could enable the housewife to safely keep food longer, the processor to make it more tasteful and appetizing, and the Nation to make use of advances in technology calculated to increase and improve our food supplies. Your committee agrees with the Food and Drug Administration that existing law should be changed to permit the use of such additives as our technological scientists may produce and which may benefit our people and our economy when the proposed usages of such additives are in amounts accepted by the Food and Drug Administration as safe." Senate Report No. 2422, 85th Cong., 2d Sess., 3 U.S. Code Cong. & Admin. News 5301 (1958).

Thus, the purpose of the Amendment was two-pronged; to permit the use of food additives in safe quantities but only after tests for safety conducted before the food in which those additives are used is introduced into commerce.

Section 348 provides an elaborate procedure for evaluating the safety of "food additives". Thus, 21 U.S.C. 348(b)(1) reads as follows:

"Petition for regulation prescribing conditions of safe use; contents; description of production methods and controls; samples; notice of regulation"

and contains elaborate procedures that must be adhered to by any person who intends to use a food additive and details the conditions under which such an additive may be safely used.

It is uncontroverted that defendants herein do not actually "add" DDT or dieldrin to its product. The chemicals in question are introduced into the chubs by the environment. In no way have the defendants been accused of nor do they deliberately use the named substances in connection with the preparation of their product.

The Committee reports which accompany the Food Additives Amendment deal with three different categories of 'food additives'.

"The legislation covers substances which are added intentionally to food. These additives are generally referred to as "intentional additives".

"The legislation also covers substances which may reasonably be expected to become a component of any food or to affect the characteristics of any food. These substances are generally referred to as incidental additives.

"The principal examples of both intentional and incidental additives are substances intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting, or holding food." Senate Rep. No. 2422.

Therefore, it may be seen that neither the 'intentional' nor 'incidental' category of 'food additive' is applicable. It is not an 'intentional' additive because there is no allegation that the defendants nor for that matter any other person or corporation add the named chemical substances to the chubs.

Nor may they be considered 'incidental' additives because Congress clearly enunciated that only those substances deliberately used in the course of the manufacturing or distribution process would be within that category. It is indisputable that any DDT or dieldrin in defendants' chubs result from unintentional circumstances which occur prior to the fish being caught.

The third category of 'additives' are 'accidental' and the Senate Report states as follows in respect to such additives:

"On the other hand, substances which may accidentally get into a food, as for example, paints or cleaning solutions used in food processing plants, are not covered by the legislation. These additives are generally referred to as 'accidental additives', since these substances if properly used may not reasonably be expected to become a component of a food or otherwise to affect the characteristics of a food. If accidental additives do get into food, the provisions of the Food, Drug, and Cosmetic Act dealing with poisonous and deleterious substances would be applicable."

I find myself in agreement with defendants that if, indeed, DDT and dieldrin traces found in fish are to be considered 'additives' in any sense, they must clearly be considered 'accidental' ones and as such not a 'food additive' under the Act. Thus, I am in disagreement with the government's contention that "as components of the defendants' chub, residues of DDT and dieldrin are incidental food additives governed by the food additive provisions of the Act." (Govt.'s post-tr. brief, pg. 30).

One of the government's witnesses Dr. Frederick Coulston stated that DDT 's presence in the chubs is 'accidental' (tr. 245). Dr. Coulston testified as follows:

Q. Do you know, sir, from your studies and through your group, what the best thinking is as to how the DDT got there? (Into fish that are swimming in lakes).

A. Well, of course nobody rightly knows exactly how it got there. We can only suppose that the use of the DDT in spraying for environmental control of insects or in use on crops in the soil, eventually washed down into the rivers and then into the lakes * * * (tr. 207).

Thus, the chemical substances DDT and dieldrin are not ones intended for use in "producing, manufacturing, packing, processing, transporting, or holding food." Congress was most explicit in its delineation of what constitutes an 'intentional' or 'incidental' additive.

21 U.S.C. 321(s) defines "food additive" and expressly excludes -

"(1) a pesticide chemical in or on a raw agricultural commodity; or

"(2) a pesticide chemical to the extent that it is intended for use or is used in the production, storage, or transportation of any raw agricultural commodity * * *."

A case on point is one cited by defendant U. S. v. Bodine Produce Co., 206 F.Supp. 201, 210 (D.C. Ariz. 1962) in which the Court stated that the DDT found in lettuce was not a 'food additive':

***By the Food Additive Amendment in 1958
*** Congress tackled the problems of food additives in processed foods in depth. It

drew a sharp line between the Food Additives Amendment and the Pesticide Chemicals Amendment. Thus in the definition of 'food additive' it excluded pesticide chemicals in or on raw agricultural commodities. ***"

In Environmental Defense Fund v. U. S., 428 F.2d 1083 (D.C. Cir., 1970), the Court stated:

"*** the statute (21 U.S.C. 321(s)) explicitly excludes pesticide chemicals from the definition of the terms 'food additive' and 'color additive'."

The government has attached as Ex. D to its Trial Memorandum the ruling in U.S. v. City Smoked Fish, supra, in which the Court found:

"It further appears that DDT found in raw chubs is a pesticide chemical and not a food additive within the meaning of the Act. However, the Court concludes that DDT found in smoked chubs is a 'food additive', since the chubs are no longer in their raw or natural state as required by the Act."

I cannot agree. 21 U.S.C. 342(a) states that a "pesticide chemical" remains a "pesticide chemical" within the meaning of the Act even after the "raw agricultural commodity has been subjected to processing such as canning, cooking, freezing, dehydrating or milling."

For the above stated reasons, I find that any traces of DDT or dieldrin found in defendants' chubs cannot be labeled a 'food additive' within the meaning of the Food, Drug and Cosmetic Act of 1938.

II

The next issue to be resolved is that of whether or not the chubs in question fall within the purview of 21 U.S.C. §342(a)(1), supra, a portion of which states:

"A food shall be deemed to be adulterated -
If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health."

The government has alleged as follows:

"It should be noted that smoked chubs containing residues of DDT, its derivatives or dieldrin in excess of the enforcement guidelines need not be proven injurious to health to be adulterated under the Act. In a long line of cases, the federal courts have held that foods may be adulterated regardless of whether they are injurious to health, unless the particular statutory definition of adulteration expressly requires the Government to prove such injury (citing cases). Since 21 U.S.C. 342 (a)(2)(C) does not require such proof, no injury to health need be shown to establish the adulteration alleged in this case." (Govt.'s Tr. Memo., p. 20).

However, having found that 21 U. S. C. 342(a)(2)(C) is not applicable, I find that injury to health must be shown in order for the government to prevail. The testimony on this issue was diverse and interesting but in the final analysis not as illuminating nor as definitive as might have been hoped.

Dr. Frederick Coulston, a toxicologist and one of the government's witnesses testified as to rumors that DDT might be a carcinogen:

"But its the uncertainty. I can only state that I know of no harm to man, human beings, from DDT even in larger amounts than five parts * * *." (Tr. 218).

Professor Rolf Hartung, another government witness testified as follows:

"There is at least one suggestive study by Poland who looked again at a series of pesticide formulators and reported that those people who had received 20 times the normal background level of pesticides did exhibit a slight increase in the rate in which they would metabolize these drugs.
* * * * *

"Now this does not in any way imply safety either. The reason it doesn't imply harmfulness is because the effects are very subtle and we cannot make an easy judgment

as to whether this is permanently hurting a person or not. I am dubious that it would personally hurt a person." (Tr. 297).

A short time later in the trial Professor Hartung stated:

"If we want to look for any evidence whatever as to what might be happening for man at normal types or close to normal types of dosage, we are very hard put." (Tr. 299).

Dr. William Deichmann, an eminent toxicologist, testified in behalf of the defendant and stated during the trial that counsel for the government had telephoned him and:

"***told me that the Vita Food Company had been selling smoked fish which contained 7 or 8 parts per million DDT, and whether I would speak for Food and Drug Administration, since the permissible limit in smoked fish is 5 parts per million, and the primary issue was whether I could make the statement that the ingestion of smoked fish containing 7 or 8 parts per million is injurious to health.

"Q. And what did you say, sir?

"A. I told Mr. Raubichek (government counsel) that if it is a question of whether the food company is guilty of exceeding the concentration, if that is the question, that I must agree that 7 or 8 is more than 5, and on that basis I would say they would be guilty, but if it is a question of health hazard of a concentration of 8 parts per million, that I couldn't support that, and for that reason I declined to testify for Food and Drug, and I wrote to Mr. Raubichek a letter to that effect." (Tr. 844-45).

When asked his opinion as to the chronic toxicity of residues of DDT in human beings Dr. Deichmann responded:

"I could refer you to the studies that have been done where the concentrations, the retention rates in human beings, have been very much higher than those

in the general population without any effect that the investigators and physicians tried to find and did not find." (Tr. 807).

In response to the question of whether he knew of any disease in humans attributable to DDT the witness replied:

"I have introduced this word on two occasions (DDT-itis), and I made the statement that there is no record of any DDT-itis in this country or any other country. . . ." (Tr. 807).

Again Dr. Deichmann testified:

"Nowhere in the world does this compound, and I am referring to DDT, present an 'imminent hazard' to public health - - -." (Tr. 852).

Thus, I cannot on the basis of the evidence tendered during the course of this trial unequivocally state that DDT is a known health hazard to man.

III

A great portion of the trial revolves around the issue of the reliability of the test methodology used by the government to prove that the samples of Vita's chubs involved herein contained DDT concentrates in excess of 5 ppm. The government's test method is referred to as the 'AOAC' method. Although I shall not go into a detailed analysis of the testing procedures I should like to note the following information that was gleaned from the trial testimony.

No method of testing has been proven to be absolutely reliable. Certain discrepancies that were raised during trial and in defendant's post-trial brief have led me to conclude that the AOAC method is capable of distinguishing between concentrations of DDT in the area of 4 to 9 ppm. Thus, there is always the possibility of a margin of error and I must hold that the AOAC method, when left to be followed by testers provided by food processors in all cases and utilized by government testers only in spot checking on the continuous batch upon batch testing to be performed by the food processors, is incapable of that degree of accuracy which ought to exist to support a court judgment enjoining a food processor from proceeding on in the industry.

Since September 1971, the American Meat Institute Laboratory (AMI) has been hired by Vita to analyze its chubs for pesticides, using the AOAC method. The AMI Laboratory also analyses each of the samples which formed the foundation for the case herein. Its analysis showed substantially lower results than did the comparable

analysis performed by the FDA chemists. Four of the seven AMI analyses showed readings below 5 ppm and the highest of those above 5 ppm read 5.35. There are numerous other examples of differences between the various methods of testing. Differences in results tended to reflect differences between individual chemists performing the tests.

The concept "absolute reliability", like the phrases "unimpeachable preciseness" and "perfect certainty", is repugnant to the scientific mind. The most that should be looked for is "sufficient reliability" - - reliability to a degree sufficient for the purpose to be served. The purpose to be served here is not served when the acknowledged degree of exactness has a coefficient of error of plus or minus 25%, and when various tests of the same samples with the same procedures performed by equally qualified persons result in readings varying over a range of one hundred percent.

From all the relevant data one fact stands out. It is that science has not developed a system which is sufficiently reliable. The AOAC's method is not sufficiently reliable for me to find by the greater weight of the evidence and as a controlling fact that the chubs sampled by FDA in April 1972 contained DDT concentrations in excess of 5 ppm.

There is in this case uncontradicted evidence tending to show that the level of Lake Michigan chubs generally is less than 5 ppm. Mr. Bernard Lorant, a chemist, testified that based upon all of the test results in evidence (FDA's, AMI's, MDES, and those of WARF) (Def. Ex. 29) the incidence of DDT and its analogs in Lake Michigan chub are at or below 5 ppm. (Tr. 1202-03).

IV

In summary, I find that 21 U.S.C. 342(a)(2)(C) is not applicable since DDT, derivatives of DDT and dieldrin found in Vita's smoked chubs are not "food additives" under the Act. I find that DDT derivatives of DDT and dieldrin as found in Vita's smoked chub are not a known health hazard within the meaning of 21 U.S.C. 342(a)(1). I find that the test method to be used by processors of smoked chub is not sufficiently precise for a finding of fact that the chubs sampled in April 1972 contained DDT concentrations in excess of 5 ppm.

It should be made crystal clear that these findings do not open the gate to an area of abandonment of concern on the part of processors of food. Neither do they restrain the Food and Drug Administration from pursuing a severe program of monitoring processors of smoked fish in its effort to keep out of interstate commerce food that constitutes a known health hazard.

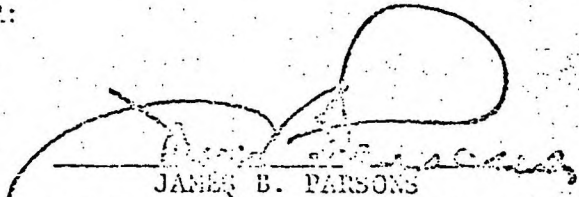
I have been presented in this case just one matter and my findings are technical ones. By the greater weight of the evidence and by the applicable law the allegations of the complaint against these defendants have not been sustained.

This Memorandum Opinion shall constitute my findings of fact and conclusions of law.

ORDER

Wherefore, it is ordered, adjudged and decreed that judgment with costs ought be and the same hereby is entered in favor of the defendants and against the plaintiff.

ENTER:


JAMES B. PARSONS
United States District Judge

DATED: February 14, 1973

UNITED STATES OF AMERICA v. LEXINGTON
MILL & ELEVATOR COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

No. 548. Argued January 5, 1914.—Decided February 24, 1914.

The primary purpose of Congress in enacting the Food and Drugs Act of 1906 was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated food.

As against adulteration the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to health.

Where such a purpose has been effected by plain and unambiguous language by an act within the power of Congress, the only duty of the courts is to give the act effect according to its terms.

The inhibition in subdivision 5 of § 7 of the Food and Drugs Act of 1906 against the addition of any poisonous or other added deleterious ingredient which may render an article of food injurious to health is definitely limited to the particular class of adulteration specified, and in order to condemn the article under subdivision 5 it is incumbent upon the Government to establish that the added substance may render the article injurious to health.

In subdivision 5 of § 7 of the Food and Drugs Act of 1906 the word "may" is used in its ordinary and usual signification; and if an article of food may not by the addition of a small amount of poisonous substance by any possibility injure the health of any consumer, it may not be condemned under this subdivision of the act.

202 Fed. Rep. 615, affirmed.

THE facts, which involve the construction of subdivi-

sions 4 and 5 of § 7 of the Food and Drugs Act of 1906, are stated in the opinion.

Mr. Attorney General McReynolds, with whom *Mr. Francis G. Caffey* was on the brief, for the United States:

The seized flour was adulterated within subd. 5, § 7 of the Food and Drugs Act. *French Silver Dragee Co. v. United States*, 179 Fed. Rep. 824; *United States v. 1,950 Boxes of Macaroni*, 181 Fed. Rep. 427; *United States v. Mayfield*, 177 Fed. Rep. 765; *United States v. Rosebrock & Co.*, Notice of Judgment, 825; *United States v. Koca Nola Co.*, Notice of Judgment, 202; *Friend v. Matt*, 68 J. P. 589.

The Circuit Court of Appeals erred in reviewing the weight of evidence as to whether the flour was adulterated within subd. 4 of § 7 of the act.

The bleaching conceals newness and imparts color of better grade and inferior flour is made to resemble patent.

Flour milled from inferior wheat is made to appear as if milled from first-quality.

The Circuit Court of Appeals had no power to review the jury's findings. *Behn v. Campbell*, 205 U. S. 403; *Lancaster v. Collins*, 115 U. S. 222; *Chicago & North Western Ry. Co. v. Ohle*, 117 U. S. 123.

The Court of Appeals was correct in holding that there was no error in submitting to the jury the charges of adulteration under subd. 1 of § 7 of the act.

The Food and Drugs Act is constitutional. *Hipolite Egg Co. v. United States*, 220 U. S. 45; *Booth v. Illinois*, 184 U. S. 425; *Otis v. Parker*, 187 U. S. 606; *Powell v. Pennsylvania*, 127 U. S. 678; *Buttfield v. Stranahan*, 192 U. S. 470; *United States v. Johnson*, 221 U. S. 488; *Shawnee Milling Co. v. Temple*, 179 Fed. Rep. 517; *United States v. 74 Cases Grape Juice*, 181 Fed. Rep. 629; *United States v. 420 Sacks of Flour*, 180 Fed. Rep. 518; *United States v.*

UNITED STATES v. LEXINGTON MILL CO. 401

232 U. S.

Argument for Respondent.

Heinle Specialty Co., 175 Fed. Rep. 299; *United States v. 100 Cases of Apples*, 179 Fed. Rep. 985.

Mr. Edward P. Smith and Mr. Bruce S. Elliott, with whom Mr. Edward L. Scarritt, Mr. C. J. Smyth and Mr. W. C. Scarritt were on the brief, for respondent:

Congress possesses no police power, and the Food and Drugs Act, if sustained at all, must be sustained on the ground that it is a regulation of commerce between the States. *Crutcher v. Kentucky*, 141 U. S. 47; *Lawton v. Steele*, 152 U. S. 133; *Gibbons v. Ogden*, 9 Wheat. 1; *Hannibal & St. Joe R. R. Co. v. Hewson*, 95 U. S. 465; *Wilkinson v. Rahrer*, 140 U. S. 545.

The power to make the ordinary regulations of police remains with the individual States and cannot be assumed by the National Government, and in this respect it is not interfered with by the Fourteenth Amendment. *Mugler v. Kansas*, 123 U. S. 623; *Plumley v. Massachusetts*, 155 U. S. 461; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *United States v. Knight*, 156 U. S. 1; *Int. Com. Comm. v. Brimson*, 154 U. S. 447; *Employers' Liability Case*, 207 U. S. 463.

The Food and Drugs Act is to be regarded as an act to regulate commerce, and the court erred in charging the jury that the Government need not prove that the flour in question, or foodstuffs made by the use of it, would injure the health of the consumer; that it is the character—not the quantity—of the added substance which is to determine this case.

Congress never intended the statute in question should be construed as the trial court construed it in this instruction to the jury.

In the passage of this act Congress intended the words of this section to be used as above indicated, in their usual and ordinary sense. It was never intended by Congress that this act should ever be construed to mean that the

VOL. CCXXXII—26

useful and harmless property of a citizen should, by the methods providing for the prevention of the sale of harmful and injurious foods, be confiscated, condemned and destroyed. This would be contrary to the policy and spirit of our laws and the fundamental principles of our government. *Church of Holy Trinity v. United States*, 143 U. S. 457; *United States v. C. & N. W. Ry. Co.*, 157 Fed. Rep. 618; *Binns v. United States*, 194 U. S. 495; *Blake v. Natl. City Bank*, 23 Wall. 307; *Wadsworth v. Boysen*, 148 Fed. Rep. 771.

The language used in the act in question is not susceptible of the interpretation placed thereon by the trial court. *Montclam v. Ramsdell*, 107 U. S. 147; *Postmaster General v. Early*, 6 L. C. P. 147; 12 Wheat. 136.

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.

Giving to all the words of the statute, therefore, their plain, usual and ordinary meaning, it is plain that the trial court erroneously construed it. *French Silver Dragee Co. v. United States*, 179 Fed. Rep. 824.

The construction contended for has been sustained by the English courts in construing a similar statute, 38 and 39 Vict., c. 63, § 3. *Friend v. Mapp*, 68 J. P. 589; *Hull v. Horsnell*, 68 J. P. 591.

The act as construed by the trial court is arbitrary and an unreasonable interference with the rights of property. *Jew Ho v. Williamson*, 103 Fed. Rep. 10.

If the flour did not contain anything which might render it injurious to health, it is wholly without the power of Congress or any other branch of the Government to exclude it from the channels of commerce or to prohibit its sale.

Congress has not undertaken to exclude flour such as this from the markets. Congress only attempted to exclude from the markets such flour as may be injurious to

UNITED STATES v. LEXINGTON MILL CO. 403

232 U. S.

Argument for Respondent.

health. The trial court by its instructions forced the condemnation and destruction of this flour, even though it contained nothing which would in any wise render it injurious to health. This is not the exercise of a legislative power, but is an arbitrary and illegal taking of property which this court has in many cases condemned. *Powell v. Pennsylvania*, 127 U. S. 678; *Mugler v. Kansas*, 123 U. S. 623; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Collins v. New Hampshire*, 171 U. S. 30; *Lochner v. New York*, 198 U. S. 45.

There is no reasonable foundation in this case for holding that it is necessary or appropriate to safeguard the public health or the health of the individuals to destroy and condemn the flour in question. *State v. Layton*, 160 Missouri, 474; *State v. Addington*, 12 Mo. App. 219; *State v. Fisher*, 52 Missouri, 174; *Toledo v. Jacksonville*, 67 Illinois, 37; *River Rendering Co. v. Behr*, 77 Missouri, 9; *McConnell v. McKillipp*, 71 Nebraska, 712.

The interpretation placed upon the act by the Circuit Court of Appeals is reasonable, gives effect to all the language contained in the act, and is the only interpretation under which its constitutionality can be sustained. *Knowlton v. Moore*, 178 U. S. 41; *Collins v. New Hampshire*, 171 U. S. 30; *Interstate Drainage Co. v. Commissioners*, 158 Rep. Fed. 270.

The statute in question is a penal statute, and as to the rule applicable to the construction of such statutes see *Martin v. United States*, 168 Fed. Rep. 198, 201; *United States v. Willberger*, 5 Wheat. 77; *United States v. Germaine*, 99 U. S. 508; *Field v. United States*, 137 Fed. Rep. 6; *United States v. Lake*, 129 Fed. Rep. 499.

The intent of Congress, as indicated by the title of the act, was to make the condition of the food the determining factor of adulteration.

The principle of construction adopted by the Circuit Court of Appeals is sustained in numerous decisions. See

Maillard v. Lawrence, 16 How. 251; *Levy v. M'Cartee*, 6 Pet. 110; *Parsons v. Hunter*, 2 Sumner, 422; *Bernier v. Bernier*, 147 U. S. 246; *Washington Market Co. v. Hoffman*, 101 U. S. 115; *United States v. Fisher*, 109 U. S. 145; *Lake Superior Canal Co. v. Cunningham*, 155 U. S. 380; *Rhodes v. Iowa*, 170 U. S. 423; *Lake County v. Rollins*, 130 U. S. 670; *Hamilton v. Rathbone*, 175 U. S. 421; *Swarts v. Seigel*, 117 Fed. Rep. 18; *Glover v. United States*, 164 U. S. 298; *Harless v. United States (C. C. A.)*, 88 Fed. Rep. 102.

The construction of the law contended for by the Government would render contraband many admittedly harmless articles of food. Other well known articles of food, admittedly harmless, contain nitrites.

The Circuit Court of Appeals committed no error in sustaining respondent's contention that there was no substantial evidence to support the charge that the seized flour was colored in a manner whereby damage or inferiority is concealed. *Naylor & Gerrard v. Alsop Process Co.*, 168 Fed. Rep. 911, 915.

By leave of court, *Mr. Ralph S. Rounds* filed a brief as *amicus curiæ*.

MR. JUSTICE DAY delivered the opinion of the court.

The petitioner, the United States of America, proceeding under § 10 of the Food and Drugs Act (June 30, 1906, c. 3915, 34 Stat. 768, 771), by libel filed in the District Court of the United States for the Western District of Missouri, sought to seize and condemn 625 sacks of flour in the possession of one Terry, which had been shipped from Lexington, Nebraska, to Castle, Missouri, and which remained in original, unbroken packages. The judgment of the District Court, upon verdict, in favor of the Government, was reversed by the Circuit Court of Appeals for the Eighth Circuit (202 Fed. Rep. 615), and this writ of certiorari is to review the judgment of that court.

The amended libel charged that the flour had been treated by the "Alsop Process," so called, by which nitrogen peroxide gas, generated by electricity, was mixed with atmospheric air and the mixture then brought in contact with the flour, and that it was thereby adulterated under the fourth and fifth subdivisions of § 7 of the act, namely, (1) in that the flour had been mixed, colored and stained in a manner whereby damage and inferiority were concealed and the flour given the appearance of a better grade of flour than it really was, and (2) in that the flour had been caused to contain added poisonous or other added deleterious ingredients, to-wit, nitrites or nitrite reacting material, nitrogen peroxide, nitrous acid, nitric acid and other poisonous and deleterious substances which might render the flour injurious to health. The libel also charged that the flour was adulterated under the first subdivision of § 7, and was misbranded; but the Government does not urge these features of the case here. The verdict was broad enough to cover the charge under the first subdivision of § 7, but in the view we take of the case as to the instruction of the court under subdivision 5 it need not be noticed.

The Lexington Mill & Elevator Company, the respondent herein, appeared, claiming the flour, and answered the libel, admitting that the flour had been treated by the Alsop Process, but denying that it had been adulterated and attacking the constitutionality of the act.

A special verdict to the effect that the flour was adulterated was returned and judgment of condemnation entered. The case was taken to the Circuit Court of Appeals upon writ of error. The respondent contended that, among other errors, the instructions of the trial court as to adulteration were erroneous and that the act was unconstitutional. The Circuit Court of Appeals held that the testimony was insufficient to show that by the

bleaching process the flour was so colored as to conceal inferiority and was thereby adulterated, within the provisions of subdivision 4. That court also held—and this holding gives rise to the principal controversy here—that the trial court erred in instructing the jury that the addition of a poisonous substance, in any quantity, would adulterate the article, for the reason that “the possibility of injury to health due to the added ingredient and in the quantity in which it is added, is plainly made an essential element of the prohibition.” It did not pass upon the constitutionality of the act, in view of its rulings on the act’s construction.

The case requires a construction of the Food and Drugs Act. Parts of the statute pertinent to this case are:

“Sec. 7. (34 Stat. 769.) That for the purposes of this act an article shall be deemed to be adulterated: . . .

“In the case of food:

“First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. . . .

“Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

“Fifth. If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health. . . .

* * * * *

“Sec. 10. (34 Stat. 771.) That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act, and is being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, . . . shall be liable to be proceeded against in any district court of the United States within the district where the same is found, and seized for confiscation by a process of libel for

condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct."

Without reciting the testimony in detail it is enough to say that for the Government it tended to show that the added poisonous substances introduced into the flour by the Alsop Process, in the proportion of 1.8 parts per million, calculated as nitrogen, may be injurious to the health of those who use the flour in bread and other forms of food. On the other hand, the testimony for the respondent tended to show that the process does not add to the flour any poisonous or deleterious ingredients which can in any manner render it injurious to the health of a consumer. On these conflicting proofs the trial court was required to submit the case to the jury. That court, after stating the claims of the parties, the Government insisting that the flour was adulterated and should be condemned if it contained any added poisonous or other added deleterious ingredient of a kind or character which was capable of rendering such article injurious to health; the respondent contending that the flour should not be condemned unless the added substances were present in such quantity that the flour would be thereby rendered injurious to health, gave certain instructions to the jury. Part of the charge, excepted to by the respondent, reads:

"The fact that poisonous substances are to be found in the bodies of human beings, in the air, in potable water, and in articles of food, such as ham, bacon, fruits, certain vegetables, and other articles, does not justify the adding of the same or other poisonous substances to articles of food, such as flour, because the statute condemns the adding of poisonous substances. Therefore the court charges you that the Government need not prove that this flour or food-stuffs made by the use of it would injure

the health of any consumer. It is the character—not the quantity—of the added substance, if any, which is to determine this case.”

On the other hand the respondent insisted that the law is, and requested the court to charge the jury:

“That the burden is upon the prosecution to prove the truth of the charge in the libel, that by the treatment of the flour in question by the said Alsop Process it has been caused to contain added poisonous or other added deleterious ingredients, to-wit, nitrites or nitrite reacting material, which may render said flour injurious to health.

“And in this connection you are further instructed that it is incumbent upon the Government to prove that any such added poisonous or other added deleterious ingredients, if any contained in said flour, are of such a character and contained in the flour seized in such quantities, conditions and amounts as may render said flour injurious to health, and unless you find that all of such facts are so proven you cannot find against the claimant or condemn the flour in question under that charge in the libel, and if you fail to so find your verdict upon that count or charge in the libel must be in favor of the claimant or defendant.

* * * * *

“The law does not prohibit the adding of nitrites or nitrite reacting material to flour, and a jury cannot find for the Government or against the claimant, even if it be shown that nitrites or nitrite reacting material was added to the flour in question, unless they believe from a preponderance of the evidence that such addition, if any, rendered said flour injurious to the health of those who might consume the bread or other foods made from said flour.”

It is evident from the charge given and requests refused that the trial court regarded the addition to the flour of any poisonous ingredient as an offense within this statute, no

232 U. S.

Opinion of the Court.

matter how small the quantity, and whether the flour might or might not injure the health of the consumer. At least such is the purport of the part of the charge above given, and if not correct, it was clearly misleading, notwithstanding other parts of the charge seem to recognize that in order to prove adulteration it is necessary to show that the flour may be injurious to health. The testimony shows that the effect of the Alsop Process is to bleach or whiten the flour and thus make it more marketable. If the testimony introduced on the part of the respondent was believed by the jury they must necessarily have found that the added ingredient, nitrites of a poisonous character, did not have the effect to make the consumption of the flour by any possibility injurious to the health of the consumer.

The statute upon its face shows, that the primary purpose of Congress was to prevent injury to the public health by the sale and transportation in interstate commerce of misbranded and adulterated foods. The legislation, as against misbranding, intended to make it possible that the consumer should know that an article purchased was what it purported to be; that it might be bought for what it really was and not upon misrepresentations as to character and quality. As against adulteration, the statute was intended to protect the public health from possible injury by adding to articles of food consumption poisonous and deleterious substances which might render such articles injurious to the health of consumers. If this purpose has been effected by plain and unambiguous language, and the act is within the power of Congress, the only duty of the courts is to give it effect according to its terms. This principle has been frequently recognized in this court. *Lake County v. Rollins*, 130 U. S. 662, 670:

"Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have

plainly expressed, and consequently no room is left for construction."

Hamilton v. Rathbone, 175 U. S. 414, 421:

"The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary."

Furthermore all the words used in the statute should be given their proper signification and effect; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 115:

"We are not at liberty," said Mr. Justice Strong, "to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sec. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times."

Applying these well-known principles in considering this statute, we find that the fifth subdivision of § 7 provides that food shall be deemed to be adulterated: "If it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health." The instruction of the trial court permitted this statute to be read without the final and qualifying words, concerning the effect of the article upon health. If Congress had so intended the provision would have stopped with the condemnation of food which contained any added poisonous or other added deleterious ingredient. In other words, the first and familiar consideration is that, if Congress had intended to enact the statute in that form, it would have done so by choice of apt words to express that intent. It did not do so, but only condemned food containing an added poisonous or other added deleterious ingredient when such addition might render the article of food in-

UNITED STATES v. LEXINGTON MILL CO. 411

232 U. S.

Opinion of the Court.

injurious to the health. Congress has here, in this statute, with its penalties and forfeitures definitely outlined its inhibition against a particular class of adulteration.

It is not required that the article of food containing added poisonous or other added deleterious ingredients must affect the public health, and it is not incumbent upon the Government in order to make out a case to establish that fact. The act has placed upon the Government the burden of establishing, in order to secure a verdict of condemnation under this statute, that the added poisonous or deleterious substances must be such as may render such article injurious to health. The word "may" is here used in its ordinary and usual signification, there being nothing to show the intention of Congress to affix to it any other meaning. It is, says Webster, "an auxiliary verb, qualifying the meaning of another verb, by expressing ability, . . . , contingency or liability, or possibility or probability." In thus describing the offense Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the act. This is the plain meaning of the words and in our view needs no additional support by reference to reports and debates, although it may be said in passing that the meaning which we have given to the statute was well expressed by Mr. Heyburn, chairman of the committee having it in charge upon the floor of the Senate (Congressional Record, vol. 40, pt. 2, p. 1131):

"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 system."

And such is the view of the English courts construing a similar statute. The English statute provides (§ 3, of the Sale of Food and Drugs Act, 1875):

"No person shall mix, color, . . . or order or permit any other person to mix, color, . . . any article of food with any ingredient or material so as to render the article injurious to health."

That section was construed in *Hull v. Horsnell*, 68 J. P. 591, which involved preserved peas, the color of which had been retained by the addition of sulphate of copper, charged to be a poisonous substance and injurious to health. There was a conviction in the lower court. Lord Alverstone, C. J., in reversing and remitting the case on appeal, said:

"In my opinion, if the justices convicted the appellant of an offence under § 3 of the Sale of Food and Drugs Act, 1875, 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. To constitute an offence under the latter part of § 3 the article of food sold must, by the addition of an ingredient, be rendered injurious to health. All the circumstances must be examined to see whether the article of food has been rendered injurious to health."

We reach the conclusion that the Circuit Court of Appeals did not err in reversing the judgment of the Dis-

RUBBER TIRE CO. v. GOODYEAR CO. 413

232 U. S.

Syllabus.

trict Court for error in its charge with reference to subdivision five of § 7.

The Circuit Court of Appeals reached the conclusion that there was no substantial proof to warrant the conviction under the fourth subdivision of § 7, that the flour was mixed, colored and stained in a manner whereby damage and inferiority was concealed. As the case is to be retried to a jury, we say nothing upon this point.

As to the objection on constitutional grounds, it is not contended that the statute as construed by the Circuit Court of Appeals and this court is unconstitutional.

It follows that the judgment of the Circuit Court of Appeals reversing the judgment of the District Court must be affirmed, and the case remanded to the District Court for a new trial.

Affirmed.

Counsel for Parties.

LONZRICK, APPELLEE, v. REPUBLIC STEEL CORP., APPELLANT.

[Cite as Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227.]

Implied warranty—No contractual relationship—Products liability case—Not restricted to basis of negligence—Petition states cause of action in tort, when—Breach of implied warranty—Defective steel roof joists collapsed, injuring workman.

1. The plaintiff in a products liability case is not restricted to prosecuting his action on the basis of negligence alone but may proceed in an action in tort based upon the theory of an implied warranty, notwithstanding that there is no contractual relationship between the plaintiff and the defendant. (*Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, and *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132, approved and followed; paragraph two of the syllabus of *Wood v. General Electric Co.*, 159 Ohio St. 273, and *Welsh v. Ledyard*, 167 Ohio St. 57, overruled.)
2. Where the allegations of a petition and the reasonable inferences therefrom establish that the defendant manufactured and sold certain steel roof joists and impliedly warranted that they were fit for the ordinary purposes for which such steel joists were to be used, and where such joists were defective because they were not fit for the ordinary purposes for which such joists were to be used, and as a direct and proximate result of being so defective these joists collapsed and fell upon the plaintiff and injured him while he was working in a place where his presence was reasonably to be anticipated by the defendant, such petition states a good cause of action in tort based upon the theory of breach of implied warranty.

(No. 39493—Decided June 15, 1966.)

APPEAL from the Court of Appeals for Cuyahoga County.

The facts are stated in the opinion.

Messrs. Hahn & Swadey and Mr. Lad J. Roth, for appellee.

Messrs. Jones, Day, Cockley & Reavis, Mr. Edward P. Trocell and Mr. Robert J. Hoerner, for appellant.

Opinion, per O'NEILL, J.

O'NEILL, J. Plaintiff filed a petition in the Common Pleas Court of Cuyahoga County which alleges:

"On August 22, 1960, at about 10.30 a. m., plaintiff, who was then in the employ of Valley Steel Erectors, Inc., * * * was engaged in his usual occupation of structural iron worker on certain premises known as the 'Stow Industrial Park' located in or near Stow, Ohio, where a new warehouse business was then under construction.

"At said time and place, while he was working on the ground in an area where certain steel roof joists manufactured and sold by defendant had been installed directly overhead, a number of such joists collapsed and fell down upon plaintiff, causing him the injuries and damages hereinafter set forth.

"* * *

"Prior to the occurrence of August 22, 1960, defendant impliedly warranted that the said roof joists were of good and merchantable quality, but said implied warranty was breached by defendant in that said roof joists were not of good and merchantable quality.

"By reason of such breach of warranty on the part of the defendant, the said roof joists came apart in use and fell upon plaintiff while he was working below them in a place in which his presence was reasonably to be anticipated by defendant. As a direct and proximate result, plaintiff sustained the following injuries and damages * * *."

Defendant's demurrer to the petition was sustained, and, plaintiff not desiring to plead further, his action was dismissed and judgment was entered for the defendant.

On appeal, the Court of Appeals reversed the judgment of the Common Pleas Court and remanded the cause to the Common Pleas Court with instructions to overrule the demurrer and for further proceedings according to law.

It may be that the petition in the instant case would be subject to a motion to make some of its allegations definite and certain, especially those allegations as to the implied warranty "of good and merchantable quality" and as to the joists not being "of good and merchantable quality." However, defendant waived its right to file such motion by filing its demurrer. *Clay v. Edgerton*, 19 Ohio St. 549. Thus, for the purpose of testing

Opinion, per O'NEILL, J.

the legal sufficiency of the petition, defendant's demurrer must be regarded as admitting the truth of the facts alleged and whatever other facts which can by fair and reasonable intendment be inferred from those facts. *Guardian Life Ins. Co. of America v. Veser*, 128 Ohio St. 200; *Gugle v. Loeser*, 143 Ohio St. 362; *Bell v. Salvation Army*, 172 Ohio St. 326.

The allegations of the petition and all reasonable inferences therefrom will support the following statement of facts:

Defendant manufactured and sold certain steel roof joists. In selling those joists, defendant impliedly warranted that they were fit for the ordinary purposes for which such steel roof joists are used. (Section 1302.27, Revised Code, reads in part: "Goods to be merchantable must be at least such as * * * [3] are fit for the ordinary purposes for which such goods are used.") Those joists were defective because they were not fit for the ordinary purposes for which such joists are used. As a proximate result of being so defective, those joists came apart and fell on and injured plaintiff. At that time, plaintiff was working as a structural iron worker on the ground in an area where the joists had been installed directly overhead and was thus in a place where his presence was reasonably to be anticipated by defendant.

The Court of Appeals held that this petition states a good cause of action in tort, based upon the theory of breach of warranty.

This is a products liability case. In such a case, there are three possible causes of action which the plaintiff may pursue:

(1) An action in tort which is grounded upon negligence. Such cause of action does not require the allegation of a contractual relationship between the plaintiff and the defendant. The petition in this case does not allege negligence and does not state facts which constitute negligence.

(2) A cause of action which is based upon contract. Such a cause of action requires that there be a contractual relationship between the plaintiff and the defendant. The petition in this case does not allege a contract and it does not allege a breach of a contractual warranty. It does not allege any contractual relationship between the plaintiff and the defendant.

(3) An action in tort which is based upon the breach of a

Opinion, per O'NEILL, J.

duty assumed by the manufacturer-seller of a product. This duty is assumed by the manufacturer by reason of his implicit representation of good and merchantable quality and fitness for intended use when he sells the product. This duty is breached when a defect in the product causes the collapse of the product and is the direct and proximate cause of injury to a person whose presence the defendant could reasonably anticipate. This is the cause of action which the petition in this case states.

In this action the plaintiff is required to allege and prove that there was a defect in the steel joists manufactured and sold by the defendant, that such defect existed at the time the joists were sold by the defendant, that the defect was the direct and proximate cause of plaintiff's injuries, and that the plaintiff, at the time he was injured, was in a place where his presence was reasonably to be anticipated by the defendant.

It is conceded by both parties that the plaintiff does not have an action based upon a contract because there was no contract of sale between the plaintiff and the defendant and, therefore, no contractual relation (privity) between the parties.

The position of the defendant is that the plaintiff's petition does not state a cause of action because it does not allege negligence, does not allege an express warranty and does not allege any contractual relationship between the plaintiff and the defendant.

The plaintiff concedes that this petition does not allege negligence, does not allege an express warranty and does not allege any contractual relationship between the plaintiff and the defendant. The plaintiff asserts that the petition states a cause of action in tort based upon an implied warranty.

The basic question for the court to decide is the same as the question was in *Welsh v. Ledyard*, 167 Ohio St. 57, in *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, and in *Inglis v. American Motors Corp.*, 3 Ohio St. 2d 132. Is the plaintiff restricted to prosecuting his action for damages on the basis of negligence alone, or may he proceed in tort on the theory of breach of warranty?

The precise questions this court is required to determine are: (1) Where a defendant manufactures and sells steel roof joists, is there implicit in the production and sale of this pro-

Opinion, per O'NEILL, J.

duct the representation that the joists are of good and merchantable quality and safe for their ordinary intended use? and (2) when, in fact, such steel joists were defective and while being devoted to their ordinary intended use collapsed because of such defect and fell to the floor and injured the plaintiff, who was working on the floor below these steel roof joists in a place where his presence was reasonably to be anticipated by the defendant manufacturer, is such innocent injured party restricted to prosecuting a tort action for damages on the basis of negligence alone, or may he proceed in tort on the theory of an implied warranty?

The defendant relies upon the cases of *Wood v. General Electric Co.*, 159 Ohio St. 273, and *Welsh v. Ledyard*, 167 Ohio St. 57.

Welsh v. Ledyard, *supra*, decided November 27, 1957, is the high-water mark for this court in the assertion of the principle of law that an action for a breach of warranty is an action in contract, and, whether it be an express or an implied warranty, there can be no recovery unless there is a direct contractual relationship between the plaintiff and the defendant.

In *Ledyard*, *supra*, a housewife was injured by an electrical shock when she grasped the handle of a defective electrical cooking appliance which her husband had purchased from the defendant. *Ledyard* presented the same question as the instant case, that is, can there be a recovery grounded in tort based upon an implied warranty where there is no direct contractual relationship between the parties?

The rationale of the majority expressed in the *per curiam* opinion of the court in that case is that the plaintiff could not recover because an action based upon implied warranty is grounded in contract and not in tort. Since the plaintiff's husband had purchased the defective appliance she had no direct contractual relationship with the seller and could not recover from him. As in this case, the petitioner in *Ledyard* did not allege negligence.

The injustice of this position was soon apparent.

In *Ledyard*, the majority of the court announced a rule which denied recovery to the wife who would ordinarily use such a cooking appliance, but indicated that the rule would

Opinion, per O'NEILL, J.

allow recovery by her husband in a contract action based upon breach of implied warranty had he suffered the same injury, on the ground that since he was the purchaser he had a direct contractual relation (privity) with the defendant.

The holding in *Ledyard* was not based upon the ground that (1) there was no defect, or (2) no defect was present when the appliance was sold, or (3) the defect was not the proximate cause of plaintiff's injury, or (4) plaintiff was someone that defendant could not reasonably foresee would use this cooking appliance for the purpose for which it was manufactured and sold. Rather the holding in *Ledyard* was grounded upon the fact that plaintiff's husband bought the defective appliance rather than the wife, a circumstance which had no relevance to the fact that the defendant was responsible for the creation of the risk of injury to plaintiff because the defendant produced and sold the defective appliance which injured the plaintiff while she was using it for the ordinary purpose for which it was manufactured.

The high tide of *Ledyard, supra*, was soon to recede.

Two months later, January 29, 1958, *Rogers v. Toni Home Permanent Co., supra*, was decided. In the opinion in that case, which has become a landmark in this area of the law nationally, Judge Zimmerman declined to embrace the rationale of *Ledyard, supra*. He was joined by Judges Matthias and Bell, who had dissented in *Ledyard*, and by the late Chief Justice Weygandt.

The plaintiff in *Toni, supra*, had purchased from a retailer a Toni Home Permanent and used it as it was intended to be used and suffered injuries to her hair and scalp by reason of the defective and deleterious ingredients of the product. The defendant relied upon *Wood, supra*, and *Ledyard, supra*, as does the defendant in this case, on the ground that the plaintiff had not purchased from the manufacturer and, thus, had no direct contractual relation (privity) with the manufacturer and, therefore, could not recover in a tort action based upon breach of warranty but must be limited to an action based upon negligence.

Judge Zimmerman succinctly stated the question, at page 245:

Opinion, per O'NEILL, J.

"The precise question we are now required to determine is whether * * * such ultimate purchaser is restricted to prosecuting his action on the basis of negligence alone or whether he may proceed on the theory of an express warranty." (Emphasis added.)

In his opinion, Judge Zimmerman established as the law of Ohio two important principles: First, that an action for breach of warranty in a products liability case may sound in tort rather than in contract; and, second, that an injured party may assert a tort action grounded on a breach of warranty, notwithstanding the fact that there was no contractual relationship between the plaintiff and the defendant.

Judge Zimmerman examined the first principle exhaustively in his opinion and cited cases and authorities to support his position. He asserted that an action based upon contract came into the law as an additional or alternative remedy to the action in tort, which had been recognized earlier, based upon breach of an implied or express warranty not arising out of the contract of sale.

He summed up his position on the first principle, in these words, at page 247:

*"A prevalent but mistaken notion is extant that the term, 'warranty,' has always carried the implication of a contractual relationship. From a historical standpoint such a notion is without foundation. Some of the cases, and well known and respected writers on legal subjects, point out that originally the consumer or user of an article, which was represented to be in good condition and fit for use and proved not to be, was accorded redress by an expansion of the action of trespass on the case to include deceit—a fraudulent misrepresentation—which sounds distinctly in tort. Undoubtedly, the recognition of such a right of action rested on the public policy of protecting an innocent buyer from harm rather than to insure any contractual rights. * * **" (Emphasis added.)

Judge Zimmerman pointed out what has been repeated by many of the leading legal writers, namely, that the confusion in these cases frequently arises from the fact that the use of the word, "warranty," has often come to have a connotation of being associated with a contract, whereas, prior to the time of the

Opinion, per O'NEILL, J.

recognition of an action for breach of warranty based upon contract, there existed the action for breach of warranty in tort. This "kind of warranty" arose not out of a contract of sale but out of the duty of a manufacturer or seller of a product to protect the person consuming or using that product in the ordinary way in which it was intended to be used from the harm of injury to person or property caused by a defect in the product. It is a failure to distinguish between these two different kinds of warranties that has caused confusion in the law, and, in our modern-day mass-production and mass-distribution industrial system, this has resulted in some of the unjust technical decisions based upon outmoded and irrelevant concepts of privity.

Judge Zimmerman stated his position with regard to the second principle of law which he established by his opinion, in the following words, at page 246:

"In asking for a reversal of the judgment of the Court of Appeals, defendant places great reliance on the comparatively recent case of *Wood v. General Electric Co.*, 159 Ohio St. 273 * * *.

* * * [That] rule is based on the proposition that to support an action grounded on an implied warranty there must be contractual privity between the buyer who sues and the seller against whom the suit is brought.

*"It must be confessed that the prevailing view is that privity of contract is essential in an action based on a breach of an express or implied warranty, and that there is no privity between the manufacturer of an article and the ultimate purchaser thereof from a retailer, where the ultimate purchaser was in no way a party to the original sale. * * **

* * * "Other writers have no hesitancy in asserting that in the beginning an action on 'breach of warranty' was a tort action to give relief for the breach of a duty assumed by the seller, and that the introduction at a much later date of the method of declaring on a warranty '*indebitatus assumpsit*' (an implied promise or obligation on the part of one to pay to another what in fairness and good conscience the former should pay) constituted the recognition of an additional or alternative remedy of

Opinion, per O'NEILL, J.

a contractual aspect to secure relief where a breach of warranty is involved. . . ." (Emphasis added.)

Judge Zimmerman realized full well that he was changing the law in this field of law by returning to an earlier recognized remedy granted by the courts, and he so stated at page 249:

"We are fully aware that the position outlined is opposed to the present weight of authority and may conflict with previous decisions of this court. However we consider it a reasonable and logical approach today in keeping with the modern methods of doing business."

Judge Zimmerman was right in his appraisal that the weight of authority, at the time he wrote the opinion, did not support his position. However, today, the overwhelming weight of authority in the cases which have been decided since he wrote his opinion support the position which he took and have extended the law, as stated in paragraph three of the syllabus of *Toni*, to include implied warranty.

Judge Zimmerman foresaw that the acceptance of these concepts would bring additional changes in the Ohio law. It is doubtful, however, that Judge Zimmerman was prepared for the rapidity with which these principles of law which he announced would be accepted in most of the leading jurisdictions of the United States.

Judge Herbert, in another landmark decision, in *Inglis v. American Motors Corp.*, *supra*, followed the principles of law asserted by Judge Zimmerman in *Toni*, *supra*, and extended the rule to allow a tort action based upon breach of warranty rather than upon negligence for property damage (*Toni* involved only personal injuries), where no direct contractual relationship existed between the plaintiff and the defendant manufacturer.

In the case before this court, the controlling principles of law were established by Judge Zimmerman in *Toni*, *supra*, and Judge Herbert in *Inglis*, *supra*.

This is an action in tort for breach of an implied warranty. The warranty in this case is the manufacturer's representation, implicit in the sale of the steel joists, that they were of good and merchantable quality, fit and safe for their ordinary intended use. This created a duty upon the manufacturer-seller,

Opinion, per O'NEILL, J.

which duty was breached when the joists proved defective and collapsed because of the defect, injuring plaintiff.

Judge Zimmerman, in *Toni*, and Judge Herbert, in *Inglis*, considered representations in national advertising as an express warranty under which the manufacturer assumed the duty and upon which a plaintiff could be said to have relied in making a purchase of a product and held that when a defect in such product caused personal injury or property damage the defendant breached the duty and the plaintiff-user was not restricted to an action based upon negligence alone but could recover upon an action in tort based upon the breach of warranty, and that in such action no contractual relation (privity) between the plaintiff-user and the defendant-manufacturer is required.

It is, then, settled law in this state, *Toni*, *supra*, and *Inglis*, *supra*, that there can be an action in tort, based upon breach of warranty, and no contractual relation between the plaintiff and the defendant is required.

The question which remains to be determined in this case is: Where it is conceded that a manufacturer produced and sold steel joists, implicitly representing that they were of good and merchantable quality, fit and safe for the ordinary purposes for which such steel joists are used, but without advertising the product, is an innocent plaintiff-user, whose presence the defendant could reasonably anticipate and who is injured because a defect in the joists caused them to fall upon him, restricted to an action based on negligence alone, or can he recover in an action in tort based upon breach of this implied warranty where he was not in direct contractual relation (privity) with the manufacturer-defendant?

It is evident that to deny this plaintiff the right to state a good cause of action in tort, based upon such implied warranty, is to hold that a plaintiff, such as the car buyer in *Inglis*, who bought the same make of car and suffered the same damage as a result of the same defect as the car buyer in *Inglis*, would be denied recovery if he in fact had not read a national advertisement or other written material published by the manufacturer about the car; or that, if a neighbor of the plaintiff in *Toni* had bought the same home permanent kit and suffered the same injury from the same defect, she would be denied

Opinion, per O'NEILL, J.

recovery if she had not read the national advertisement or other written material published by the manufacturer.

To state the result of this kind of rule is to point out its essential injustice.

The rulings in *Toni* and *Inglis* were sound in allowing recovery to the plaintiff in a tort action based upon an express warranty.

The fact that the plaintiff saw the advertisement is a sound basis for recovery, *but the fact that he did not read an advertisement is not a sound basis for denying recovery.* Such a rule looks not to the defect in the product which produced the injury, but focuses upon the question of whether the plaintiff saw an advertisement, which is not relevant to the creation of the risk of harm to the plaintiff.

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.

If this case comes to trial before a jury, there may well be a directed verdict for the defendant if the plaintiff fails in his proof of any one of the elements required to be proved in order to have his case submitted to the jury. If the case goes to the jury, there may well be a verdict for the defendant.

For the plaintiff to recover, he must prove, by the required degree of proof, that the joists were defective, that they were defective at the time the manufacturer sold them, that the defect caused them to collapse while they were being used for their ordinary intended purpose, that the defect was the direct and proximate cause of the plaintiff's injury, and that the plaintiff's presence was in a place which the defendant could reasonably anticipate.

Each of these elements of the plaintiff's case is a jury question, including the question of proximate cause.

Defendant has available the opportunity to offer evidence in defense on each of these necessary elements of the plaintiff's case, and also has available the defense of assumption of risk and intervening cause.

An examination of *Wood* and *Ledyard* as to the fundamental reasons on which the decisions in those cases were based is of no help.

Opinion, per O'NEILL, J.

The *per curiam* opinion in *Ledyard* does not state any reasoning upon which the result rested, but rather arbitrarily cites as authority the holdings of previous cases, as at page 60, where the court cites *Wood, supra*, and quotes, from Judge Williams, in *Canton Provision Co. v. Gauder, a Minor*, 130 Ohio St. 43, 48, as follows:

"* * * An implied contract of warranty requires a meeting of the minds the same as does an express contract. * * * There was no privity of contract between the plaintiff and either of the defendants for the petition alleges that the liver pudding was purchased by the plaintiff's mother. Any liability that exists in the instant case therefore necessarily arises out of tort [negligence]."

Wood, supra, is no more illuminating. As a basis for the decision, the opinion in that case simply makes the arbitrary statement, at pages 278, 279:

"* * * To support an implied warranty there must be contractual privity between the seller and the buyer.

"Although a subpurchaser of an inherently dangerous article may recover from its manufacturer for negligence, in the making and furnishing of the article, causing harm to the subpurchaser or his property from a latent defect therein, no action may be maintained against such manufacturer by such subpurchaser for such harm, based upon implied warranty of fitness of the article so purchased. * * * Here, there was no such privity and hence no implied warranty upon the part of General Electric and no valid issue on that subject."

It must be noted that this rationale is contra to Judge Zimmerman's reasoning and conclusions in *Toni*.

Judge Zimmerman recognized this at page 249, where he said:

"Without commenting on the soundness of the holding in the *Wood* case, in light of what has been stated above, suffice it to say that should a case come before this court with facts resembling those in the *Wood* case, it would then be time to re-examine and reappraise that decision."

In *Wood*, the opinion relied upon the Restatement of the Law of Torts, which has since been changed to approve such an action.

Opinion, per O'NEILL, J.

Supporting the position of plaintiff and the Court of Appeals are the following authorities: *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P. 2d 897; *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P. 2d 168; *Garthwait v. Burgio* (Conn.), 216 A. 2d 189; *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N. E. 2d 182; *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 353 Mich. 120, 90 N. W. 2d 873; *Piercefield v. Remington Arms Co., Inc.*, 375 Mich. 85, 133 N. W. 2d 129; *Morrow v. Caloric Appliance Corp.* (Mo.), 372 S. W. 2d 41; *Santor v. A and M Karagheusian, Inc.*, 44 N. J. 52, 207 A. 2d 305; *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N. J. 434, 212 A. 2d 769; *Goldberg, Admx., v. Kollsman Instrument Corp.*, 12 N. Y. 2d 432, 191 N. E. 2d 81; *Marathon Battery Co. v. Kilpatrick* (Okla.) CCH Prod. Liab. Rep. 5501; *Wights v. Staff Jennings, Inc.* (Ore.), 405 P. 2d 624; *Ford Motor Co. v. Lonon* (Tenn.), 398 S. W. 2d 240; Restatement of Law of Torts 2d, Section 402A; Prosser on Torts (3 Ed.) 672 *et seq.*, Section 97, pp. 672 ff; and 2 Harper and James, The Law of Torts, 757, Section 12.4.

In Ohio the law in the field of products liability has had a slow, orderly and evolutionary development. In 1958, *Toni* established an action in tort based upon an express warranty for the recovery for personal injuries. In 1962, the Ohio General Assembly enacted the Uniform Commercial Code. Section 1302.31, Revised Code, a section of the Commercial Code, provides for extending a seller's warranty whether express or implied to any natural person the family or household of his buyer, or who is a guest in his home, if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

The effect of this section of the Code is to reverse the result in *Ledyard* by extending an express or implied warranty, arising out of a contract of sale, to the additional persons designated in that section.

In 1965, in *Inglis*, an action in tort based upon an express warranty was established allowing recovery for property damage.

— In *Stump v. Phillians*, 2 Ohio St. 2d 209, this court held that, where a defendant's brakes failed because of a defect in manu-

Dissenting Opinion, per TAFT, C. J.

facture, which could only have been detected by a fluoroscopic inspection method, which defect caused a weld to break and pulled the hydraulic fluid line and the emergency brake cable causing both to break with tension and leaving the vehicle with no means of applying the brakes, the defendant was liable as a matter of law and, as a matter of law, his negligence was the proximate cause of the injuries to the plaintiff.

If the rule is just in *Stump, supra*, certainly it would have been just for the defendant in that case to be able to recoup his loss from the manufacturer by proving the defect was present when the brake left the manufacturer's plant, and that the defect was the proximate cause of the defendant's loss, without the burden of alleging and proving negligence.

Judge Zimmerman dissented in that case on the ground that the question of proximate cause should be one for the jury.

Under the proper rule applicable to this case, all the elements of the plaintiff's case are jury questions, including proximate cause.

In the posture of the present case, which is a demurrer to a petition, the cause of action asserted represents a normal development in the law in this field.

The petition in this case states a good cause of action grounded in tort, based upon a breach of the representations which are implicit when a defendant manufactures and sells a product which, if defective, will be a dangerous instrumentality.

Judgment affirmed.

ZIMMERMAN, MATTHIAS and HERBERT, JJ., concur.

TAFT, C. J., SCHNEIDER and BROWN, JJ., dissent.

TAFT, C. J., dissenting. If followed, the syllabus and judgment in the instant case would make the manufacturer and seller of a product (here, steel roof joists) an insurer without limit of any damage proximately caused by a defect existing in his product at the time of its sale, even though no amount of care could have eliminated that defect, even though such manufacturer made no representations about his product to anyone, and even though no one knew that it was his product.

Dissenting Opinion, per TAFT, C. J.

In my opinion, it is particularly unfortunate that this court should announce such a revolutionary decision where the case before it does not even have in it a basic fact regarded in the syllabus and in the majority opinion as essential for the decision described therein.

Both deal only with a case in which defendant's product was defective at the time of its sale by defendant. There is no allegation in plaintiff's petition that defendant's product was then defective.

The petition does allege that "defendant impliedly warranted that the said roof joists were of good and merchantable quality," and that "said implied warranty was breached by defendant in that said roof joists were not of good and merchantable quality." There is no allegation as to the respect in which the joists were not of such quality.

There are no other allegations which help us to give any meaning at all to the allegations as to defendant's warranty and breach of warranty. Hence, we must look elsewhere for guidance.

At the time plaintiff's petition was drawn, Section 1302.27, Revised Code, provided in part that "goods to be merchantable must be at least such as: (1) Pass without objection in the trade under the contract description * * *."

Thus, under the allegations of the petition, the roof joists sold by defendant could have been not "of good and merchantable quality" if defendant supplied them in a weight-bearing capacity per unit of length lighter than that specified, although they were not defective in any way whatever, and even if their actual weight-bearing capacity was clearly marked on them. In such an instance, they would not "pass without objection in the trade under the contract description" for the heavier weight-bearing capacity. Thus, there would be a breach of the alleged warranty of merchantable quality even though the joists were not defective in any way.¹

¹An extreme example of this is *Bennison v. Stillpass* (1965), 5 Ohio St. 2d 122, 214 N. E. 2d 213, announced a few weeks after the argument of the instant case. There, this court held that mere proof of breach of a contract as to the condition that an article was to have when delivered would not authorize an inference that the article was in a defective condi-

Dissenting Opinion, per TAFT, C. J.

If the plaintiff's petition had included allegations that the joists were defective when sold by defendant and that their defective condition was a proximate cause of plaintiff's injuries, then its allegations would have been sufficient, with help from the doctrine of *res ipsa loquitur*, to state a cause of action in negligence. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)* (1960), 69 Yale L. J. 1099; *Edelstein v. Cook* (1923), 108 Ohio St. 346, 140 N. E. 765, 31 A. L. R. 1333; *Soltz v. Colony Recreation Center* (1949), 151 Ohio St 503, 87 N. E. 2d 167. Thus, if the petition had included the allegations that the joists were defective when sold by defendant, and that their defective condition was a proximate cause of plaintiff's injuries, it would be unnecessary for this court to go beyond well settled principles of law to determine, as it has, that the petition states a cause of action.

tion when delivered. In that case, defendant supplied to plaintiff's decedent's employer a tank which "contained vapors of an explosive nature * * * the tank exploded and plaintiff's decedent was killed as a result of the explosion." In the opinion by O'Neill, J., it is stated at page 125:

"The duty under the contract * * * was to send a tank which was 'clean' [i. e., one that admittedly would contain no explosive vapors] * * *."

"* * * In order for the plaintiff to recover it would be necessary to determine that the gasoline vapors in the tank constituted a 'defective condition' * * *."

"* * * it can not be said that the gasoline vapors in the tank constituted a 'defective condition' * * *."

Dean Prosser states:

"One may well ask at the outset, why is not liability for negligence enough? Why do the plaintiffs want strict liability * * *."

"Where the action is against the manufacturer of the product, an honest estimate might very well be that there is not one case in a hundred in which strict liability would result in recovery where negligence does not. When a negligence action is brought against a manufacturer, the plaintiff is faced with two initial tasks. One is to prove that his injury has been caused by a defect in the product. The other is to prove that the defect existed when the product left the hands of the defendant. For neither of these is strict liability of any aid to him whatever. It cannot prove the causation; and it cannot trace that cause to the defendant. Once over these two hurdles, the plaintiff has a third task, to prove that the defect was there because of the defendant's negligence. This is by far the easiest of the three, and it is one in which the plaintiff almost never fails."

"It is true that he has the burden of proof on the issue of negligence."

Dissenting Opinion, per TAFT, C. J.

The syllabi and decisions in *Rogers v. Toni Home Permanent Co.* (1958), 167 Ohio St. 244, 147 N. E. 2d 612, and *Inglis v. American Motors Corp.* (1965), 3 Ohio St. 2d 132, 209 N. E. 2d 583, are inconsistent with and do not in any way support the syllabus and judgment of the instant case. This is apparent from a comparison of the allegations of the petition in the instant case with the essential requirements for a cause of action specified in the syllabi of the *Rogers* and *Inglis* cases.

In *Rogers*, the syllabus reads in part:

"2. An express warranty is an affirmation of fact by the seller as to a product or commodity to induce the purchase thereof, on which affirmation the buyer *relies* in making the purchase.

"3. Under modern merchandising practices, where the manufacturer of a product in his advertising makes representations as to the quality and merit of his product aimed directly at the ultimate consumer and urges the latter to purchase the product from a retailer, and such ultimate consumer does so *in reliance on* and pursuant to the inducements of the manufacturer and suffers harm in the use of such product by reason of deleterious ingredients therein, such ultimate consumer may maintain an action for damages immediately against the manufacturer on the basis of express warranty, notwithstanding that there is no direct contractual relationship between them." (Emphasis added.)

The recovery there allowed was in tort. However, it is apparent that the tort contemplated was one, similar to that of deceit, requiring reliance by the consumer on the affirmations or representations of the seller. (See paragraphs two and three of syllabus and opinion at page 247.)

There is nothing in the petition in the instant case from which even an inference could be drawn that plaintiff knew

It is true also that he seldom, if ever, has any direct evidence of what went on in the defendant's plant. But in every jurisdiction, he is aided by the doctrine of *res ipsa loquitur*, or by its practical equivalent. In all jurisdictions this at least gives rise to a permissible inference of the defendant's negligence, which gets the plaintiff to the jury. And in cases against manufacturers, once the cause of the harm is laid at their doorstep, a jury verdict for the defendant on the negligence issue is virtually unknown."

Dissenting Opinion, per TAFT, C. J.

that defendant had supplied the steel joists. In other words, the essential elements of representations and reliance thereon emphasized in paragraphs two and three of the syllabus of the *Toni* case are not present in the instant case.

There is no allegation that plaintiff or anyone else relied upon any implied warranty or any representation of defendant.

The necessity of "reasonable reliance" by the plaintiff is also emphasized, especially in paragraph three of the syllabus in *Inglis v. American Motors Corp.*, *supra* (3 Ohio St. 2d 132).

Where products are sold as those of a particular maker who has advertised the general quality of his goods, the reasons underlying our decision in *Rogers v. Toni Home Permanent Co.*, *supra* (167 Ohio St. 244), may be applicable and justify implication of a warranty even though there is no express warranty, and *Rogers v. Toni Home Permanent Co.*, *supra*, may therefore require some modification of our decision in *Wood v. General Electric Co.* (1953), 159 Ohio St. 273, 112 N. E. 2d 8.

However, that is not this case. There is no allegation of any reliance by anyone on any implied representations or warranties of defendant.

In the opinion in *Rogers v. Toni Home Permanent Co.*, *supra* (167 Ohio St. 244), it is stated, at page 249, that "an express warranty excludes an implied warranty," and in the opinion in *Inglis v. American Motors Corp.*, *supra* (3 Ohio St. 2d 132), at page 140, which purports to follow the foregoing statement, it is stated that "where there are express warranties alleged * * * there is no need for the law to imply a warranty."

Unless, therefore, we overrule the requirements of reliance specified in the syllabi of those last two named cases, we will have the incredible result that a non-negligent manufacturer of a defective product will be liable to someone proximately injured by its defective condition if he says nothing; but such manufacturer will not be liable, where he has made express warranties about the good condition of his defective product, unless the injured party alleges and proves that he relied on those express warranties.

Dissenting Opinion, per TAFT, C. J.

The Court of Appeals recognized that "use of the word 'warranty' is probably improper" in explaining what this court is doing in the instant case, and that what it is really doing is recognizing a cause of action for "strict tort liability." See *Lonzrick v. Republic Steel Corp.* (1964), 1 Ohio App. 2d 374, 384, 205 N. E. 2d 92.

Quite obviously, as is apparent from the authorities cited, the legal conclusions set forth in paragraph two of the syllabus represent a somewhat disguised statement of what is usually referred to as the doctrine of "strict tort liability."

This doctrine of strict tort liability has for some time been vigorously promoted by certain law professors (see for example Prosser, *The Assault Upon the Citadel [Strict Liability to the Consumer]*, *supra* [69 Yale L. J. 1099]; Harper and James, *The Law of Torts*, 752 and 1605, Sections 12.4 and 28.33; James, *General Products—Should Manufacturers be Liable Without Negligence* [1957], 24 Tenn. L. Rev. 923; James, *Products Liability* [1955], 34 Texas L. Rev. 44, 192; Wade, *Strict Tort Liability of Manufacturers* [1965], 19 Southwestern L. J. 5) and by at least one organized group of lawyers (see for example 31 *Journal of the American Trial Lawyers Association* [1965], 247 to 254, 256 to 259, 261 to 267, 268 to 273, 275 to 279).

The doctrine was recently incorporated in Section 402A of the American Law Institute Restatement of the Law of Torts 2d for which Dean Prosser is the reporter. See Smyser, *Products Liability in the American Law Institute; a Petition for Rehearing* (1965), 42 U. of Detroit L. J. 343.

As stated in 74 A. L. R. 2d 1111, at 1131:

"It is frequently stated that it is a 'general rule' that a manufacturer or seller of a product alleged to have caused injury cannot be held liable therefor, on the ground of negligence, to one with whom he is not in privity of contract. At the foundation of this 'general rule' as to the nonliability of a manufacturer to a remote vendee or ultimate consumer of the manufactured product is the English decision in * * * *Winterbottom v. Wright* (1842), 10 Mees and W. 109, 152 Eng. Rep. 402."

The unsoundness of the rule of *Winterbottom v. Wright*,

Dissenting Opinion, per TAFT, C. J.

supra, led to what Dean Prosser, in quoting from Mr. Justice Cardozo, has referred to as "The Assault Upon the Citadel of Privity."

Apparently, those who have been successful in destroying the rule of *Winterbottom v. Wright* have become so enthusiastic as not to be satisfied with mere liability of the manufacturer for negligence, even where they have the help of the doctrine of *res ipsa loquitur* in establishing that negligence. As Dean Prosser pointed out, they are and have been carrying their "assault . . . against the fortress of strict liability." Prosser, *supra* (69 Yale L. J. 1099), 1103.

Apparently much of the enthusiasm for this latter assault represents a residue of the enthusiasm left over after the successful "Assault Upon the Citadel of Privity" which destroyed the rule of *Winterbottom v. Wright*.

This court should be able to consider whether it should succumb to the "Assault . . . Against the Fortress of Strict Liability" without being subject to the influence of any such residue of enthusiasm. The rule of *Winterbottom v. Wright* was rejected in this state long before the much more publicized case of *McPherson v. Buick Motor Car Co.* (1916), 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F 696, Ann. Cas 1916C 440. The rule was rejected by this court in *Davis v. Guarnieri* (1887), 45 Ohio St. 470, 491, 15 N. E. 350, and in *Pennsylvania Rd. Co. v. Snyder* (1896), 55 Ohio St. 342, 351, 361, 45 N. E. 559. Our subsequent holdings to the same effect are *Sicard v. Kremer* (1938), 133 Ohio St. 291, 13 N. E. 2d 250; *Witherspoon v. Haft* (1952), 157 Ohio St. 474, 106 N. E. 2d 296; *Thrash, a Minor, v. U-Drive-It Co.* (1953), 158 Ohio St. 465, 110 N. E. 2d 419 (as to defendant Spot Motors); *Durham v. Warner Elevator Mfg. Co.* (1956), 166 Ohio St. 31, 139 N. E. 2d 10.

From comment (b) to Section 402 A of the American Law Institute Restatement of Torts 2d, it appears that the cases supporting the rule stated in that section were decided after 1950 and represent an extension of the rule of strict liability of the seller of food for human consumption. That comment points out that the earlier food decisions "displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case," but that "in later years the courts

Dissenting Opinion, per TAFT, C. J.

have become more or less agreed upon the theory of a 'warranty' from the seller to the consumer, either 'running with the goods' by analogy to a covenant running with the land, or made directly to the consumer," and "other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependant upon either contract or negligence."

In Ohio there has been no need for any such ingenuity. The violation of a statute passed for protection of the public is negligence per se. *Schell v. DuBois, Admr.* (1916), 94 Ohio St. 93, 113 N. E. 664; *Coal Co. v. Estievenard* (1895), 53 Ohio St. 43, 40 N. E. 725. Hence, because of our holdings that a violation of our pure-food statutes represents negligence per se, there has never been any occasion for this court to consider whether, or for any one to argue that, apart from those statutes, strict liability in tort should be imposed on the seller of food. See, for example, *Portage Markets Co. v. George* (1924), 111 Ohio St. 775, 146 N. E. 283; *Canton Provision Co. v. Gauder, a Minor* (1935), 130 Ohio St. 43, 196 N. E. 634; *Great Atlantic & Pacific Tea Co. v. Hughes* (1936), 131 Ohio St. 501, 3 N. E. 2d 415; *Kniess v. Armour & Co.* (1938), 134 Ohio St. 432, 17 N. E. 2d 734; *Yochem v. Gloria, Inc.* (1938), 134 Ohio St. 427, 17 N. E. 2d 731; *Rubbo v. Hughes Provision Co.* (1941), 138 Ohio St. 178, 34 N. E. 2d 202; *Wolfe v. Great Atlantic & Pacific Tea Co.* (1944), 143 Ohio St. 643, 56 N. E. 2d 230; *Allen v. Grafton* (1960), 170 Ohio St. 249, 164 N. E. 2d 167. From the foregoing decisions, it is apparent that our General Assembly has full power to readily impose what is in effect strict liability in tort on sellers of tangible items other than food if it should deem it advisable or desirable to do so. In some instances, it has. See, for example, *Spaulding v. Waxler* (1965), 2 Ohio St. 2d 1, 205 N. E. 2d 890; *Bird v. Hart* (1965), 2 Ohio St. 2d 9, 205 N. E. 2d 887; and *Stump v. Phillians* (1965), 2 Ohio St. 2d 209, 207 N. E. 2d 762.

Without such statutory help and in the absence of an express warranty, this court refused to do so in *Wood v. General Electric Co., supra* (159 Ohio St. 273), and in *Welsh v. Ledyard* (1957), 167 Ohio St. 57, 146 N. E. 2d 299.

Thereafter, the General Assembly apparently considered the problems with which we dealt in deciding those cases and

Dissenting Opinion, per TAFT, C. J.

Rogers v. Toni Home Permanent Co., *supra* (167 Ohio St. 244), and enacted a statute which in effect overrules our decision in *Welsh v. Ledyard*, *supra* (167 Ohio St. 57), (see Section 1302.31, Revised Code, extending seller's express or implied warranty "to any natural person who is in the family or household of his buyer" as the plaintiff in *Welsh v. Ledyard* was); but the General Assembly did nothing to interfere with our decision in either the *Wood* or *Toni* case.

We have the power to overrule *Wood v. General Electric Co.*, *supra* (159 Ohio St. 273), and also to overrule the limitations requiring reliance of the plaintiff on representations of the defendant, which we provided for in deciding *Rogers v. Toni Home Permanent Co.*, *supra*, and later required in *Inglis v. American Motors Corporation*, *supra* (3 Ohio St. 2d 132). We may do this even though the General Assembly, by what it did and did not do, has apparently indicated its approval of those limitations and of the case of *Wood v. General Electric Co.*, *supra*. However, in my opinion, that apparent legislative approval should be given weight and respect in deciding the instant case.

Dean Prosser has confessed that the only substantial argument for the doctrine of "strict liability in tort" of the seller of a chattel is (Prosser, *supra* [69 Yale L. J. 1099], 1120) "the 'risk spreading' argument, which maintains that the manufacturers, as a group and an industry, should absorb the inevitable losses which must result in a complex civilization from the use of their products, because they are in the better position to do so, and through their prices to pass such losses on to the community at large." He then quotes from Justice (now Chief Justice) Traynor's opinion in *Escola v. Coca Cola Bottling Co.* (1944), 24 Cal. 2d 453, 461, 150 P. 2d 436, as follows, and we have interpolated in brackets some comments with regard thereto:

"Those who suffer injury from defective products are unprepared to meet its consequences [agreed]. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured [agreed], and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. [We

Dissenting Opinion, per TAFT, C. J.

do not know. A legislature could conduct hearings which would enable it to determine whether this "risk can be insured by the manufacturer" or otherwise "distributed among the public as a cost of doing business." It is to the public interest to discourage the marketing of products having defects that are a menace to the public [agreed—our present law does so]. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market [maybe—but a legislature has more means of determining through hearings than a court does whether so placing responsibility would unduly interfere with "desirable activity." See 2 Harper and James, *The Law of Torts*, 757, Section 12.4]. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection [agreed] and the manufacturer is best situated to afford such protection [but how? A legislature has the power to devise ways which no court can]."

Another reason why a court cannot cope with the reasons for strict liability suggested by Justice Traynor, as well as a legislature, was stated by Dean Prosser as follows (Prosser, *supra* [69 Yale L. J. 1099], 1121):

"* * * Even the distribution of the losses through insurance may be a process that has its flaws. Until we develop, by analogy to workmen's compensation, a comprehensive system of compulsory insurance with rigidly limited damages—which no one as yet seems to have proposed specifically in this particular field—there will always be uninsured defendants, there will always be liability in excess of coverage, and there will be members of the group whose competitive situation does not permit them to pass on the cost of the insurance to their customers. * * *

There is considerable appeal to the idea of spreading the risk of loss to an individual from a particular activity over those who engage in that activity and profit from it. However, before determining to do so with respect to the manufacture and

sale of a particular product, a court should at least consider questions such as:

- (1) What additional liability would be involved?
- (2) Could insurance be procured against such additional liability?
- (3) If so, what would its cost be?
- (4) Could such cost be passed on to buyers of the product?

How can a court know the answers to such questions? A court such as this has no means of even exploring them. However, these are problems which a legislature can fully explore.

This court has no reliable information which would justify it in jettisoning existing products liability law and manufacturing new rules of law. To do so, could seriously affect the level of industrial activity in Ohio, and it could substantially increase manufacturing costs and result in either higher consumer prices, if the costs could be passed on, or many bankruptcies, if they could not.

Further, it is submitted that our General Assembly has, by what it has done, indicated an intention that strict tort liability should not be imposed upon the manufacturer of a product in a case such as that now assumed by the majority to be before this court for decision.

For example, as late as 1957, the General Assembly revised our laws dealing with pure foods and drugs (127 Ohio Laws 819). At that time, it knew that it would be negligence per se to make a sale prohibited by such a statute; and, as a result, such a statutorily prohibited sale would in effect involve "strict liability in tort." See citations, *supra*, page 247. However, the General Assembly has never enacted any statute which could possibly be construed to prohibit the sale of defective steel joists, and thereby in effect to impose strict liability in tort on the seller of such joists.

Thus, although the General Assembly has recently legislated so as to impose in effect strict tort liability on the manufacture and sale of certain defective products, it has not dealt with steel joists.

Finally, the legislative history of the Uniform Commercial Code, which was enacted in this state in 1962 (129 Ohio Laws

Dissenting Opinion, per TAFT, C. J.

13), clearly indicates a legislative intention against imposing liability such as that approved by the syllabus and judgment of the instant case. See note "Implied Warranty, Strict Liability for Personal Injuries, and the Uniform Commercial Code, Section 2-318, 13 University of Kansas L. Rev. 411 (1965).

The May 1949 draft of Section 2-318 of the Uniform Commercial Code extended liability for breach of a seller's express or implied warranty to "one whose relationship [to the buyer] * * * is such as to make it reasonable to expect that such person may use, consume or be affected by the goods * * *." This would have expressly permitted an action such as approved by the syllabus and judgment in the instant case. See James, Products Liability, *supra* (34 Texas L. Rev. 44, 192 at 194, Note 10).

However, Section 2-318 was modified in the 1952 official draft so as to provide that such warranty "extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty."

As so modified, Section 2-318 became Section 1302.31, Revised Code* (see variations in the Ohio Enactment of the Uniform Commercial Code, 14 Western Reserve L. Rev. 22 [1962]); and, as hereinbefore mentioned, that statute had the necessary effect of overruling *Welsh v. Ledyard, supra* (167 Ohio St. 57), but approving *Wood v. General Electric Co., supra* (159 Ohio St. 273).

If Comment 3 to that statutory section, as prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Laws (see 13 Page's Revised Code, Annotated 7, 55), is regarded as expressing any legislative intent, it clearly indicates an intention that a seller's warranties shall not extend to a person who is not "in the distributive chain." The plaintiffs in *Rogers v. Toni Home Permanent Co., supra* (167 Ohio St. 244), and *Inglis v. American Motors Corp., supra* (3 Ohio St. 2d 132), were each "in the

*Unlike Section 1302.31, Revised Code, the recently enacted procedural Section 2307.382(5) does not purport to extend the right of recovery beyond those to whom a warranty is "made."

Concurring Opinion, per SCHNEIDER, J.

distributive chain." Admittedly, plaintiff is not "in the distributive chain" and is not one of those specified by the statute as one to whom a seller's warranty should extend.

Thus, the syllabus and judgment in the instant case disregard the intention expressed by the General Assembly when it adopted Section 1302.31, Revised Code. See *Hochgertel v. Canada Dry Corp.* (1963), 409 Pa. 610, 187 A. 2d 575.

SCHNEIDER and BROWN, JJ., concur in the foregoing dissenting opinion.

SCHNEIDER, J. I desire to add that the basic underlying difference dividing the court is not the absence of privity but the operative effect of the decision, which eliminates from the consideration of the trier of the facts *any* standard of care to which the defendant would be required to adhere. In short, if the plaintiff should succeed in laying the defect which proximately caused his injury at the door of defendant's place of business, the defendant will be permitted no explanation of any transaction occurring therein, including that which might tend to show that every precaution known to man was exercised to prevent the occurrence of the claimed defect.



424 Pa. 140

**Wilbur F. HECK and Ruth E. Heck,
Appellants,**

v.

The BERYLLIUM CORPORATION.

Supreme Court of Pennsylvania.

Sept. 27, 1966.

Rehearing Denied Feb. 15, 1967.

Action against defendant beryllium company for damages for disease allegedly caused by the inhalation of beryllium. The Court of Common Pleas for the County of Berks, as of August Term, 1962, No. 312, James W. Bertolet, J., after jury verdict for the plaintiff entered a judgment n. o. v. for the defendant and the plaintiff appealed. The Supreme Court, No. 184 January Term, 1966, Cohen, J., held that where at least 11 years had elapsed since defendant corporation had started emitting beryllium from its plant and thereby exposing plaintiff and others before recommendations of maximum safe concentrations had been set forth by Atomic Energy Commission, jury could have found that because of the unknown extent of the pre-recommendation exposure and the highly dangerous nature of the substance the defendant had a duty to adhere to the minimum figure set forth by the Atomic Energy Commission recommendation al-

though after the issuance of recommendation the emissions which did exceed the minimum figure never exceeded the safety factor.

Judgment reversed and case remanded for a new trial.

Roberts and Musmanno, JJ., dissented in part.

1. Negligence ⇨19

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.

2. Negligence ⇨136(18)

Where plaintiffs and others had been exposed to beryllium emissions from defendant's plant for 11 years before recommendations of maximum safe concentrations were set forth by Atomic Energy Commission, jury, in suit against defendant for damages from inhalation of beryllium, could have found that defendant had a duty to adhere to the minimum figure set by Commission although after the recommendation the emissions, which did exceed the minimum figure, never exceeded the safety factor.

3. Negligence ⇨136(18)

A jury question was presented as to whether emissions of beryllium from defendant's plant of a greater amount than the minimum figure set forth by Atomic Energy Commission but in an amount less than the safety factor constituted negligence toward any person within the area of the exposure including the plaintiff who had been exposed to the emissions for at least 11 years prior to time Commission issued recommendations.

4. Damages ⇨19

Once a finding of negligence becomes permissible the defendant becomes liable for all harm caused by its negligent act though increased by unknown physical condition.

5. Damages ⇨208(1)

Expert testimony was sufficient to require submission to jury of issue of whether the emissions of beryllium from defendant's plant in excess of minimum recommended figure was a substantial cause of plaintiff's contraction of disease, although plaintiff had been previously exposed to emissions under conditions which did not render defendant negligent because no recommendation had been issued as to toxicity level.

6. Negligence ⇨139(1), 140

Instruction which permitted jury to use some figure lower than the minimum recommended by the Atomic Energy Commission for emission of beryllium with respect to determining whether defendant beryllium company was negligent and whether such negligence caused plaintiff's condition was error, since jury should have been instructed that an emission of less than the minimum could not constitute negligence by defendant which had no other guide for its conduct and no knowledge that its emissions might be harmful.

7. Negligence ⇨56(1.1)

It is the negligent conduct which must be causative in order to permit recovery.

8. Damages ⇨216(1)

Although defendant corporation could not be held negligent for beryllium emissions from its plant prior to date on which Atomic Energy Commission issued its recommendations as to toxicity level, jury should have been instructed that once it found negligence on defendant's part for emissions exceeding the minimum after

issuance of recommendations it could consider plaintiff's physical condition on date recommendations were issued as affected by prior emissions in determining if the post-recommendation emissions caused plaintiff's disease.

Seymour I. Toll, Bala-Cynwyd, B. Nathaniel Richter, Edward L. Wolf, John J. McCarty, John A. McMenamin, Richter, Lord & Cavanaugh, Philadelphia, for appellants.

George P. Williams, III, John S. McConaghy, Reading, Samuel Kagle, Oscar Brown, Philadelphia, Schnader, Harrison, Segal & Lewis, Philadelphia, of counsel, for appellee.

Before MUSMANNO, JONES, COHEN, EAGEN, O'BRIEN and ROBERTS, JJ.

OPINION OF THE COURT

COHEN, Justice.

Plaintiff contracted a disease caused by inhalation of beryllium and, alleging defendant's liability for the resultant loss, instituted this suit. The lower court, after a jury verdict for the plaintiff, granted judgment notwithstanding the verdict. The trial court also found that a new trial would be proper and that the verdict was excessive, but it denied the motion for a new trial because it had granted judgment n. o. v.

Between 1939 and trial plaintiff resided within several miles of a plant of the defendant Beryllium Corporation. During that time, except for the period 1942-1943 when she laundered the workclothes of her brother who was then employed at the plant, she inhaled beryllium only from emissions of the substance from the plant. The record shows that the defendant knew of the toxicity of beryllium in 1947 and

perhaps earlier. However, the toxicity level which was unsafe was not known to defendant until the Atomic Energy Commission, on March 30, 1950, issued tentative recommendations stating that the average monthly concentration should not exceed .01 micro-grams per cubic meter (mc3) for out-plant areas. The testimony shows that a safety factor of eight to ten was used in determining the recommended figure.¹

Plaintiff was only able to show (because of limitations on data available) that from the years 1951 to 1955 the defendant's emissions of beryllium exceeded the .01 mc3 standard at the location where plaintiff resided (although such emissions did not exceed the safety factor). Thus, her showing of any negligence was limited to that period.

[1] In its opinion the lower court held, first, that defendant was not negligent before March 30, 1950. This ruling is correct. However, relying on the testimony of plaintiff's expert to the effect that if plaintiff had not been exposed before 1951 an exposure from that time to the date of trial in the intensity of her exposure from 1951 to 1955 would not have caused her illness, the court then held that any negligence of defendant after March 30, 1950, could not have been causative. This was error.

[2-4] Since the recommendation of maximum safe concentrations was not set forth until 1950, at least eleven years after defendant commenced its emissions exposing plaintiff and others, the jury could reasonably have found that, because of the unknown extent of the pre-1951 exposure and the highly dangerous nature of the substance, the defendant had a duty to adhere to the minimum figure of .01 mc3. *Malitovsky v. Harshaw Chemical Company*, 360 Pa. 279, 283, 61 A.2d 846, 848 (1948); Restatement, Second, Torts, § 289

1. The safety factor thus would have permitted emissions of up to .08 mc3 or .10 mc3.

226 A.2d—6½

(comment j) (1965). Thus, the jury could have found that defendant's emission of a greater amount constituted negligence towards any person within the area of that exposure even though the emission did not exceed the safety factor. Once a finding of negligence became permissible, defendant became "liable for all harm caused by [its] negligent act though increased by an unknown physical condition * * *." *Offensend v. Atlantic Refining Company*, 322 Pa. 399, 403, 185 A. 745, 747 (1936); Restatement, Second, Torts, § 461 (1965). The lower court erred in not considering plaintiff's physical condition as of March 31, 1950, occasioned by her previous exposure to the emissions even though such earlier emissions were non-negligent.

[5] So also, we consider the testimony of plaintiff's expert that the 1951 to 1955 " * * * exposures may be the critical ones, more so than [the] earlier ones and certainly have to be dealt with," sufficient to require the submission to the jury of the issue of whether the emissions from 1951 to 1955 in fact were a substantial cause of plaintiff's contractions of the disease. *Majors v. Brodhead Hotel*, 416 Pa. 265, 271, 205 A.2d 873, 877 (1965); Restatement, Second, Torts, §§ 431(a), 432(1), 433(a) (1965).

[6] However, we grant a new trial in this matter because we believe the instructions of the trial judge to have been overly broad with regard to the issues of negligence and causation. While it was proper for the lower court not to bind the jury to either the .01 mc3 standard or the safety factor, the language of the charge permitted the use by the jury of some lower figure. Since, other than by the AEC recommendation the defendant had no guide for its conduct and no knowledge that its emissions might be harmful, the jury should have been instructed that an emission of less than .01 mc3 could not constitute negligence.

[7,8] Further, the trial court did not charge that the jury must find substantial causation only from the 1951 to 1955 emissions in order to find for the plaintiff. On the evidence presented, the defendant could not have known prior to March 30, 1950, to what extent its emissions could be harmful. Consequently, it could be negligent only as to emissions subsequent to that date; and, of course, it is the negligent conduct which must be causative. Restatement, Second, Torts, § 430 (1965). As noted above, however, the jury is entitled, once it finds negligence on defendant's part, to consider plaintiff's physical condition on March 31, 1950, as affected by the prior emissions, in determining if the post-March 31, 1950, emissions caused plaintiff's disease.

Judgment reversed and case remanded for a new trial.

ROBERTS and MUSMANNO, JJ., concurring and dissenting.

BELL, C. J., absent.

CONCURRING AND DISSENTING OPINION

ROBERTS, Justice.

I concur in so much of the majority opinion as reverses the action of the trial court in granting defendant-appellee's motion for judgment n. o. v. I dissent, however, from the majority's action in granting defendant-appellee a new trial and would remand the case with directions to reinstate the jury verdict.

Not only did defendant-appellee not raise the correctness of the court's instructions on this appeal, it specifically disclaimed any complaint with respect thereto, stating, in its brief, that the correctness of the charge is not in issue.¹ This is of itself sufficient to preclude the majority's action

1. Brief of appellee, p. 6.

in ordering a new trial. Moreover, the record discloses that at trial no specific exception was taken by defendant-appellee to the charge.² In the absence of such an exception, I believe it inappropriate to grant a new trial on the basis of an instruction which could and should have been excepted to at trial, if defendant-appellee's counsel regarded it erroneous and harmful to his client's interests. Having failed to express any dissatisfaction at trial, where the matter was subject to correction, I would not permit defendant-appellee to impose this extensive litigation for the second time on the plaintiff and our already overburdened trial courts.

To paraphrase a view which I have previously expressed, to permit defendant-appellee to obtain a second trial, on the ground that instructions, not specifically excepted to, were erroneous, in light of the issues involved, would do a great injustice to countless numbers of persons who are compelled to endure oppressive delay or to settle claims at a fraction of their value because timely judicial relief was not available. While I would heartily approve of ordering a new trial in any case in which such action would be in the interest of justice, I find no justice in setting aside the endeavors of all those who participated in the trial below merely because the majority discerns some disadvantage, problematical at best, to defendant-appellee, a disadvantage which defendant-appellee had every opportunity to discern and to seek to have rectified at trial. See *Lobalzo v. Varoli*, 422 Pa. 5, 7, 8, 220 A.2d 634, 636 (1966) (concurring opinion); *Kersey Mfg. Co. v. Rozic*, 422 Pa. 564, 222 A.2d 713 (1966) (concurring opinion).

MUSMANNO, J., joins in this concurring and dissenting opinion.

2. The following statement was made by appellee-defendant's counsel, during an interchange with the trial judge following the charge: "I have no exceptions to take to the charge. I want to protect my position on the record. I would like to except to your Honor's refusal of our

supplemental requests for charge, numbers 17, 18 and 19." It should be noted, however, that the majority does not predicate its grant of a new trial on the court's disposition of defendant-appellee's points for charge.

LA PORTE v. UNITED STATES RADIUM CORPORATION.

District Court, D. New Jersey.
Dec. 17, 1935.

1. Limitation of actions ⇨55(4)

Alleged cause of action against employer by watch-dial painter who died from radium poisoning accrued some time in course of her employment, or at latest when she was last exposed to radium, as respects limitation (3 Comp.St.N.J.1910, p. 3164, § 3).

2. Limitation of actions ⇨99(1)

In action at law for injuries, plea of limitation bars recovery, regardless of fraud of tort-feasor (3 Comp.St.N.J.1910, p. 3164, § 3).

3. Equity ⇨11

Equity, in case of fraud, does not bar relief to injured party who has been in ignorance of fraud.

4. Injunction ⇨29

In New Jersey, person wronged by fraud is relieved from bar of limitation at law by going into Chancery Court and enjoining plea of limitation statute at law.

5. Injunction ⇨29

To constitute fraudulent concealment of cause of action rendering enjoined plea of limitation, acts or conduct constituting concealment need not be such as would be required to make out fraud in law court.

6. Injunction ⇨29

Test of fraudulent concealment of cause of action, rendering enjoined plea of limitation, is whether conscience and duty of honest dealing should deny one right to repudiate consequences of his representations or conduct and whether author of proximate cause may justly repudiate its natural and reasonably anticipated effect.

7. Injunction ⇨29

Generally, to constitute fraudulent concealment of cause of action rendering enjoined plea of limitation, ignorance of existence of cause of action is required of plaintiff, and lack of knowledge of evidence or of defendant's identity is insufficient.

8. Injunction ⇨29

To render plea of limitation enjoined under doctrine of fraudulent concealment, plaintiff must be in ignorance of existence

of cause of action and defendant must intend to keep plaintiff in ignorance thereof, and silence is not enough to make out fraudulent concealment.

9. Injunction ⇨29

In New Jersey, plaintiff, seeking to enjoin plea of limitation on ground of fraudulent concealment of cause of action, must show reasonable diligence in bringing suit after estoppel has expired.

10. Injunction ⇨29

As respects existence of fraudulent concealment of cause of action rendering enjoined plea of limitations, whether concealment or fraud springs from same act as cause of action, or is found in subsequent acts or failure to act, is immaterial.

11. Injunction ⇨29

To constitute fraudulent concealment of cause of action rendering enjoined plea of limitation, there must be some sort of conduct or acts which are fraudulent or unconscionable, and mere negligence will not constitute equitable fraud even if plaintiff has no knowledge of cause of action.

12. Limitation of actions ⇨99(1)

In New Jersey, plaintiff will not be relieved of bar of limitation unless defendant by his equitable fraud has prevented plaintiff from commencing his cause of action.

13. Injunction ⇨29

Employer, sued for injuries and death of watch-dial painter from radium poisoning, could not be enjoined from pleading limitation on ground of fraudulent concealment of cause of action because of failure to disclose existence of occupational hazard, where in 1920, when employment ceased, and up to 1924, when two-year limitation would have elapsed, there was neither knowledge of occupational hazard in dial painting industry nor reason for employer to believe or to have known of hazard (3 Comp.St.N.J.1910, p. 3164, § 3).

14. Limitation of actions ⇨100(1)

In equity, in cases of fraud, time limit within which action must be brought will not commence to run until discovery of fraud, or until complainant was in situation, where, by exercise of reasonable diligence, he would have discovered fraud.

15. Limitation of actions ⇨104(1)

Limitation statute will not be tolled on ground of fraudulent concealment of cause

of action unless plaintiff has shown reasonable diligence.

In Equity. Suit by Vincent P. La Porte, administrator ad prosequendum and general administrator of the estate of Irene F. La Porte, deceased, and individually, against the United States Radium Corporation. On bill, etc.

Bill dismissed.

Milton M. Unger, of Newark, N. J. (Leonard J. Emmerglick, of Newark, N. J., of counsel), for plaintiff.

Collins & Corbin (by Edward Markley) and Edwards, Smith & Dawson (by Edwin F. Smith), all of Jersey City, N. J., for defendant.

FORMAN, District Judge.

The principal question in this suit is whether or not the plaintiff, in an action at law for damages caused by injuries to the plaintiff's intestate and her subsequent death, is entitled to an injunction restraining the defendant from pleading the statute of limitations as a bar to the plaintiff's alleged cause of action at law on the ground of equitable fraud.

Irene F. La Porte, the plaintiff's intestate, was employed by the defendant, the United States Radium Corporation, from May 14, 1917, to December 11, 1918, and for a brief period of not over six weeks in 1920.

The decedent was employed to paint the dials of inexpensive watches with a luminous paint containing small quantities of the element radium in the form of a sulphate. While the decedent was in the employ of the defendant, no precautions were taken to prevent dial painters from being exposed to the small quantity of radium sulphate, an insoluble salt, and the radium emanation present in the air of their work-rooms.

The decedent was one of eighty girls who worked for five and one-half days per week in a large factory room ventilated by a skylight and by windows around the room. The windows were regulated by any of the girls who saw fit to do so. They worked at four rows of tables extending practically the length of the room. Each girl worked a few feet away from the girl next to her and a few feet away

from the girl at the opposite side of the table. Each girl procured a tray containing twenty-four watch dials and the material to be used to paint the numerals upon them so that they would appear luminous. The material was a powder, of about the consistency of cosmetic powder, and consisted of phosphorescent zinc sulphide mixed with radium sulphate. This compound was contained in a small vial about an inch and one-half long and about the size of an ordinary lead pencil in diameter. The powder was poured from the vial into a small porcelain crucible, about the size of a thimble. A quantity of gum arabic, as an adhesive, and a thinner of water were then added, and this was stirred with a small glass rod until a paint-like substance resulted. In the course of a working week each girl painted the dials contained on twenty-two to forty-four such trays, depending upon the speed with which she worked, and used a vial of powder for each tray. When the paint-like substance was produced a girl would employ it in painting the figures on a watch dial. There were fourteen numerals, the figure six being omitted. In the painting each girl used a very fine brush of camel's hair containing about thirty hairs. In order to obtain the fine lines which the work required, a girl would place the bristles in her mouth, and by the action of her tongue and lips bring the bristles to a fine point. The brush was then dipped into the paint, the figures painted upon the dial until more paint was required or until the paint on the brush dried and hardened, when the brush was dipped into a small crucible of water. This water remained in the crucible without change for a day or perhaps two days. The brush would then be repointed in the mouth and dipped into the paint or even repointed in such manner after being dipped into the paint itself, in a continuous process. Some girls painted an entire dial with a single pointing of the brush. Some re-pointed the brush after each numeral.

It appears that the radium used by decedent had between 8 and 30 micrograms of radium element to one gram of zinc sulphide; and 1,000 micrograms equal one milligram and 1,000 milligrams equal one gram. At any rate, the maximum quantity the decedent might have ingested was 43 micrograms of radium sulphate for each working day. This figure is doubtless much too large. The plaintiff has incorporated the following chart in his brief and

accepts the figures used in the third column for his purposes:

The decedent died June 16, 1931. Dr. Martland performed an autopsy and con-

Material Used.	Radium Ingested per Week.	Radium Ingested in 1½ Yrs.	Radium Constantly in Alimentary Tract.
8½ ug. ra. per gram			
40 grams a week	16½ ug.	1300 ug.	46 ug.
½ gram ingested out of every 10 gr. used			
33½ ug. per gr.			
40 grams a week	66½ ug.	5200 ug.	184 ug.
½ gr. ingested out of every 10			
averaging 8½ to 33½ ug. per gram			
40 gr. a week	41½ ug.	3250 ug.	115 ug.
½ gr. ingested out of every 10			

The evidence shows that the decedent was in good health at the time she left the employ of the defendant. In April, 1921, the decedent was married to the plaintiff. Her health remained excellent up until the autumn of 1927.

In the latter part of 1927 the decedent complained of a fear that she might have radium poisoning. She delayed visiting her dentist for some time because other persons who had radium poisoning had demonstrated symptoms similar to those from which she suffered. The decedent constantly associated with those persons who were suffering from the radium poisoning and frequently discussed its danger and symptoms with them, her husband, and sister.

In the spring of 1928, the decedent had a tooth extracted that troubled her. She told her dentist that she had hesitated to go to him for fear that she might have radium necrosis. Her dentist reassured her, and for the time being she appeared to be in good health.

From the latter half of 1928 to October 1930, she was treated by a doctor and she complained continually of pains in her face and jaw and frequently discussed radium poisoning. She was convinced that she was a victim. In October, 1930, she began to have pains in her legs and joints. Dr. Harrison S. Martland, the chief medical examiner of Essex county, N. J., determined that the decedent was a victim of radium necrosis on October 15, 1930. At that time Dr. Martland read X-rays taken of the decedent's jaws in 1925 as showing typical areas of radiation osteitis.

On May 4, 1931, she first presented a claim for damages to the defendant.

13 F.Supp.—17½

firmed his diagnosis that the decedent had died of occupational radium poisoning (osteogenic-sarcoma of pelvis) in the watch-dial industry. Dr. Martland found radium deposited in the bone structure of the decedent.

Plaintiff, husband of the decedent, individually, as general administrator, and as administrator ad prosequendum, commenced an action at law for her injuries and death on May 17, 1932. In its answer to the complaint at law, the defendant pleaded various provisions of the New Jersey statute of limitations, among other defenses.

On January 10, 1933, the plaintiff instituted this suit in equity to enjoin the defendant from setting up the statute of limitations as a defense to the plaintiff's action at law.

Nothing like a fair analysis of the evidence relating to the development of radium therapeutically and industrially can be given here. The legal issues will be decided on the basis of the evidence offered by the plaintiff, and only a brief allusion can be made to the details of the cases presented in such a thoroughgoing manner by both parties.

There is no question but that dial painters, at the time the decedent worked in the defendant's factory, ingested radium sulphate contained in the paint, with which they worked, by pointing the brushes with their lips, and that they breathed and swallowed radium sulphate contained in the dust in the air of their workroom, and radium emanation present in the workroom. The dial painters were protected by neither special methods or devices nor scientific ventilation.

Doubtless, the insoluble radium sulphate was absorbed in part after ingestion; some of it must have reached the blood stream and eventually been deposited in the bones of its victim. At the same time a dial painter would have constantly been subject to radium emanation and radium A. It suffices that the autopsy of the decedent revealed that radium was present in the decedent's bones after her death in 1931. The amount of radium to which the systems of dial workers were subjected must have been fairly constant, and added to that it appears that its effect would be cumulative.

But there is no reason to consider those factors now. It has only been established since 1924 or 1925 that the conditions under which the dial painters worked in 1917 and thereabouts subjected them to a pernicious and frightful occupational hazard. The important factual question is to determine how much the scientific and medical world and the defendant knew about the industry at the time, or thereabouts, that the decedent's alleged cause of action arose.

Even to-day the problems concerning radium have hardly been touched. A decade and more ago theories presently ac-

cepted were in a stage of controversial experimentation or unknown. In the plaintiff's brief there are listed some twenty-five alleged admissions made by the defendant's experts in the course of their testimony to the effect that in 1917 radium was known to be dangerous; that it was possessed of tremendous energy; that its very use, medically, was experimental; and that there were divers other recognized and unrecognized reasons in the light of the knowledge of that time to destroy the defendant's case. Many of those "admissions," much of the plaintiff's evidence and innumerable of plaintiff's assertions are unquestionably true. The great difficulty is that no one was talking about the use of radium under the circumstances here.

Of course, it was recognized in 1917 and many years before that radium was the most active of the elements and possessed an incomprehensible store of energy.¹

Several writers, one as early as 1913, suggested that radium salts which were not eliminated from the body would eventually be deposited in the bone structure and there replace the calcium and actually become a part of the structure in the form of radium sulphate.² This was theory and there were no computations at that time

¹ Madame Curie, "Radioactive Substances" (1904).

Lord Rutherford likewise made this clear in his book, "Radioactivity," published in 1905 (Exhibit P-25), and also in his book, "Radioactive Substances and their Radiation," published in 1913 (Exhibit P-23), pointing out that radium was known to be a substance which was undergoing spontaneous self-transformation. In other words, the breaking up of atoms of radium discharged a gas known as "radium emanation." This gas in turn decayed and deposited a solid product known as "radium A." This in turn decayed and left a solid known as "radium B," and so on down through "radium F," which decayed and deposited lead. Radium itself was known to have a half life of 2,000 years; that is to say, it would be reduced to half its activity in 2,000 years. What activity then remained would take another 2,000 years to reduce 50 per cent., and so on. Radium emanation was known to have a half life of 3.85 days and a practical life of about 20 days, although after 90 days approximately 1 per cent. of the emanation would still remain in existence. Radium A to F, inclusive, were known as the "active deposit." Their periods of half life appear on the chart which is Ex-

hibit P-24, a copy of which is attached hereto, and marked "Appendix I."

These various products gave off radiations. Radium, radium emanation, radium A, and radium F gave off alpha particles. Radium itself was known to give off 34,000,000,000 per second per gram. In equilibrium with its decay products almost five times this number of alpha particles were given off per second. Exhibit P-23, p. 132. These particles were known to have mass and to be approximately 7,000 times the size of an electron. They were likewise known to be positively charged. The speed with which they were shot out from the parent radioactive atoms was between 12,000 and 18,000 miles per second, and they were shot out in a constant stream.

² Seil, Viol and Gordon, "Elimination of Soluble Radium Salts, Taken Intravenously and Per Os" (May 1, 1915), New York Medical Journal, p. 896, Exhibit P-34; Dominici and La Bordes, "Study on Injection of Radium Salts" (1913), Comptes Rendus Des Seances De L'Academie Des Sciences, 156, 1107-1109, Exhibit P-12; and "Concerning Fixation by the Skeleton of Radium Injected in the Soluble State" (1913), Seances Et Memoirs De La Societe De Biologie, 75; 108-110, Exhibit P-13.

to indicate what percentage of a given amount of the soluble or insoluble salt taken internally would eventually reach the bone.

There is evidence in the literature that radioactive salts introduced in the body would be eliminated in part very slowly.³ Assuming that was established, it might be a fair inference, but surely not conclusive, that radium given in frequent doses was cumulative in its nature and effect.

The evidence shows that in 1917 many dangers to the human body from radium and radium emanation were recognized. Long exposure to emanation, irradiation, and X-rays had resulted, among a few technicians and scientific men, in fatal or dangerous injuries.⁴ An article published in 1914 was entitled "Concerning Occupational Injuries Due to Radioactive Substances,"⁵ and another, "Occupational Diseases Due to Radium; Report of Cases."⁶ Those articles were principally concerned with external burns of the skin.

Furthermore, prior to 1917, the indications from radium were contrary to using it for treatment in a number of diseases.⁷ It was fairly established that burns might show late effects in the form of general

disturbances or skin changes resulting in cancer.⁸ The plaintiff said correctly in his brief that in 1917 "no one had re-examined an individual who years before had been treated by radium salts administered internally, and found evidence of late injurious effect." But it is difficult to understand how the defendant can be said to have perpetrated a fraud when it, a commercial enterprise, failed to draw inferences, which no doctor had ventured, to the effect that its industry was suicidal to its workers. It was a theory that radium would be deposited in the bones and there were proven cases of burns by X-ray and direct contact causing delayed external effects, but that does not lead to the conclusion that dial painters were doomed or even in danger as of the knowledge of 1920.

On the contrary, in the early literature, numerous statements were made as to the beneficial effect of radium applied internally. Some of the articles to that effect are listed below.⁹

Plaintiff argues that the administration of radium by prescription under the supervision of physicians was not to be compared with the exposure by ingestion, in-

³ Dominici and the La Bordes, *supra*, note 2.

⁴ Mesernitzky, St. Petersburg-Kreuznach, "Concerning Injury to the System Through Large Doses of Radium Emanation" (1914), publication not given, Exhibit P-6; "Contribution on the Biological and Pathological Action of Soluble Radium Salts—With Special Reference to its Therapeutic Value in Pernicious Anaemia and Leukemia" (1914), Radium, vol. III, No. 5, p. 65, Exhibit P-21A; Part II of same article, vol. III, No. 6, p. 85, Exhibit P-21B; Rolleston, "The Harmful Effects of Irradiation" (1930), The Quarterly Journal of Medicine, No. 93, p. 101, Exhibit P-49.

⁵ Gutzend and Halberstaedter—Deutsche-Medizinische Wochenschrift, March 20, 1914, p. 633, Exhibit P-9.

⁶ Ordway, The Journal of American Medical Association, vol. LXVI, No. 1, p. 1, 1916, Exhibit P-26.

⁷ Mesernitzky, *supra*, note 4; Cameron and Viol, "Classification of Various Methods Employed in the Internal Administration of Radium Emanation and Radium Salts," 1915, Radium, vol. IV, No. 4, p. 57, Exhibit D-18.

⁸ Gutzend and Halberstaedter, *supra*, note 5; Rolleston, *supra*, note 4; Ruthenford, "Radioactive Substances and Their Radiations," 1913, Exhibit P-23.

⁹ Proescher, "The Intravenous Injection of Soluble Radium Salts," 1914, Radium, vol. II, No. 4, p. 45, Exhibit D-26; vol. II, No. 6, p. 77, Exhibit D-28.

Bissell, "The Intravenous Injection of Radium Element," November, 1914, Pennsylvania Medical Journal, p. 129, Exhibit D-29.

Cameron and Viol, "Classification of the Various Methods Employed in the Internal Administration of Radium Emanation and Salts," 1915, Radium, vol. IV, No. 4, p. 57, Exhibit D-18.

Delano, "A Study in the Internal Therapeutics of Radium," July 24, 1915, Medical Record, p. 137, Exhibit D-32.

Bissell, "Radium Therapeutics Otherwise Than For Malignancy," June, 1915, Medical Record, p. 1023, Exhibit D-30.

Proescher, "Contribution on the Therapeutic Value of the Intravenous Injection of Soluble Radium Salts in the Treatment of Pernicious Anaemia and Leukaemia," 1916, Radium, vol. VII, No. 3, p. 71, Exhibit D-27A, vol. VII, No. 1, p. 102, Exhibit D-27.

Park, "Chronic Interstitial Nephritis," July 8, 1916, New York Medical Journal, p. 66, Exhibit D-30A.

Sterns, "Radium and Radium Salts," 1920, American Journal of Electrotherapeutics and Radiology, p. 169, Exhibit D-22.

halation, etc., suffered by the workers. This is undoubtedly true, but plaintiff seeks to charge that defendant should have known of the great danger from the literature of that time. A great deal of the literature, as heretofore stated, described the advantages and benefits to be derived from the administration of radium, the existence of which furnished an indubitably disarming influence as to the dangers attendant to its effect.

It was true in 1917, as the plaintiff states, that radium had been known to have a fatal effect on human beings; that medical and scientific men would prefer to experiment on animals rather than persons to determine its effects under different conditions; that it was not used in treatment of certain diseases because of contraindications; that the dial painters were ingesting radium and its emanations under conditions far different from its medical use; that the dial workers would have been partly protected by certain devices and changed working conditions; that some literature may have suggested the chance of hazard in the occupation and the requirement for constant or frequent medical surveillance; that there were less dangerous methods of dial painting in use in Europe which could have been adopted; and that there were no experiments conducted or being conducted in 1917, or prior thereto, to determine the effect of dial painting.

What has been said as to the evidence before the court may not be accurate from an expert's viewpoint. It was not so intended. The object of the narrative was to present the situation in the best light for the plaintiff, since the court is of the opinion that relief must be denied to the plaintiff on his own statement of facts. Indeed, it is doubtful if an accurate picture of the knowledge existing in 1920 concerning radium could be drawn even by experts. The learning of that time was so colored with conjecture and theory, some of which has since been discarded, that it is impossible impartially and reliably to rationalize it.

There is no question but that defendant was utterly ignorant of the harmful effects attendant upon its factory process until 1924, when its attention was directed to an alleged case of radium necrosis suffered by one of its former employees.

It had examinations made of several of its employees of longest standing and re-

quested an investigation into the situation by the Life Extension Institute of New York. That agency reported on March 11, 1924, that no evidence was disclosed of the influence of any particular metallic poisoning and that the cases, in so far as they went, showed the ordinary range of human troubles and did not reflect any specific occupational influence. (Letter of Dr. Fisk, to H. B. Viedt, vice president, U. S. Radium Corporation, Exhibit D-3.)

On March 12, 1924, it retained Dr. Cecil K. Drinker of the School of Public Health, Harvard University, to conduct an investigation of the cause of necrosis occurring in reported cases. His report concludes that the necrosis was probably caused by exposure to radium, but as to how this could have occurred he was unable to demonstrate then. The report is contained in Exhibit P-31-7 and the substance of the same was received for publication on May 25, 1925, by and actually published in the Journal of Industrial Hygiene of August, 1925, vol. VII, No. 8, p. 371, Exhibit D-7.

Following investigations and reports made by Dr. Blum, a dentist, and Dr. Hoffman, a statistician, in 1924, Dr. Harrison S. Martland, in 1925, published his first article on the subject, which he entitled, "Some Unrecognized Dangers in the Use and Handling of Radioactive Substances," Journal of American Medical Association, vol. 85, p. 1769, December 5, 1925, Exhibit D-1. It is undisputed that he established the occupational hazard in the dial-painting industry.

The defendant instigated the investigations and evidenced a willingness to cooperate in them, demonstrating its effort to determine the cause of the harmful effect upon its workers as soon as its attention was directed thereto, and there is no suspicion upon which the court may rest to charge it with having knowledge of such cause or that it should, prior to 1924, have had such knowledge.

There is no better way to illustrate that conclusion than to turn briefly to the defendant's case.

The defendant contends that up until the year 1924 it did not know and cannot be charged with the knowledge that it was dangerous for the dial painters to ingest the possible maximum amount of radium in the paint into their systems in the course of their work.

Its contention is based on the assumption that the decedent might have ingested 43 micrograms of radium sulphate daily for 5½ days a week for a period of a year and a half. That amount is a considerably larger figure than that on which the plaintiff insists. The defendant suggests it because Dr. Martland once stated that this was the maximum amount according to his estimate.

As a matter of fact, it is evident that a far smaller quantity was taken into the system. Each worker painted 24 dials, each dial having 14 figures, with a gram or less of paint. There are 28.54 grams in an ounce and the several grades of paint used contained 1 part of radium to 30,000 to 120,000 parts of zinc sulphide. A great number of considerations enter into any approximation of the amount of paint ingested, and all of them tend to lessen the amount suggested by the defendant or calculated by the plaintiff.

Dr. Lind testified that in his opinion of 1920 no harmful effects were to be expected from dial painting under the circumstances and the length of time that the decedent worked. He further testified that the literature of that time had nothing in it to lead to a contrary conclusion. Dr. Lind's opinion was corroborated at the trial by the testimony of Dr. Schlunt, Dr. Flinn, Dr. Failla, and Dr. Pohle.

Both Dr. Lind and Dr. Schlunt participated in the government's project to recover radium in Colorado, and as physicists stand out in the field. Dr. Lind exposed himself, without anticipating danger to as much as 440 milligrams of radium at one time, and in a period of four years he supervised the handling of 8½ grams of radium. Despite the attack made by plaintiff against him because he could qualify only as a physicist and not as an expert

medical man, consideration of the evidence in this case makes it increasingly obvious that the considerable portion of the working knowledge and experimentation in the radium field was that of physicists and not of physicians.

The corroborating testimony mentioned came from very respectable authorities.

The Office of Industrial Hygiene and Sanitation, United States Public Health Service, stated in an article published in 1933.¹⁰ the following: "Painting watch and clock dials with a luminous paint containing a radioactive substance began in this country in 1915. During the world war and immediately after, this small industry was at its peak, and since the industry began several thousand workers in all have been employed. Only within the last decade had poisoning by radium been recognized. Martland in 1929 reported 40 cases of radium poisoning among workers and former workers in this industry or in closely allied occupations."

It is admitted that Dr. Martland first established the danger in the dial-painting industry in 1924 or 1925. Prior to 1924, it had not been suspected, and Dr. Lind, whose creditability is not to be questioned, was unable to conclude that Dr. Martland was right until 1929.

Dr. May, who was the only expert witness for the plaintiff, testified that prior to 1924 there was nothing in the literature indicating danger from dial painting or to show that harm would result from the use of radium under those circumstances. He stated that he agreed with an article published in 1926 by Dr. Flinn¹¹ that the conclusion that no industrial hazard existed in the dial-painting industry was justified as of that time. He later stated he disagreed. But he accepted Dr. Martland's

¹⁰ "Health Aspects of Radium Dial Painting," 1933, The Journal of Industrial Hygiene, vol. XV, Nos. 5 and 6, Exhibit P-53. This series of articles contained the findings and recommendations resulting from an investigation of the United States Public Health Service into the hazards which existed in this industry, which investigation was undertaken in collaboration with an advisory committee consisting of Dr. L. F. Curtiss, Physicist, United States Bureau of Standards, Washington, D. C.; Prof. William Duane, Professor of Bio-physics, Harvard University; Dr. Gioacchino Failla,

Physicist, Memorial Hospital, New York City; Dr. O. H. Gish, Chief, Section of Terrestrial Electricity, Department of Terrestrial Magnetism, Carnegie Institution of Washington; Prof. S. C. Lind, Director, School of Chemistry, University of Minnesota; Dr. Harrison S. Martland, Chief Medical Examiner, Essex County, New Jersey; Prof. Herman Schlundt, Professor of Physical Chemistry, University of Missouri.

¹¹ Flinn, "Radioactive Material An Industrial Hazard?" 1926, Journal of American Medical Association, vol. 87, No. 25, p. 2078, Exhibit P-39.

articles¹² of 1925 and 1926 as true. He further agreed with the conclusion of Dr. Field as of 1920 that small quantities of radium given internally had no toxic effect.

In 1912, an article by Dr. E. Bellingham Smith¹³ stated: " * * * Soluble salts of radium are rapidly eliminated, however administered. The insoluble salts per os are excreted directly by the bowel, and there is no evidence of any temporary absorption and circulation."

Dr. May disagreed with the conclusion that insoluble radium salts administered per os are excreted completely. He thought that as of 1912 some of the insoluble salt might be absorbed. But there is no literature prior to 1920 that supports his opinion as to insoluble salts, and the opinions of Dr. Schlundt and Dr. Lind to that effect are contrary.

Radium sulphate is one hundred times less soluble than barium sulphate. The barium salt is so insoluble that it is introduced in the intestinal tract so that it may be examined by X-ray. Up to 1925, the literature did not show that radium sulphate would remain in the body. Although there had been suggestions to the contrary, it was accepted that the insoluble salt when taken by mouth would pass directly through the intestinal tract and from the body in a short period of time. Radium was administered by some doctors in the form of a bromide, on the theory that it would remain in the body longer.

It must be remembered that in considering all of the evidence prior to 1924, none of it is remotely concerned with the dial-painting industry, but with the knowledge and experiments of the scientific and medical world.

There is no way to illustrate more emphatically what the experts in radium thought of the dial-painting industry than to recall that even after Dr. Martland's findings in 1925, Dr. Lind, Dr. Flinn, Dr. Schlundt, and Dr. Pohle disagreed with

him, although they all eventually came to agree with him.

It is apparent from the literature produced during this trial that prior to 1925, although there was some suggestion of hazard through the agency of radium, many hailed it as a great boon to humanity, and its internal uses by injection, inhalation, etc., were frequently advocated. That the articles by Hoffman followed by that of Martland, Conlon, and Knaf in the Journal of the American Medical Association, published respectively in September and December of 1925, startled the medical world, is demonstrated in the language of Lacassagne in his article entitled, "A New Professional Accident Among Handlers of Radioactive Materials; Necrosis of the Maxillaries."¹⁴ He says: "Two recent articles (1), appearing in the Journal of the American Medical Association, have revealed an unforeseen and surprising new accident, which has affected an important proportion of workers occupied in painting with luminous radioactive products; it is a question of maxillary necrosis, always serious, and often ending in death." He concludes: "This persistence explains the serious lesions of blood forming organs which can appear some years after the introduction of the radioelement in the body, and ends in fatal pernicious anemia. *The knowledge of these facts imposes on physicians the greatest care in the practice of injections of longlived radioactive materials.*"

(Italicizing in both paragraphs mine.)

Again in 1927, Allen, Bowing, and Rowntree¹⁵ commented upon the evolution of thought on the use of radium, as follows: "Fifteen years ago the literature was flooded with the optimistic reports on the use of radium in medicine. These reports ceased rather abruptly, and during the last ten years little has been written on the subject, except by those directly or indirectly concerned commercially. During the intervening years radium has been em-

¹² Martland, "Some Unrecognized Dangers in the Use and Handling of Radioactive Substances," Journal of American Medical Association, vol. 85, p. 1769, Dec. 6, 1925, Exhibit D-1.

Martland, "Microscopic Changes of Certain Anemias Due to Radioactivity," 1926, Archives of Pathology, vol. 2, No. 4, p. 465, Exhibit D-6.

¹³ "Distribution and Excretion of Ra-

dium and its Emanation After Internal Administration," Quarterly Journal of Medicine, 1912, p. 249, Exhibit D-10.

¹⁴ Published in the Paris Medical, February 6, 1926, pp. 132-134, Exhibit P-14.

¹⁵ "The Use of Radium in Internal Medicine" January 15, 1927, The Journal of the American Medical Association, vol. 88, No. 3, p. 164, Exhibit D-25.

ployed sporadically in the treatment of various diseases, particularly arthritis, neuritis and hypertension, and more recently thrombo-angiitis obliterans (Buerger's disease). Although striking results have been observed on rare occasions in cases of hypertension and arthritis following the use of radium by the so-called sipping cure, the method has dropped into complete disuse and has been replaced by a more certain procedure, the intravenous administration of the soluble salts of radium. However, in most cases, even with this method results have been meagre, transient or entirely negative. Radium treatment is now rarely employed in our wards, in spite of the fact that it always can be had on request."

In a paper published in 1932, by Dr. Martland, entitled "The Danger of Increasing the Normal Radio-activity of the Human Body,"¹⁶ he says:

"It is the purpose of this paper to summarize my findings and views and leave the reader with the facts, that undue or professional exposure to radium and other long-lived radioactive substances is dangerous and should be reduced to a minimum, and that the therapeutic use of these substances by internal administration, either by way of the mouth, or by inhalation, or by intravenous or intramuscular injection may be highly dangerous and is not warranted in any medical condition, as none of the known radioactive substances produce any curative results.

"It should be emphasized, that the disastrous results cited in this paper are not to be confused with the legitimate use of external irradiation by means of the X-rays and radium, such as is used for the treatment of malignancy in hospitals and institutions specializing in and competent to handle such treatments. The deleterious effects and hazards of external, penetrative, non-accumulative irradiation are well recognized and have been reduced to a minimum by proper technic."

He concludes:

"Since there is no evidence indicating any beneficial results from the drinking of waters containing emanation, except phsyic ones, and there is scientific evidence that radon is not free from danger, their use should be forbidden. The human race will not suffer if they are eliminated. * * *

"It would appear that the intravenous injection of long-lived radio-active elements, or the internal administration of radium, mesothorium, or radiothorium, is highly dangerous on account of the late harmful effects. As previously stated, and here repeated for emphasis, it is not warranted in any medical condition, as none of the known radioactive substances produce any specific or curative result."

These, then, were red flags of warning to the medical profession. They appear subsequent to the year 1925. But if the defendant is to be denied the protection of the statute of limitations, the plaintiff's case must be based upon the proposition that the defendant should have known of the harmful effects during the period from 1917 to 1920.

[1] If it is assumed that a cause of action existed in this case in favor of the decedent against the defendant, it must have accrued some time in the course of her employment in 1917, 1918, or 1920, at the latest, when she was last exposed to the radium. It is unnecessary, if not impossible, to determine the exact date. The question has not been raised, but, at any rate, if the action arose on the last day of her employment, the statute would have normally barred her remedy some time in 1922, which is at least two years before radium necrosis was discovered and over seven years before she was diagnosed.

It appears, from a careful consideration of all the evidence, that no one had considered the effect of the radium substances on the workers in this comparatively small and commercially unimportant occupation. There was much conflicting opinion in the minds of the few experts and little settled knowledge. Some experts in 1920 considered small quantities of radium such as the painters ingested beneficial to the human system. There is apparently no express statement to the contrary.

It is tempting in the light of the knowledge of to-day and the experience since 1920 to create the thought that the defendant must have been negligent in some way. To-day, industrial methods which the defendant then employed would not be merely negligent but criminal. But it should be carefully noted that this case must be decided on the facts as they existed in the light of the knowledge of 1917 to 1920.

¹⁶ Emanuel Libman Anniversary Volume, 1932, International Press, New

York, Exhibit P-33.

Were safety measures such as scientific ventilation, masks, periodical medical examinations, abolition of brush pointing, and other now known precautions to be considered necessary as of 1920?

Actually, the defendant and its research bureau failed to anticipate what later research and scientific investigation proved to be a fact, namely, that the defendant's dial painters in 1920 were exposed to the gravest of dangers in their occupation.

The fact is that this experience was not brought home to science and medicine until a considerable number of cases such as that at bar had been considered and then the knowledge came slowly, only to be accepted as fact several years after the first necrosis cases were exposed.

Notwithstanding the fact that the court is convinced that the plaintiff is not entitled to the relief he seeks on the ground of undisclosed fraud, the seriousness of the consequences of the decision makes it desirable to review briefly the New Jersey authorities defining the limits of the so-called doctrine of fraudulent concealment.

The New Jersey statute of limitations which is applicable to tort actions provides: "All actions hereafter accruing for injuries to persons caused by the wrongful act, neglect or default of any * * * corporation or corporations within this state, shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after." Rev. 1877, p. 594, as amended P.L. 1896, p. 119, 3 Comp.St. 1910, p. 3164, § 3.

[2] This is the genuine and orthodox statute which was taken from 21 James I, c. 16. In an action at law, the plea of the statute, regardless of fraud on the part of the tort-feasor, is always a bar to recovery. The New Jersey courts have held that the Legislature did not intend that there should be any exceptions to the statute other than those expressly enacted in other sections. Moreover, it appears that in the later English statute of 3 and 4 Wm. IV, c. 27, a clause in section 26 expressly saves the remedy under that statute from the bar of concealed fraud.

In *Thorpe v. Corwin*, 20 N.J.Law, 311, 317, the court said: "The statute of limitations makes the lapse of time a positive and legal bar. When once it has begun to run against a person under no legal disability, it pursues its course uninterrupted by any

subsequent events; and when the period prescribed by the statute has elapsed, the bar is complete, and its force can neither be strengthened nor impaired by anything that has happened in the meantime. * * * The statute leaves nothing for presumption. Time alone settles the rights of the parties, by the giant force of the statute."

That is law to-day in New Jersey. *Freeman v. Conover*, 95 N.J.Law, 89, 112 A. 324; contra, *Crawford v. Winterbottom*, 88 N.J.Law, 588, 96 A. 497.

[3] In our system of jurisprudence, equity, in the case of fraud, has never barred relief to an injured party who has been in ignorance of the fraud. *Prevost v. Gratz*, 6 Wheat. 481, 5 L.Ed. 311; *Badger v. Badger*, 2 Wall. (69 U.S.) 87, 17 L.Ed. 836; *Bailey v. Glover*, 21 Wall. (88 U.S.) 342, 349, 22 L.Ed. 636; *Exploration Company v. United States*, 247 U.S. 435, 38 S. Ct. 571, 62 L.Ed. 1200; *Howard v. West Jersey & S. S. Railroad Company*, 102 N. J.Eq. 517, 141 A. 755.

In *Bailey v. Glover*, supra, the court said in giving its reasons for the equitable doctrine: "They [statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." Cited in *Exploration Company v. United States*, 247 U.S. 435, at page 447, 38 S.Ct. 571, 62 L. Ed. 1200.

Vice Chancellor Leaming in the *West Jersey Railroad Company Case*, supra, explained that the statute is for the benefit of the individual and not to secure general objects of policy; so, therefore, its benefits may be lost by conduct invoking the principles of estoppel in pais, as well as is familiarly known, by waiver.

[4] In New Jersey, a person who has been wronged by fraud is relieved from the bar of the statute of limitations at law by a unique method. The plaintiff goes into the Court of Chancery and enjoins the plea of the statute at law.

The phase of the doctrine with which this case is concerned, "fraudulent concealment," of a cause of action, is established on a broad basis in this state.

[5, 6] It is not necessary that the acts or conduct constituting the concealment of a cause of action be such as would be required to make out fraud in a law court.

The test is defined as follows: "Also it should be noted that, while the doctrine of estoppel in pais rests upon the ground of fraud, it is not essential that the representations or conduct giving rise to its application should be fraudulent in the strictly legal significance of that term, or with intent to mislead or deceive; the test appears to be whether in all the circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct; whether the author of a proximate cause may justly repudiate its natural and reasonably anticipated effect; fraud, in the sense of a court of equity, properly including all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. 1 Story Eq.Jur. § 187. The authorities in this state to the general effect stated are *Lamb v. Martin*, 43 N.J.Eq. 34, 37 [9 A. 747]; *Martin v. State Insurance Co.*, 44 N.J.Law 485, 487, 43 Am.Rep. 397; *Holloway v. Appelget*, 55 N.J.Eq. 583, 585, 40 A. 27, 62 Am.St.Rep. 827; *Clark v. Augustine*, 62 N.J.Eq. 689, 695, 51 A. 68; *Freeman v. Conover*, 95 N.J.Law, 89, 93, 112 A. 324. See, also, *Magner v. Mutual Life Association*, 17 App.Div. 13, 44 N.Y. S. 862, affirmed 162 N.Y. 657, 57 N.E. 1116; *Thompson v. Phenix Insurance Co.*, 136 U.S. 287, 300, 10 S.Ct. 1019, 34 L.Ed. 408." *Howard v. West Jersey, etc., R. Co.*, 102 N.J.Eq. 517, 521, 141 A. 755, 757, *supra*.

That statement was recently approved by the Court of Errors and Appeals in *Patrick v. Groves*, 115 N.J.Eq. 208, 169 A. 701. It suggests a much wider scope to the doctrine of "fraudulent concealment" than is generally accepted elsewhere. See *Dawson, Fraudulent Concealment and the Statute of Limitations*, 31 Mich.L.R. 591; note, *Fraudulent Concealment of a Right of Action and the Statute of Limitations*, 43 Harv.L.R. 471; *Wood v. Carpenter*, 101 U.S. 135, 25 L.Ed. 807.

13 F.SUPP.—18

In *Lincoln v. Judd*, 49 N.J.Eq. 387, 24 A. 318, 319, the complainant shipped sheep to the defendants, who sold them and remitted the proceeds of the sales, less their commissions and amounts purported to have been expended for freightage. The freightage deducted was grossly in excess of the actual charges, but the complainants accepted the moneys as correct, relying on the defendant's honesty, and did not discover the fraud presumably for over six years. The defendants demurred to the bill for an accounting on the grounds that the complainant had an adequate remedy at law and that more than six years had elapsed since the cause accrued. But the court overruled the demurrer, holding that "in cases of fraud, the time limited within which the action must be brought will not commence to run until the discovery of the fraud, or until the complainant was in a situation where, by the exercise of reasonable diligence, he would have discovered the fraud."

Another case, *Holloway v. Appelget*, 55 N.J.Eq. 583, 40 A. 27, 62 Am.St.Rep. 827, held that the defense of the statute in an action at law would be enjoined in equity where a defendant sold certain municipal bonds after making an agreement with an attorney to pay him a percentage for collecting the bonds and allowed the statute to run without informing the attorney of the fact. See comment, 12 Harv. L.R. 220.

The court held in *Clark v. Augustine*, 62 N.J.Eq. 689, 51 A. 68, that nonresident executors would be enjoined in equity from setting up the bar of the statute to an action at law on a claim against the estate when the executors gave notice that the claim had been rejected and then remained out of the state until the period for instituting suit had expired. The court said in disposing of the case (62 N.J.Eq. 689, at pages 694 and 695, 51 A. 68, 70): "In large numbers of cases where the defendant has caused the plaintiff to subject his claim to the statutory bar by procuring an injunction upon its prosecution, or by fraudulently concealing its existence, or by apparently waiving, by a promise or otherwise, the benefits of the statute as a defense, courts of equity have restrained the defendant from pleading the statute, on the ground that he had estopped himself, or that to permit him to interpose such a plea would be to allow him to take advantage of his own wrong. *Doughty v. Doughty* (1855) 10 N.J.Eq. [2 Stock.] 347;

Cowart v. Perrine (1870) 21 N.J.Eq. [6 C.E.Gr.] 101; Quick v. Corlies [39 N.J. Law, 11], supra; Freeholders of Somerset County v. Veghte (1882) 44 N.J.Law [15 Vr.] 509; Lamb v. Martin (1887) 43 N.J. Eq. [16 Stew.Eq. (34)] 36, 9 A. 747; Holloway v. Appelget (1896) 55 N.J.Eq. [10 Dick.Ch.Rep.] 583, 40 A. 27, 62 Am.St. Rep. 827; 19 Am. & Eng. Encycl.L. (2d Ed.) 243, 286, 288, and cases cited."

Howard v. West Jersey Railroad Company, supra, one of New Jersey's leading cases, furnishes an excellent illustration of the breadth of the doctrine. There, the plaintiff and the defendant had been negotiating a settlement of the plaintiff's claim for damages for personal injuries. The defendant apparently admitted liability, but the amount of damages was in question. The court appears to have been of the opinion that the plaintiff believed, by reason of the statements and conduct of the defendant, that the amount of damages would be determined when the extent of the injuries had been determined. He asked for \$10,000 in settlement of the claim. This was taken under advisement, and the plaintiff awaited a reply. Two days prior to the end of the statutory period, of which the plaintiff did not know, the defendant offered \$2,500 in settlement. After discussing the facts of the case, the court said:

"While it cannot be said to be ordinarily any part of duty to apprise an adversary of his rights, it must be recognized that one cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought. This is recognized by our federal Supreme Court as a rule of justice in the concluding sentence of the opinion of the court in Thompson v. Phenix Insurance Co., supra, and is made the basis of decision in Magner v. Mutual Life Association, supra.

"Any suggestion of want of authority of Mr. MacDonald and Mr. Turnbull to bind defendants by their conduct is untenable. Admittedly both were acting within the field of their employment. Defendants cannot avail themselves of the fruits of their activities and at the same time escape responsibility for the methods employed by them."

In Patrick v. Groves, 115 N.J.Eq. 208, 169 A. 701, the defendant, who had been an attorney for the plaintiff, misappropriated his clients' money. In affirming the decree of the Court of Chancery enjoining a plea of the statute to an action at law to recover the misappropriated money, the Court of Errors and Appeals held that the defendant's fraudulent conduct was responsible for the plaintiff's delay in prosecuting their action and that he was estopped thereby to set up the statute. The court approved the statement of the doctrine of estoppel in pais in the West Jersey Railroad Case, supra.

[7] Generally, ignorance of the existence of a cause of action is required on the part of the plaintiff. The lack of knowledge of evidence or the identity of the defendant is not sufficient to invoke the doctrine of fraudulent concealment. But in Noel v. Tefteau, 116 N.J.Eq. 446, 174 A. 145, a "hit and run" driver of an automobile was restrained by the Court of Chancery from setting up the defense of the statute to an action brought by the person whom he had injured. This decision was influenced by a statute of New Jersey making it the duty of persons involved in accidents to report such occurrences to proper authorities.

[8] Under the orthodox doctrine of fraudulent concealment, it is required that the plaintiff be in ignorance of the existence of the cause of action and that the defendant must intend to keep the plaintiff in ignorance thereof. Silence is not enough to make out fraudulent concealment.

[9,10] It is accepted in New Jersey that the plaintiff must show reasonable diligence in bringing his suit after the estoppel has expired. See cases, infra. And it makes no difference if the concealment (or fraud) springs from the same act as the cause of action or is found in subsequent acts (or failure to act).

Thus, it was said in Holloway v. Appelget, supra, 55 N.J.Eq. 583, at page 585, 40 A. 27, 28, 62 Am.St.Rep. 827:

"The question is whether, in equity, Mr. Holloway is entitled to invoke the statute of limitations in bar of Appelget's action at law. In most of the cases the bar has been set up in suits in equity instituted for the purposes of obtaining relief in instances of fraud. There, however, is no reason why a court of equity should not, by the use of its injunctive power, dis-

arm a defendant from using the statute fraudulently in an action at law. In the case of Freeholders of Somerset County v. Veghte, 44 N.J.Law [15 Vr.] 509, where it was held that a fraudulent concealment of a cause of action was no answer to the statute in an action at law, it was admitted that relief could be successfully sought in equity.

"It also appears that the equitable relief here invoked has been granted mostly in cases where the act out of which the cause of action arose was a fraudulent act, in its nature self-concealing, such as embezzlements or thefts carried out by the falsification of accounts or vouchers. But it seems clear that a court of equity will interfere, although the cause of action may not have arisen out of a technically fraudulent act, if the defendant has employed any means to mislead the plaintiff, or to hide from him the fact that a cause of action has arisen."

[11] But of course, there must be some sort of conduct or acts which are fraudulent or unconscionable. Mere negligence will not constitute equitable fraud even if the plaintiff has no knowledge of the cause of action.

There are apparently no New Jersey cases holding to that effect, but the rule has no exceptions in any jurisdiction except in the so-called inadvertent trespass cases, such as Lewey v. H. C. Fricke Coke Company, 166 Pa. 536, 31 A. 261, 28 L.R.A. 283, 45 Am.St.Rep. 684.

[12] As heretofore indicated, there is no orthodox doctrine of "fraudulent concealment" in New Jersey. That is due doubtless to the flourishing Court of Chancery, which is maintained apart from and independently of the law courts. At any rate, the plaintiff will not be relieved of the bar of the statute unless the defendant by his equitable fraud has prevented him from commencing his cause of action. The test of equitable fraud is stated in Patrick v. Groves and the West Jersey Railroad Case, both supra.

[13] In this case, the plaintiff contends that the testimony tends to show:

"1. An omission which involves a breach of legal duty.

"2. An omission which involves a breach of confidence justly reposed (found in the fact that as a matter of law the servant is entitled to assume that his mas-

ter has exercised due care to fulfill the obligations imposed upon him by law, Leuteritz v. Ice Consumers' Co., supra [82 N.J.Law, 251, 83 A. 176]; and found also in the fact that as a matter of equity it is a fraud to act as the defendant did whenever there exists in fact a relationship in which confidence is reposed on one side with a resulting superiority on the other side. Pomeroy Eq.Jurisp. p. 2039, as quoted at page 17 of the trial brief).

"3. An omission which involves a breach of legal and equitable duties, and by which undue and unconscientious advantage is sought to be taken."

The plaintiff further contends that the evidence requires a finding that the defendant is not entitled to use the statute of limitations as a defense on the following grounds:

"1. Actual fraud, consisting of concealment of material facts when there was a duty to disclose them.

"2. Equitable estoppel, found in

"(a) Actual knowledge and nondisclosure of material facts when a duty to disclose them existed.

"(b) Imputed knowledge of material facts and nondisclosure under the same circumstances.

"(c) Proximate causation within the meaning of the rule stated in Patrick v. Groves and the other authorities, as set forth in the trial brief.

"3. Constructive fraud, found in

"(a) Actual knowledge and nondisclosure of material facts when a duty to disclose them existed.

"(b) Imputed knowledge of material facts and nondisclosure under the same circumstances.

"(c) Proximate causation within the meaning of the rule stated in Patrick v. Groves and the other authorities, as set forth in the trial brief."

On the contrary, the court is constrained to find that in 1920 and up to 1924, in which time the two-year period of limitations would have elapsed, there was neither knowledge of an occupational hazard in the dial-painting industry nor, in the light of the knowledge concerning radium, reason for the defendant to believe or to have known of the hazard. The defendant could not have been under a duty to disclose a hazard which, so far as it or the world knew, did not exist.

In 1920, it is a fact that dial painting was not known to be a hazardous occupation. It was only shown to be some time in 1924, or thereafter. To determine this case, the court must consider the knowledge concerning radium existing at least prior to the end of the normal period of limitations. All the learning of the scientific and medical world after that time, including the fact, which is now admitted by every one, that the occupation was highly dangerous, is not relevant, *per se*, to the issue.

Another way of stating this case in its final analysis is that in 1920 the head of the defendant's research bureau had failed to carry its research to the conclusion which scientific and medical experts later accepted, with some reluctance, after a number of the cases of radium necrosis had been carefully studied. Indeed, it is fair to say that until Dr. Martland established the cause, it was only by the process of elimination that suspicions pointed to radium as the trouble maker.

It can be said that this is a case wherein both the plaintiff and defendant were ignorant of the existence of facts which may have constituted a cause of action, the reason for it being the fault of neither. Medical and scientific knowledge had failed to discover the dangerous propensities of the occupation. The statute of limitations and its exceptions were not conceived for this extraordinary situation.

No one has even attempted to controvert the fact that Dr. Blum, Dr. Hoffman, Dr. Drinker, and the defendant, itself, found reason to suspect the danger in 1924; that Dr. Martland established it in 1925; but that several of the most eminent men in radium could not accept his conclusion as true until later. There are no suggestions to the contrary even by the plaintiff; but, at any rate, the court is compelled to accept the opinions of the expert witnesses to that effect and the literature which fully corroborates those opinions and the fact that no reported cases existed prior to the one to which the defendant's attention was brought early in 1924.

Going back to 1920, there was no knowledge that an occupational hazard existed in dial painting. Whether or not it could have been established, if the radium experts had put themselves to the specific task, is a matter of conjecture. Medical and scientific opinion concerning radium was going through changes, slow in proc-

ess, which were the result of an increasing number of experiments. There is nothing on which a finding of negligence, in failing to discover the dangers in the industry, could be based.

There is another serious question which should be briefly considered, but the decision of the court makes it unnecessary to determine it. It is that of whether or not the conduct of the decedent and the successors to her alleged cause of action constituted laches which would prevent the plaintiff from enjoining the defense of the statute of limitations, even if the defendant was guilty of equitable fraud.

It should be remembered that the defendant was unaware of the decedent's existence after 1920; that the decedent firmly believed during 1927 that she was a victim of radium poisoning; that, in fact, she had the common symptoms of the disease experienced by other cases with whom she frequently associated; that she had had X-rays taken in 1925 which Dr. Martland read in 1930 as showing typical areas of radiation osteitis in her jawbone; that after 1927 she attended dentists and a physician and related her fears to them but was reassured by them; that she continued to suffer from the manifestations of the disease; that on October 15, 1930, Dr. Martland diagnosed her trouble as radium poisoning; that a claim was made against the defendant on May 14, 1931, for the first time; that the decedent died on June 16, 1931; and that the action at law was commenced May 17, 1932.

[14] "It is a well-settled rule in equity that, in cases of fraud, the time limited within which the action must be brought will not commence to run until the discovery of the fraud, or until the complainant was in a situation where, by the exercise of reasonable diligence, he would have discovered the fraud." *Lincoln v. Judd*, 49 N.J.Eq. 387, 24 A. 318, 319; *Patrick v. Groves*, 115 N.J.Eq. 208, 169 A. 701.

Accordingly, it might be contended that this rule should be invoked against the decedent and her successors in view of the evidence. The action at law was not commenced until June 16, 1931. While Dr. Martland did not diagnose her case until October 15, 1930, and her physician and dentist assured her that she did not suffer from the radium affliction, she knew of her own experience that she was suffering from the usual manifestations of the disease as she had had the opportunity to ob-

serve. It was more than the suggestion of fear in her mind that troubled her. She suffered the progressive effects of the disease. Her associations with known victims with whom she even visited the offices of the radium experts when they were being treated is significant in determining whether or not she was using reasonable diligence in establishing her true condition which was probably discoverable as early as 1925.

[15] In view of the unanimity of opinion of all courts that the statute will not be tolled unless the plaintiff has shown "reasonable diligence," the question may well be raised here as to whether or not the decedent was required to avail herself of such medical examination as could have been made as soon as she entertained suspicions of her condition as early as 1927. Under the reasoning herein it seems unnecessary to decide this question, however.

The plaintiff contends that the decedent did voice her complaints and suspicions to at least one doctor and dentist, as early as 1927 or 1928, but was assured by them that they were unfounded. This in itself lends force to the argument of the defendant that, in fairness and equity, it could not be charged in 1917 to 1920, with the anticipation of the dangers and hazards attendant upon its industrial use of radium in the infinitesimal quantities in which it was incorporated in the luminous paint. In 1925 and 1926, nation-wide publicity was given to the discovery of radium poisoning as the cause of the ailment from which several of these dial painters suffered. In the face of this and the direct statement by the decedent that she suspected that she, too, was a victim, her own doctor and dentist in 1927 were unable to diagnose her trouble. Under such circumstances, can her employer be charged with the responsibility of anticipating such dangers in the light of the learning of the years 1917 to 1920?

Naturally there is no question as to where the sympathies of any human being would lie in a case of this sort. But a court has no power to adjust the law which has been enacted to meet the needs of a time when no such case as this could be foreseen. This is an extraordinary case even today. The statute of limitations was enacted for the purpose of pro-

tecting the public from fraud. Its ends were desirable and necessary, and in the infinite variety of cases that come before the courts that is still true. The responsibility in this case can only be laid to the tremendous progress made in science in the last four decades, for radium was unknown prior to 1898. The development of the law to meet such contingencies must of necessity lag behind their discovery. Only forward looking, intelligent legislation can protect future situations such as the one here presented.

The bill must be dismissed.

It is intended that the foregoing discussion of facts and law shall be in satisfaction of the requirements of Equity Rule 70½ (28 U.S.C.A. following section 723), concerning findings of fact and conclusions of law.

Appendix I.

SUBSTANCE	PERIOD OF ONE HALF LIFE
	2000 YEARS
	3.85 DAYS
	3 MINUTES
	26.8 MINUTES
	19.5 MINUTES
	16.5 YEARS
	5 DAYS
	136 DAYS

LEGEND
 — ALPHA
 --- BETA
 ~~~ GAMMA

## Statement of the Case.

**MITCHEM ET AL., APPELLANTS, v. JOHNSON, D. B. A. WALLACE  
JOHNSON CO., APPELLEE.**

[Cite as *Mitchem v. Johnson*, 7 Ohio St. 2d 66.]

*Warranty—Breach by builder-vendor of real-property structure—Liability for damages not dependent on negligence—Implied warranty of uncompleted structure not imposed on builder-vendor, when—Duty of builder-vendor to employ care and skill—Hidden defects resulting from failure of duty—Liability to vendee.*

1. Where a warranty is breached by the builder and vendor of a real-property structure, he is subject to liability for damages proximately caused by such breach, and the recovery of damages for such breach does not depend on his negligence. (Paragraph two of the syllabus of *United Pacific Ins. Co. v. Balcrank, Inc.*, 175 Ohio St. 267, approved and followed.)
2. ~~An implied warranty in favor of the vendee of an uncompleted real-property structure that it will, when finished, be suitable for the purpose intended will not be imposed upon the vendor who constructed it and undertakes to complete it as a part of the executed contract for sale of the real estate.~~
3. A duty is imposed by law upon a builder-vendor of a real-property structure to construct the same in a workmanlike manner and to employ such care and skill in the choice of materials and work as will be commensurate with the gravity of the risk involved in protecting the structure against faults and hazards, including those inherent in its site. If the violation of that duty proximately causes a defect hidden from revelation by an inspection reasonably available to the vendee, the vendor is answerable to the vendee for the resulting damages.

(No. 40023—Decided June 29, 1966.)

CERTIFIED by the Court of Appeals for Lucas County as being in conflict with *Vanderschrier v. Aaron*, 103 Ohio App. 340.

## Statement of the Case.

For the sum of \$31,000, plaintiffs (appellants) purchased a new residence from the defendant (appellee), who constructed it. When the purchase price was paid and the title transferred to plaintiffs, the structure was not complete, and defendant agreed to finish the house as a part of the transaction. Plaintiffs have no complaint as to defendant's work in completing the house. Beyond this point, however, the facts are in dispute.

Plaintiffs sued the defendant because, they allege in substance, the lot and residence were located in an area which had surface-water problems, and, notwithstanding that fact and unknown to the plaintiffs, the residence was constructed on a low portion of the lot and without the installation of foundation drainage tile or any system to protect the structure from the surface-water problems, "the same being required by *good workmanship*" (emphasis supplied); "defendant did not use *proper* roofing, sheeting and insulating materials, and did not erect and install the same *properly*, or in the exercise of *good workmanship*, resulting in the installation of a *defective* roof" (emphasis supplied); and, because of these conditions, surface waters accumulated under the residence, saturated the foundation and roof support members, and seeped up and into the roof insulation and roofing portions of the structure, which, in turn, caused the latter to warp, open, pull apart and permit water to seep into the residence. These conditions required the roof and related parts of the structure to be removed and replaced "with *proper* materials" (emphasis supplied).

Plaintiffs allege further that, during periods of heavy rainfall and high soil moisture, the area around the residence structure became sodden and impaired the effectiveness of the septic tanks, rendering the interior toilet facilities partially unusable.

Plaintiffs attempted to correct all these "*defects and poor workmanship*" (emphasis supplied) but without avail. Plaintiffs claim that as a result of defendant's breaches "of his implied warranties to construct and wholly complete said residence in a *proper and workmanlike manner*, using *proper* materials throughout" (emphasis supplied), plaintiffs were damaged in the amount of \$3,800.

Opinion, per SCHNEIDER, J.

In his answer, defendant presents two affirmative defenses beyond a general denial of the matters disputed: (1) That certain modifications made in the structure by the plaintiffs were the real cause of their problems, and (2) that the damages sustained were the result of natural conditions in the land over which defendant had no control. By reply, the plaintiffs deny the statements contained in the separate defenses and, on the issues thus joined, a trial was had.

(A second cause of action based on express warranty and misrepresentation was dismissed for lack of sufficient evidence. No error was claimed arising from that action.)

Before argument, the jury was given a special written instruction reading in pertinent part as follows:

"I instruct you that, as a matter of law, when parties purchase a home from a builder and construction is not yet completed, the law implies certain conditions and warranties in that contract of sale. Among these conditions and warranties, it is an implied term of the sale that the builder will complete the house in such a way that it will be reasonably fit for its intended use and that the work would be done in a reasonably efficient and workmanlike manner."

The jury returned a verdict for the plaintiffs for \$2,258.95. On appeal, the Court of Appeals for Lucas County reversed the judgment and remanded the cause for a new trial for the sole reason that the special written instruction was improper and prejudicial. Two other assigned errors were not considered in view of that judgment.

*Mr. Richard H. Conn*, for appellants.

*Messrs. Rowley & Leahy* and *Mr. Paul J. Leahy*, for appellee.

SCHNEIDER, J. The record brought to our attention under Rule IV of our Rules of Practice, and relied upon by plaintiffs, consists only of the petition, the answer, the reply, the special written instruction given before argument, and the judgment entries of the lower courts. Thus, the singular question presented is whether an implied warranty, in favor of the vendee of an uncompleted structure that it will, when finished, be suitable for the purpose intended, should be imposed upon the



Opinion, per SCHNEIDER, J.

vendor who constructed and who undertook to complete it as a part of the executed contract for the purchase and sale of the real estate.

In the *Vanderschrier* case, 103 Ohio App. 340, at best, a "bargain" was implied that work *to be completed* on real estate "would be done in a reasonably efficient and workmanlike manner," notwithstanding that the promise to complete was part of an executed contract of sale for the purchase of the realty. The implied "bargain" was held to extend beyond, and not to be extinguished by, the payment of the purchase price and the transfer of title. See, also, annotation, 84 A. L. R. 1008, and the cases cited therein.

A contract to furnish labor and materials is not a sale if the finished product is not personal property. The requirement of workmanlike performance is no more than that which the law imposes upon the builder of a structure on land owned by another, unless, of course, a higher duty may be fairly implied from the terms of the contract itself. 17A Corpus Juris Secundum 851, Contracts, Section 515.

In *Flannery v. St. Louis Architectural Iron Co.*, 194 Mo. App. 555, 558, 185 S. W. 760, we are of the opinion that the law is correctly stated:

"'It is the duty of the builder to perform his work in a workmanlike manner; that is, the work should be done as a skilled workman would do it; the law exacting from a builder ordinary care and skill only.' [6 Cyc. 59.] It is certain that the builder is not an insurer. Nor is he required to respond to the owner on account of defective construction, except in accordance with the precepts of ordinary care, unless the obligation is affixed upon him through a special contract to do so.

"Here, it is conceded there was no special contract requiring plaintiff to mend the roof in any event or make good any other part of the building which should fail because of latent defects in material not discoverable through exercising ordinary care to that end. Of course, there is no absolute warranty implied by law against the builder, for the measure of his duty, as above stated, is to be ascertained by reference to the standard of ordinary care and skill in the circumstances which beset the particular situation."

Opinion, per SCHNEIDER, J.

If, as to work to be done and material to be furnished on real estate *in futuro*, the law imposes no higher standard than a "reasonably efficient and workmanlike manner," and the duty required is no more and no less than ordinary care (except perhaps in the case of an extraordinarily hazardous transaction), we are not persuaded by any logic that the higher duty of an insurer should be imposed upon the builder-vendor as to the completed portion of a partially completed structure. Paragraph two of the syllabus of *United Pacific Ins. Co. v. Balcrank, Inc.*, 175 Ohio St. 267.

In the absence of express warranties, the overwhelming weight of authority is that *caveat emptor* controls the purchase and sale of a *completed* structure, and the vendor will not be strictly liable to the vendee on an implied warranty that the structure is fit or suitable for the purpose ordinarily intended, even though the vendor was responsible for its construction. *Shapiro v. Kornicks*, 103 Ohio App. 49; annotation, 78 A. L. R. 2d 446; 6 A. L. R. 2d, Later Case Service, 285; 7 Williston on Contracts 3 Ed. 779, Section 926.

If recovery were to be permitted solely on a warranty in this case, the effect would be as follows: By reason of the water seeping into the basement, thence into the roof supports and to the roof itself, the warranty would be breached by the vendor, because that condition is not reasonably anticipated in a structure to be used as a residence nor is that structure reasonably suitable as a residence, unless the vendor could demonstrate that those conditions were caused other than by his own acts. Having constructed the building, the vendor must be held to his bargain irrespective that the work or materials, or both, utilized in its construction may have been reasonably suitable for their purpose and the care and skill utilized may have been that which was commensurate with the gravity of the risk involved in protecting the structure against hazards, including those inherent in its site. Such result avoids the harsh truth that unfortunate problems arise on real estate and in real structures which no prudence can avoid and which defy every reasonable skill.

However, the courts of several American jurisdictions have purported to imply a warranty of fitness in sales of real estate upon a builder-vendor. In Louisiana (*Sikes v. B & S Supply*,

Opinion, per SCHNEIDER, J.

*Inc.*, 164 So. 2d 81), the decision is explained entirely by the Louisiana Civil Code, Book III, Title 7, "Of Sale," which is applicable to sales of realty as well as personalty, as distinguished from the Uniform Commercial Code adopted in Ohio. Section 1302.03, Revised Code. Three other cases (*Carpenter v. Donohoe*, 154 Colo. 78, 388 P. 2d 399; *Glisan v. Smolenske*, 153 Colo. 274, 387 P. 2d 260; and *Jones v. Gatewood* [Okla.], 381 P. 2d 158) involved defects caused by the negligence of the builder which were not disclosed to the buyer. There appears no valid reason why recovery should not have been permitted even without the device of implied warranty. In the only other case which we have been able to discover (*Hoye v. Century Builders, Inc.*, 52 Wash. 2d 830, 329 P. 2d 474), the cause of the "condition which stubbornly resists correction" is not revealed by the report of the case. Thus, it is difficult to either agree or disagree with the reasoning of that decision, but, to the extent that it implies a warranty in a contract to construct a dwelling on the lot owned by the contractee, we cannot concur in the absence of knowledge of the terms of that particular contract.

We are of the opinion that the paucity of reported decisions involving an authentic common-law implied warranty involving real estate sales indicates that the doctrine of *caveat emptor* is so ingrained in our customary real estate transactions that few, if any, attempts have been made to pierce the shield of protection from specious claims of defect which it affords to vendors, not only of older buildings but of newly completed structures. It may also indicate that real estate buyers generally experience little difficulty in securing express warranties or guarantees if they are insistent, or, if not, that they have been successful in recovering for latent defects arising from improper work or materials in actions sounding in deceit or misrepresentation for nondisclosure of those defects. *Pumphrey v. Quillen*, 165 Ohio St. 343; *Drew v. Christopher Construction Co.*, 140 Ohio St. 1; *Triplett v. Ostroski*, 103 Ohio App. 290; and *Galvin v. Keen*, 100 Ohio App. 100.

In any event, the rule of *caveat emptor* is firmly anchored in the fact that the purchase of real estate is invariably preceded by a lengthy period of inspection, consideration and negotiation. One does not purchase land under conditions in any way similar to the purchase of home permanents (*Rogers v.*

Opinion, per SCHNEIDER, J.

*Toni Home Permanent Co.*, 167 Ohio St. 244), cooking appliances (*Welsh v. Ledyard*, 167 Ohio St. 57), soap (*Krupar v. Procter & Gamble Co.*, 160 Ohio St. 489) or electric blankets (*Wood v. General Electric Co.*, 159 Ohio St. 273).

Therefore, we find no overarching reason in this case "to pierce the shield." On the other hand, that is not to say that defendant here is entitled to final judgment. We note that the allegations of the petition make out a case of liability for the vendor's failure to disclose that which, as the builder, he should have known—a fault hidden from revelation by an inspection reasonably available to the vendee and caused by poor workmanship or materials or both.

Apparently, the evidence reviewed by the Court of Appeals was sufficient on both sides of the issues of faulty construction and damages proximately flowing therefrom to convince that court to remand this cause for retrial and submission to the triers of the facts, free from the issue of implied warranty which would compel a verdict for the plaintiffs on the mere finding that the damage was proximately caused by acts of the defendant, notwithstanding that those acts might have involved the exercise of ordinary care and skill. Defendant would be permitted no explanation other than to show causation of damage flowing otherwise than from his own conduct or assumption of the risk by the plaintiffs.

In other words, the special instruction on warranty obviated the necessity of plaintiffs proving, and the triers of the facts finding, a lack of good workmanship, that is, ordinary care employed by the builder under all of the circumstances, and that such lack of good workmanship proximately caused the damage. And it shifted the burden of explanation from the plaintiffs to the defendant. *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227.

The trial court confused the operative effect of a warranty, even though implied by law, with the duty historically imposed by law upon all persons that they measure their conduct by that of the ordinarily prudent person under all the circumstances, which include the risk of harm from the natural and probable consequences of that conduct. We do not understand that a builder of structures on real estate is relieved of that duty any more than any other person in whatever capacity he may act,



## Syllabus.

Thus, it is not the law that a vendor-builder "does not generally, in the absence of some express bargain or warranty, undertake *any* obligation with regard to the condition of the house." (Emphasis supplied.) *Vanderschrier v. Aaron*, 103 Ohio App., at page 341. Nor can we agree with the trial court's instruction in this case that it was "an implied term of the sale that the builder will complete the house in such a way that it will be reasonably fit for its intended use. \* \* \*." On the other hand, we do concur in the statement that "it is an implied term of the sale that the builder will complete the house in such a way that \* \* \* the work [both before and after the sale] would be done in a \* \* \* workmanlike manner." Thus, the defendant should be entitled to show, and to have the triers of the facts consider in assessing fault, that he employed proper materials and workmanlike skill and judgment in constructing the house, taking into consideration the hazards of the lot and area and the risk of harm to the structure from those hazards.

The judgment of the Court of Appeals is affirmed, and the cause is remanded to the Common Pleas Court for further proceedings consistent herewith.

*Judgment affirmed.*

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT and BROWN, JJ., concur.

---

Cox vs. Shaffer, (1972) Pennsylvania Superior Court No. 238. Appeal from the Court of Common Pleas, Civil Division, Washington County. CCH Products Liability, Paragraph 6937.

**Strict Liability—Applicability of—Silo Builder's Liability**

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. A silo constructed in place on the employer's land is not the sale of a "product" within the meaning of the doctrine.

Back reference.—¶ 4180.39.

For the plaintiff: Milton D. Rosenberg, Bloom, Bloom, Rosenberg & Bloom, Washington, Pa.

For the defendant: Thomas L. Anderson, Washington, Pa.

PER CURIAM: Glenn Cox, an employee of Agway, Incorporated, died on May 3, 1970 from asphyxiation when overcome with lethal fumes after entering a silo through a hatch in the top. The silo had been constructed for Agway in January, 1970 by Donald Shaffer, d/b/a Shaffer Construction Co.

**[Strict Liability]**

Suit was thereafter instituted against Shaffer by the Administratrix of Cox's Estate, the Complaint alleging that Cox had fatally suffocated from lack of oxygen and charging negligence of defendant in design and construction of the silo in that it did not provide for ventilation of air and also charging defendant with strict liability under section 402A of Restatement of the Law of Torts.

Defendant filed Preliminary Objections in the nature of demurrer alleging that the Complaint failed to state a cause of action because (1) "such silo is by definition and generally known to be constructed and operated oxygen-free, as an essential of its physical and chemical operating principle..."; and (2) section 402A was not applicable in that "such silo obviously was not a product, nor was plaintiff's decedent a user or consumer, nor was this defendant a seller, nor were any other governing facts, within the intent and meaning of sec. 402A."

The court below dismissed the first objection, the court correctly holding that whether or not there was negligence in the design of the silo could not be answered as matter of law on the basis of any definition of the term but that a factual issue was presented for determination by a jury.

The court below, however, sustained defendant's second objection and held that the strict liability of section 402A was not applicable to this constructed silo. Plaintiff has appealed to this court, arguing that the court below erred in so ruling. We would agree with plaintiff's complaint that the lower court went astray in its discussion of the issue as an attempted extension of no-fault insurance or of liability for an ultrahazardous activity, as such discussion was not of any relevance to the very narrow issue involved, namely: Did the strict liability of Section 402A apply to a silo constructed in place on the employer's premises.

However, though the lower court did, in its reasoning, go far afield, it eventually reached the correct result, as a study of the language of section 402A reveals, that section applies only to "One who sells any product in a defective condition". A silo constructed in place on the employer's land is not a sale of a "product". We find the section inapplicable by virtue of its very clear language and find no need to resort to any extended reasoning to support our determination that a building so constructed on the site is not a product within the intent and meaning of section 402A.

It can be noted that the inability to proceed under section 402A will not materially affect the plaintiff's right of recovery in this case. In the event that defendant proves what he contends, that there is no defective condition in the silo because a silo of necessity must be constructed oxygen-free, there would be no defective condition making section 402A applicable. If plaintiff proves there is a defective condition in a silo constructed without ventilation, of which condition defendant knew or should have known, recovery can be supported on the basis of negligence. The fact that plaintiff in the negligence action (unlike the action based on 402A) has to prove defendant knew or should have known of the defect does not in this case impose upon plaintiff any great obstacle since defendant has not disclaimed knowledge of the condition alleged to be defective but has claimed that that condition is a necessary and proper one in the proper construction of a silo.

Order affirmed.

burden of proof on the plaintiff and did not erroneously limit the time when the defendants were required to give warning.

**Affirmed.**

**1. Courts ⇨359**

Louisiana law controlled diversity case against cigarette manufacturers for death from cancer of plaintiff's husband, a Louisiana resident.

**2. Negligence ⇨134(1)**

**Sales ⇨441(1)**

Evidence supported verdict for cigarette manufacturers sued for death of heavy cigarette smoker on basis of breach of warranty and negligence.

**3. Sales ⇨446(1)**

The use, in instructions on warranty in action against cigarette manufacturers for death from cancer of plaintiff's husband, a heavy smoker, of such terms as "knowledge," "reasonable diligence," "reasonably foreseeable," "reasonably fit" and "reasonable care" was proper even though such terms are ordinarily associated with negligence.

**4. Sales ⇨279**

The terms "knowledge," "reasonable diligence," "reasonably foreseeable," "reasonably fit" and "reasonable care" define the nature and scope of a manufacturer's so-called "warranty" (law-imposed duty) to consumers.

**5. Sales ⇨425, 427**

The liability on warranty that consumer invokes against manufacturer, with whom he has no contract of sale, is delictual, a liability in tort; in Louisiana, in the case of food products and other articles intended for human consumption, it is strict liability regardless of fault; this is a heavy burden on a manufacturer, but it is a liability only for a defective condition not contemplated by consumer, the harmful consequences of which, based on state of human knowledge, are foreseeable.

**6. Sales ⇨255**

The Louisiana codal warranty against redhibitory vices contemplates a



**Victoria St. Pierre LARTIGUE,**  
**Appellant,**

**v.**

**R. J. REYNOLDS TOBACCO COMPANY**  
**and Liggett and Myers Tobacco**  
**Company, Appellees.**  
**No. 18903.**

**United States Court of Appeals**  
**Fifth Circuit.**  
**April 19, 1963.**

Action against cigarette manufacturers for death from cancer of plaintiff's husband, a heavy smoker. The United States District Court for the Eastern District of Louisiana, Herbert W. Christenberry, J., rendered judgment on jury's general verdict for the defendants. The plaintiff appealed. The Court of Appeals, Wisdom, Circuit Judge, held that the verdict was not contrary to the manifest weight of the evidence, that the instructions on the nature of implied warranty were not contrary to Louisiana law, and that the instruction on the negligence claim did not place an impossible

direct, seller-buyer, contractual or commercial law relationship, not a manufacturer-ultimate consumer relationship. LSA-C.C. arts. 2476, 2520, 2522, 2531, 2545, 2547.

**7. Fraud** ⇨31  
Sales ⇨425

The Louisiana Civil Code distinguishes between redhibitory action, based on implied warranty, arising from sale and action for fraud or deceit for misrepresentations which might arise. LSA-C.C. arts. 2476, 2520, 2522, 2531, 2545, 2547.

**8. Food** ⇨25  
Negligence ⇨102  
Sales ⇨425

To recover from cigarette manufacturers for death from cancer of plaintiff's husband, a heavy smoker, it is not necessary for the plaintiff to resort to the redhibition articles of the Louisiana Civil Code; the Code is broad enough to allow a consumer to recover damages against a manufacturer, either on negligence or, in food products cases, on strict liability without negligence. LSA-C.C. arts. 2315, 2316, 2476, 2520, 2531, 2545, 2547.

**9. Food** ⇨25  
Negligence ⇨27

Under the Louisiana Civil Code, a manufacturer of injurious or defective product is liable to a consumer when he fails to use due care in manufacturing a product; in the case of decayed food-stuffs or food products containing deleterious substances, the manufacturer is held to strict liability, without regard to negligence; such liability is not inconsistent with the civilian requirement of "fault". LSA-C.C. arts. 2315, 2316.

**10. Torts** ⇨1

In Louisiana, delictual responsibility without *dolus* (willful harming) or *culpa* (negligent harming) is explainable in terms of presumption of fault.

**11. Torts** ⇨1

In Louisiana, delicts (torts) do not have to depend on negligence.

**12. Sales** ⇨255, 274, 277

In Louisiana the law imposes strict liability on manufacturer for breach of implied warranty of wholesomeness that food product is safe for human consumption; this warranty of wholesomeness may co-exist with warranty against redhibitory vices but manufacturer's warranty is directly to consumer and distinct from any conventional obligation he assumes to his immediate buyer or that is imposed upon him by the redhibition articles of the Code; the liability is delictual, imposed because the party responsible for the product, in control of its preparation, and therefore in a superior position, breached his duty to ultimate consumers who rely on him to furnish goods reasonably safe for human consumption. LSA-C.C. arts. 2476, 2520, 2522, 2531, 2545, 2547.

**13. Sales** ⇨255

In Louisiana, privity is not a necessary element in holding manufacturer liable on his warranty.

**14. Sales** ⇨266, 280

In Louisiana, manufacturer of tobacco should be classified with food processor and held to warrant the wholesomeness of his product, (that is, he is strictly liable in tort for an unwholesome product)—but, as in the case of the food processor, the strict liability should apply only when the damages were foreseen, or could easily have been foreseen, as likely to result from the putting of the thing sold to the use for which it was sold.

**15. Sales** ⇨284(1)

Under Louisiana doctrine of strict liability of manufacturer on his warranty, it is not necessary for the plaintiff to show that the manufacturer failed to use due care or that the manufacturer had knowledge of the defective condition; however, it is necessary to show that the warranted product contained an element from which, on basis of existing human knowledge, harm might be expected to flow.



16. Food Ⓒ25

When a manufacturer or a processor places food products in channels of commerce for human consumption he assumes a special responsibility to the public; the consumer has the right to expect, in the case of products so vitally important to human existence and health of community as food and other products for intimate bodily use, that products are reasonably fit for purposes for which they were sold; the goods therefore must comply with reasonable and ascertainable standards of safety; the burden of any accidental injuries caused by such products must be placed upon those who produce and market the products and know the risks.

17. Sales Ⓒ280

In Louisiana, manufacturer of food products is strictly liable for breach of warranty of wholesomeness only if there is foreseeability of harm.

18. Sales Ⓒ279

Strict liability on warranty of wholesomeness, without regard to negligence, does not mean that goods are warranted to be foolproof or incapable of producing injury; by and large, the standard of safety of goods is the same under the warranty theory as under the negligence theory; the article sold must be unreasonably dangerous to the ordinary consumer, with the knowledge common to the community as to its characterization.

19. Sales Ⓒ279

The fitness of cigarettes for use, under the redhibitory article of the Louisiana Civil Code, is essentially the same as their fitness for human consumption. LSA-C.C. art. 2520.

20. Fraud Ⓒ33

Negligence Ⓒ103

Sales Ⓒ427

Torts Ⓒ24

Assuming facts favorable to plaintiff suing cigarette manufacturers for death from cancer of plaintiff's husband, a heavy smoker, recovery might be grounded under Louisiana law under (1) negligence, (2) fraud for misrepresentation,

(3) implied warranty against redhibitory vices, and (4) strict liability or implied warranty of wholesomeness of articles of intimate bodily use.

21. Trial Ⓒ295(5)

The charge, read as a whole, gave plaintiff, who was suing cigarette manufacturers for death from cancer of plaintiff's husband, a heavy smoker, the full benefit of the manufacturer's implied warranty of wholesomeness.

22. Food Ⓒ25

Sales Ⓒ279

Torts Ⓒ1

In Louisiana, a manufacturer of food and cigarettes is strictly liable for foreseeable harm resulting from defective condition in product when customer uses product for purposes for which it was manufactured and marketed; there is no absolute liability for harmful effects of which no developed skill or foresight can avoid; cigarette smokers who started smoking before the great cancer-smoking debate cannot rely on tobacco companies' "warranty" that their cigarettes had no carcinogenic element; the manufacturer is not an insurer against the unknowable.

23. Negligence Ⓒ138(2), 139(7)

In negligence action against cigarette manufacturers for death from cancer of plaintiff's husband, a heavy smoker, instruction to effect that manufacturer charged with negligence for some inherent danger or defective condition in his product is held to standard of reasonable care, that in determining this standard it is proper for jury to take into account the state of medical knowledge before the husband's cancer started, and that tobacco companies are not liable for negligence on basis of medical studies yet to be published did not place an impossible burden of proof on plaintiff and did not erroneously limit time when manufacturers were required to give warning.

H. Alva Brumfield, Baton Rouge, La.,  
Melvin M. Belli, Sr., San Francisco, Cal.,  
Sylvia Roberts, Baton Rouge, La., for  
appellant.

Harry B. Kelleher, Harry McCall, Jr., New Orleans, La., Frederick P. Haas, Theodore Kiendl, Porter R. Chandler, Edwin J. Jacob, New York City, for appellees.

Before HUTCHESON, RIVES, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge.

[1] The Court's decision on this appeal turns on the nature and scope of a cigarette manufacturer's warranty of its product. The plaintiff's husband, Frank J. Lartigue, died of cancer. The complaint alleges that the cancer came from smoking the defendants' tobacco products, Picayune cigarettes and King Bee tobacco, manufactured by Liggett & Myers, and Camel cigarettes, manufactured by Reynolds.<sup>1</sup> The plaintiff bases her claim on breach of warranty and negligence. The defendants pleaded a general denial, contributory negligence, and assumption of risk. After a long trial, the jury gave a general verdict for the tobacco companies. The plaintiff appeals, mainly on the ground that the trial judge erred in not instructing the jury properly on the defendants' implied warranty of wholesomeness, a warranty distinct from the warranty against hidden vices implied in every sale as provided in the Louisiana Civil Code. This is a diversity suit; Louisiana law controls the case. We affirm.

#### I.

Frank J. Lartigue, a resident of New Orleans, started smoking Picayunes in 1899 when he was nine years old. He continued to smoke Picayunes and also King Bee tobacco for 55 years until October 5, 1954, when he was operated on for cancer of the larynx. In 1944 he began smoking Camels, along with King Bee and Picayunes. His wife, who married him in 1917, testified that he was a "cigarette fiend." As long as she knew him he smoked at least two packs a day,

lit one cigarette from another, and smoked them down to small butts. As early as 1934, "all the doctors" had advised him not to smoke. October 5, 1954, Lartigue was operated for cancer of the larynx. The larynx, all of the right vocal cord, and part of the left vocal cord were removed. Medical reports showed that he had a squamous cell cancer and evidence of leukosplahia. He was discharged from the hospital October 12, 1954. December 12 he returned to the hospital; he had lung cancer. He remained in the Ochsner Clinic Foundation Hospital in New Orleans until February 25, 1955, and then entered the Veterans Hospital in Houston, June 21. There he died July 13, 1955, in his sixty-fifth year. An autopsy showed that the cause of death was carcinoma of the right lung, with extension to chest wall and suppression of superior vena cava.

Lartigue's long medical history shows that for over thirty-five years he was physically weak, racked by coughing and a sore throat. His army records reflect that he had measles, pertussis, and diphtheria as a child; malaria in 1917; influenza in 1918; chronic tonsilitis, pyorrhea, and muscular pain; gonorrhea in 1910 and tertiary syphilis in 1918. Later, he had tuberculosis. Lartigue had rheumatism as early as 1934. He had all of his teeth pulled. The plaintiff offered evidence that none of these ills cause or aggravate cancer; the defendant countered with evidence that, except for rheumatism, all of these ills aggravate and are suspected causes of cancer.

[2] The plaintiff contends that the jury's verdict was contrary to the manifest weight of the evidence. The record consists of twenty volumes, not to speak of exhibits, most of it devoted to medical opinion. The jury had the benefit of chemical studies, epidemiological studies, reports of animal experiments, pathological evidence, reports of clinical observations, and the testimony of re-

1. The Irby Branch of the old American Tobacco Company, not a defendant in the case, manufactured King Bee tobacco and Picayune cigarettes until 1911. Liggett

& Myers was incorporated upon the dissolution of the old American Tobacco Company.

nowned doctors. The plaintiff made a convincing case, in general, for the causal connection between tobacco and cancer and, in particular, for the causal connection between Lartigue's smoking and his cancer. The defendants made a convincing case for the lack of any causal connection. The district judge, in the course of the hearing on the plaintiff's motion for a new trial, expressed the view:

"I regret now I did not propound the interrogatory with respect to the connection between the smoking and his lung cancer because I'm satisfied the jury never got beyond that question and I know—I'm sure at least that they simply decided the plaintiff had failed to prove the causal connection between his smoking and his lung cancer but that is water under the bridge now."

We consider it unnecessary in this opinion to summarize the evidence. We find substantial evidence in the record to support the verdict.

## II.

The appellant's central attack on the trial judge's charge is that the instructions on the nature of implied warranty were contrary to Louisiana law. The appellant's flank attack is that the instructions on warranty were so interspersed with principles of negligence as to be misleading.

The appellant relies on the following extract from the charge, quoting the underscored language to support her main attack:

*"I will give this special charge, 30: Plaintiff also claims that the Defendants are liable to her for the death of her husband because, as she contends, their products caused or contributed to the causing of cancer from which he died, and thereby, breached the warranty of general quality which is implied by Louisiana law in every sale. The warranty of general quality which is implied by Louisiana law is only as to those qualities of which a manu-*

*facturer can have knowledge in the exercise of reasonable diligence, the absence of which causes damage that is reasonably foreseeable.*

"The manufacturer of products which are offered for sale to the public in their original package for human consumption or use, impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold. But such implied warranty does not cover substances in the manufactured products, the harmful effects of which no developed human skill or foresight can afford.

"You are instructed that the manufacturer who makes a product is under a duty first to exercise reasonable care in testing and inspecting its finished product to determine whether such products are reasonably safe for their intended use. And if he fails to do so and injury proximately results, he in such instance would be liable for the injury. A party is liable for all the consequences which reasonably flow from or follow the wrongful act, if they be established. Whether actually contemplated or not, and the wrongful act being established, the liability extends to all the consequences that naturally and proximately flow from such act.

*"If you find that at the time Mr. Lartigue's cancer started, the cigarettes manufactured by the defendants were usable as such, and that the state of medical knowledge was then such that the defendants could not have anticipated in the exercise of reasonable care that their products would cause cancer, then your verdict on the issue of implied warranty, would be in favor of the defendants.*

"Now, in weighing the actions of the defendants and plaintiff's deceased husband, Frank Lartigue in this case, in so far as negligence on the part of the defendants and contributory negligence and assump-



tion of the risk on the part of the plaintiff is concerned, you should consider that even if defendants did not know of the dangerous substances in their products, you should consider from the evidence whether they should have taken steps to ascertain the effects of their products when used for human use, especially as to whether their products would cause or be a contributing cause in the development of cancer of the lung and larynx."

Considering the charge as a whole, we find that the trial judge explained to the jury that the action was based both on negligence and on breach of warranty and that he correctly differentiated between the two claims. After the usual general instructions, the trial judge, in three pages of printed text, instructed the jury on the elements of negligence. In about a page of printed text he explained contributory negligence. In these instructions the trial judge made no reference to warranty. Next he made it clear to the jury that having completed the instructions on negligence he would then instruct on breach of warranty. At this point he gave the instructions we have quoted.

[3-5] It is true that such terms as "knowledge", "reasonable diligence", "reasonably foreseeable", "reasonably fit" and "reasonable care", which the trial judge employed in his instruction on warranty, are ordinarily associated with negligence. But they are also prop-

erly used when recovery is sought against a manufacturer on the ground of breach of warranty. These terms define the nature and scope of a manufacturer's so-called "warranty" (law-imposed duty) to consumers. The trial judge used them properly. "Liability in warranty arises where damage is caused by the failure of a product to measure up to express or implied representations on the part of the manufacturer or other supplier.

\* \* \* [It] is strict if a breach thereof is proved." 1 Frumer & Friedman § 16.01 [1] (1961). The liability on warranty that a consumer invokes against a manufacturer, with whom he has no contract of sale, is delictual, a liability in tort; in Louisiana in the case of food products and other articles intended for human consumption, it is strict liability regardless of fault. This is a heavy burden on a manufacturer, but it is a liability only for a defective condition not contemplated by the consumer, the harmful consequences of which, based on the state of human knowledge, are foreseeable. "The foreseeability here involved is different from that required in negligence cases. It is not the foreseeability of unreasonable risks, but rather the foreseeability of the kinds of risks which the enterprise is likely to create." James, *Strict Liability of Manufacturers*, 24 *Tenn.L.Rev.* 923, 925 (1957). Further discussion will clarify our views.

A. First, it is helpful to take a quick look at the manufacturer's liability<sup>2</sup> as the law has developed in other states.

2. Legal writings on the subject are prolific. See especially Perkins, *Unwholesome Food as a Source of Liability*, 5 *Iowa L.Bull.* 6 (1919); Llewellyn, *on Warranty of Quality, and Society*, I, 36 *Col.L.Rev.* 699 (1936); II, 37 *Col.L.Rev.* 341 (1937); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 *Va.L.Rev.* 134 (1937); Prosser, *The Implied Warranty of Merchantable Quality*, 27 *Minn.L.Rev.* 117 (1943); James, *Products Liability*, 34 *Tex.L.Rev.* 44, 192 (1955); James, Green, Plant, Lucey, Noel, *Symposium, Strict Liability of Manufacturers*, 24 *Tenn.L.Rev.*, Spring, 1957; Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L.J.* 1099

(1959); Patterson, *Manufacturer's Statutory Warranty: Tort or Contract*, 10 *Mercer L.Rev.* 272 (1959); Keeton, *Products Liability-Current Developments*, 40 *Tex.L.Rev.* 193 (1961); Comment, 27 *Mo.L.Rev.* 194 (1962). In general, see Melick, *The Sale of Food and Drink* (1936); 1 *Williston, Sales* § 241-243 (Rev. Ed. 1948); Dickerson, *Products Liability and the Food Consumer* (1951); Prosser, *Torts* § 84 (2d Ed. 1955); 2 *Harper & James, Torts*, § 28 (1956); Frumer and Friedman, *Products Liability* (1961); Hursh, *American Law of Products Liability* (1961). See also *Restatement of Torts*, Second § 402(A) Tent. Draft No. 7 (1962).



Cite as 317 F.2d 19 (1963)

In the common law, traditionally, the doctrine of caveat emptor<sup>3</sup> and the requirement of privity between the seller and buyer freed a manufacturer of liability to a remote user or consumer. *Winterbottom v. Wright*, 1842, 10 M. & W. 109, 152 Eng.Rep. 402. The "citadel of privity"<sup>4</sup> was first successfully stormed in negligence actions against manufacturers involving inherently dangerous instrumentalities. In a watershed decision, Judge Cardozo stated the modern rule in affirmative terms of liability rather than in terms of a negative rule of nonliability to which an exception must be found: if a manufacturer's product "is reasonably certain to place life and limb in peril when negligently made," the manufacturer is liable to consumers, even if there is no privity. *MacPherson v. Buick Motor Co.*, 1916, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696. When the claim is based on breach of implied warranty in a non-food case, lack of privity is generally a defense.<sup>5</sup> One engaged in the business of selling a product by advertising, however, may be liable on express warranty to a consumer injured by relying upon a misrepresentation in the advertising. *Baxter v. Ford Motor Co.*, 1932, 168 Wash.

456, 12 P.2d 409, 15 P.2d 1118, 88 A.L.R. 521.

When a claim is based on injuries from food products manufactured or processed for human consumption a special rule prevails in a large majority of the states: strict liability, with or without privity, regardless of negligence.<sup>6</sup> In recent years a number of courts have extended the rule of strict liability to articles "for intimate bodily use", such as cosmetics, chewing tobacco, cigarettes, drugs given by injection, and similar products. Thus, the American Law Institute has approved a new section in the Restatement of the Laws of Torts Second which is couched in non-contractual phraseology:

"§ 402A. SPECIAL LIABILITY  
OF SELLERS OF  
PRODUCTS FOR INTIMATE BODILY USE

"ONE ENGAGED IN THE  
BUSINESS OF SELLING FOOD  
FOR HUMAN CONSUMPTION OR  
OTHER PRODUCTS FOR INTIMATE BODILY USE, WHO  
SELLS SUCH A PRODUCT IN A  
DEFECTIVE CONDITION UN-  
REASONABLY DANGEROUS TO

3. See Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L.J. 1133 (1931). Hamilton points out, however, that in the common law food vendors have long been held to a special responsibility when they failed to exercise the degree of skill prevailing in their trade. The ale-wife who sold weak beer "journeyed to the tumbrel with distaff and spindle".

4. "The assault upon the citadel of privity is proceeding in these days apace." Justice, then Judge, Cardozo in *Ultramares Corp. v. Touche*, 1931, 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139.

5. For example: "[T]here is no contractual relation existing between the original seller, the warrantor, and a subpurchaser. They are unknown to each other in the transaction." *Pense & Dwyer Co. v. Somers Planting Co.*, 1922, 130 Miss. 147, 93 So. 673.

6. The Restatement of Torts Second, Tentative Draft No. 7, 1962, lists the following nineteen jurisdictions as sup-

317 F.2d—24

porting the rule of strict liability for food and drink: Arizona, California, Florida, Illinois, Iowa, Kansas, Louisiana (citing *LeBlanc v. Louisiana Coca Cola Bottling Co.*, 1952, 221 La. 919, 60 So. 2d 873; *Miller v. Louisiana Coca-Cola Bottling Co.*, La.App.1954, 70 So.2d 409; Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Puerto Rico, Texas, Virginia and Washington. The following five states reach the same result under statutes which provide for strict liability, or are construed to have that effect: Connecticut, Georgia, Minnesota, Montana, and South Carolina. The following eleven jurisdictions reject the rule: Alabama, District of Columbia, Kentucky, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island, South Dakota, West Virginia, and Wisconsin. In the remaining fourteen states the law is not definite as to food products liability. No state has rejected the rule since 1935; since 1935 ten states have adopted the rule.

THE CONSUMER, IS SUBJECT TO LIABILITY FOR BODILY HARM THEREBY CAUSED TO ONE WHO CONSUMES IT, EVEN THOUGH

"(a) THE SELLER HAS EXERCISED ALL POSSIBLE CARE IN THE PREPARATION AND SALE OF THE PRODUCT, AND

"(b) THE CONSUMER HAS NOT BROUGHT THE PRODUCT FROM OR ENTERED INTO ANY CONTRACTUAL RELATION WITH THE SELLER."

Courts have had little trouble in holding a seller of foods strictly liable to the ultimate consumer; it has not been so simple to rationalize the result. From time to time courts have based recovery on a contract for the benefit of a third person, an agency relationship between an intermediate dealer, wholesaler or retailer, and the consumer, and an implied representation of fitness.<sup>7</sup> Until recently, the most popular theory based recovery on an implied warranty running with the goods similar to a covenant running with the land. This theory has many obvious difficulties, the most serious of which is the confusion caused when the useful fiction of a warranty to

explain an action for damages in tort is sought to be applied literally as if it were indeed a covenant inseparable from a contract of sale. That confusion permeates the thinking of the parties in this case: the plaintiff considers that the warranty, like a warranty of title to real estate, covers all possible defects; the defendants resolutely insist that the only warranty in Louisiana is the contractual warranty against redhibitory vices implied in every sale. The view now generally accepted by common law authorities is that the "warranty" is not contractual but is strict liability in tort, independent of negligence.<sup>8</sup> The explanation is consistent with the history of warranty. "The action for breach of warranty was originally one on the case, sounding in tort and closely allied to deceit, from which it was not distinguished."<sup>9</sup> The Comment to Section 402A of the Restatement of Torts Second, Tentative Draft No. 7 (1962), states, in part:

"*'Warranty.'* The liability stated in this Section does not rest upon negligence. It is strict liability, similar in its nature to that covered by Chapters 20 [Liability of Possessors of Wild Animals] and 21 [Liability for Abnormally Danger-

7. For a collection of twenty-nine examples of what Dean Prosser calls (60 Yale L.J. 1099, 1124) "a remarkable variety of highly ingenious, and equally unconvincing theories of fictitious agency, third-party-beneficiary contract, and the like to get around the lack of privity" see Gillam, *Products Liability in a Nutshell*, 37 Ore. L.Rev. 119, 153 (1957).

8. Ames, *The History of Assumpsit*, 2 Harv.L.Rev. 1 (1888); Williston, *Sales* § 195 (1948); Melick, *The Sale of Food and Drink* 8 (1930); Dickerson, *Products Liability and the Food Consumer* 34 (1951); Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, (1960), *Restatement of the Law of Torts Second* § 402A, Tent.Draft No. 7 (1962).

9. Prosser, *Assault Upon the Citadel*, 69 Yale L.J. 1099, 1126 (1960).

"[I]t was not until 1778 that the contract action was held to lie at all. It is undisputed that the original tort

form of action, as on the case, still survives to the present day, and may everywhere be maintained. Nor is this a mere technical matter of procedure, since there are many decisions which have held that the tort aspects of warranty permit the application of a tort rather than a contract rule, in such matters as the survival of actions, the statute of limitations, the measure of damages, or recovery for wrongful death. Beyond this, the old tort character has continued to color the substantive law of warranty itself, by perpetuating the idea of a misrepresentation of fact, however innocent, and of a liability arising and imposed by operation of law, which is quite independent of any intention to agree upon terms as a matter of fact. Thus there are a great many cases, even between the immediate parties, in which to say that the warranty is a term of the contract is 'to speak the language of pure fiction.'" Ibid.

ous Activities] of this Restatement. The basis of liability is purely one of tort. \* \* \*

"Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. If the rule stated in this Section is to be treated as one of 'warranty' to the consumer, it is at least a very different kind of warranty from those usually found in the sale of goods, and it is not subject to the various contract rules which have grown up to surround them." <sup>10</sup>

10. The Comment continues:

"The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption. The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to 'buyer' and 'seller' in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the hands of the consumer. In short, 'warranty' must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here settled as merely one of strict liability in tort."

In food products cases Louisiana courts have reached the same result as courts in most common law states. In doing so Louisiana courts have relied on common law authorities about as often as on civilian authorities.<sup>11</sup> We turn now to Louisiana law.

B. Louisiana courts, unlike common law courts, have no difficulty in finding an implied warranty when the defendant is the seller: the LSA-Civil Code implies a warranty in every sale. Article 2475 provides: "The seller is bound to two principal obligations, that of delivering and that of warranting the thing which he sells." This obligation resulting from the sale is similar to the warranty in the Uniform Sales Act and the Uniform Commercial Code.<sup>12</sup> Thus, the Civil Code deals with the subject in Chapter 6, "Of

Dean William L. Prosser is the Reporter for the Restatement. The Advisers are: Laurence H. Eldredge, Gerald F. Flood, Fleming James, Jr., Robert E. Keeton, W. Page Keeton, Calvert Magruder, Wex Smathers Malone, Clarence Morris, Warren A. Seavey, Samuel D. Thurman, Jr., Roger J. Traynor, and John W. Wade.

11. See especially *LeBlanc v. Louisiana Coca Cola Bottling Co.*, 1952, 221 La. 919, 60 So.2d 873.

12. "[W]hile there are differences between the two systems in the treatment of some situations, the basic principle behind both is the same." Fazio, *A Comparison of Redhibition in Louisiana and the Uniform Commercial Code*, 19 La.L.Rev. 165. See also Dickerson, *Products Liability and the Food Consumer* 44-63 (1951). Cf. the Restatement comment quoted in footnote 10.

Section 15 of the Uniform Sales Act provides for warranties of (1) fitness and (2) merchantability. In all sales: "(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



the Obligations of the Seller", Articles 2476-2548, in the title "Of Sales".

The warranty is two-fold. Article 2476 provides: "The warranty respecting the seller has two objects; the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the things sold or its redhibitory vices."<sup>13</sup> The defendants assert that the plaintiff must find relief in the Code and that the only warranty the Code provides "for hidden defects of the things sold" is the sales warranty described in the articles on redhibition.

The scope of the codal warranty against redhibitory vices is stated in terms of fitness for intended use.<sup>14</sup> The defendants therefore argue that the basic question is whether their cigarettes were fit for smoking. They say that their cigarettes are *established products* made from commercially acceptable or superior tobacco having no quality differentiating it from tobacco in other commercially acceptable cigarettes. Historically, in Louisiana such products comply with the warranty of quality if they meet the standards of comparable products and are suitable for the use for which they are bought. The plaintiff contends that independent of the warranty of "quality"

or "fitness for use" implied in every sale, a seller or manufacturer of products for human consumption warrants the *wholesomeness* of such products. There are material differences in legal theory between the two warranties. In this case, however, where the defendants have chosen to ignore the defensive possibilities of the contractual aspects of the warranty against redhibitory vices and where the intended use of the product is for human consumption (of a kind), the differences in the warranties are not as great as the parties would have it appear—at least, in terms of the scope of the liability for the risk of harm.

[6] Starting with the words of the Code itself, as one must, we find that the Code refers to the warranty against redhibitory vices only as an implied term of a contract of sale. Article 2520 defines the scope of the warranty as fitness for the use for which the thing was bought by the buyer:

"Art. 2520. Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have

warranty that the goods shall be of merchantable quality." 63 Col.L.Rev. 517. The Uniform Commercial Code is similar except that § 2-314 of the Code does not require a sale by description for the warranty of merchantability to apply; and, while the Uniform Sales Act provides that there is no implied warranty of fitness for a particular purpose when the article is sold under its patent or trade name, the Code requires only reliance on the seller's "skill and judgment".

13. The warranty of quality has been treated extensively in the Tulane and Louisiana State Law Reviews. See especially the symposium on the subject in 23 Tulane Law Review 83-173 (1948). See also Morrow, Warranty of Quality: A Comparative Survey, 14 Tul.L.Rev. 327, 528 (1940); Malone, Res Ipsa Loquitur, and Proof by Inference, 4 La.L.Rev. 70 (1941); Rabel, The Nature of the Warranty of Quality, 24 Tul.L.Rev. 273 (1950); Fazio, A Comparison of Redhibition in Louisiana and the Uniform Com-

mercial Code, 19 La.L.Rev. 165 (1953); Murray, Implied Warranty Against Latent Defects: A Comparative Law Study, 21 La.L.Rev. 586 (1961); Jumonville, Liability for Damages Resulting from Consumption of Deleterious Foodstuffs in Louisiana, 22 La.L.Rev. 435 (1962). And see Notes 5 Tul.L.Rev. 646 (1931); 14 Tul.L.Rev. 470 (1940); 13 La.L.Rev. 624 (1953); 14 La.L.Rev. 182 (1953); 27 Tul.L.Rev. 369 (1953); 33 Tul.L.Rev. 273 (1958); 37 Tul.L.Rev. 336 (1963).

14. In each instance where breach of warranty under Article 2520 is claimed, the first question is "whether the thing purchased served the purpose for which it was brought". *Di Pietro v. LeBlanc*, La. App.1953, 63 So.2d 156, 158. In the case of machinery, the question is whether it can be "successfully used for the operation for which it was constructed and sold". *Nelson v. M.C.M. Truck Lines*, 1946, 209 La. 582, 25 So.2d 236, 237.



purchased it, had he known of the vice."

Article 2522 provides for disclaimer, an escape valve of doubtful value to a seller of food products:

"The buyer can not institute the redhibitory action, on account of the latent defects which the seller has declared to him before or at the time of the sale. Testimonial proof of this declaration may be received."

The extent of liability for breach of warranty depends on whether the vendor was in good or bad faith. If a seller did not know of the vices, he is bound only to restore the price and pay expenses; if the seller knew of the vices he is answerable in damages. Thus:

"Art. 2431. The seller who knew not the vices of the thing, is only bound to restore the price, and to reimburse the expenses occasioned by the sale, as well as those incurred for the preservation of the thing, unless the fruits, which the purchaser has drawn from it, be sufficient to satisfy those expenses."

"Art. 2545. The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of the price and repayment of the expenses, is answerable to the buyer in damages."

However, the imputation of knowledge to a seller-fabricator reduces the utility of Article 2531 as a bar to liability.

These articles contemplate a direct, seller-buyer, contractual or commercial

law relationship, not a manufacturer-ultimate consumer relationship. In civilian terms, if the buyer would not have made the purchase had he known of the defect, his obligation is lacking in the "cause" which prompted him to buy.<sup>15</sup>

The defendants make a persuasive argument, but the fact is that the plaintiff relies on none of the articles touching on redhibition and expressly denies that her suit has anything to do with the warranty against redhibitory vices. Mrs. Lartigue's suit is not a redhibitory action to rescind her husband's lifetime purchases of cigarettes or an action of *quantum minoris* for a retroactive reduction in sales price. And, although Article 2545 does impose damages on the seller who has concealed the vices of the thing sold from the buyer, that was not the basis of the complaint. Moreover, the plaintiff's vendors who made the sales to Lartigue were not the defendant manufacturers. They were unknown retailers, subvendees. Unless by some awkward theory of subrogation or fictitious assignment enabling the last buyer eventually to reach the manufacturer, it is by no means certain that in Louisiana a redhibitory action reaches back through a chain of sales to the first seller.<sup>16</sup> The notion has never been advanced in any of the Louisiana cases involving a manufacturer of food products.

[7] Article 2547 is especially significant in this case. It reads:

"Art. 2547. A declaration made by the seller, that the thing sold pos-

mitted with the sale of the goods. 10 Huc, Commentaire théorique et pratique des droit civil 209 (1897); 17 Baudry-Lacantinerie et Saignot, Traité théorique et pratique de droit civil, De la vente et de l'échange 369 (2d ed. 1900). Professor Morrow has suggested that Article 2503 of the Louisiana Civil Code gives rise to the same rule. Morrow, Warranty of Quality: A Comparative Survey, 14 Tul.L.Rev. 529, 550 (1940). Note, 33 Tul.L.Rev. 275 (1958). See also Fazio, A Comparison of Redhibition in Louisiana and the Uniform Commercial Code, 19 La.L.Rev. 165, 171-183 (1958).

15. Fazio, A Comparison of Redhibition in Louisiana and the Uniform Commercial Code, 19 La.L.Rev. 165, 167 (1958).

16. A dictum in McEachern v. Plaque Lumber & Construction Co., 1952, 220 La 696, 57 So.2d 405, 408, suggests that Louisiana recognizes the extension of warranty against redhibitory vices to subvendees. The decision in LeBlanc v. Louisiana Coca Cola has been criticized because of the extension of implied warranty to one who was not a buyer. 13 La. L.Rev. 624 (1952).

In France the right to sue the original vendee for breach of warranty is trans-

sesses some quality which he knows it does not possess, comes within the definition of fraud, and ought to be judged according to the rules laid down on the subject, under the title: Of Conventional Obligations.

"It may, according to circumstances, give rise to the redhibition, or to a reduction of the price, and to damages in favor of the buyer."

Thus, the Code itself distinguishes between the redhibitory action, based on implied warranty, arising from a sale and an action for fraud or deceit for misrepresentations which might arise, as in this case, out of the same circumstances, assuming for example that the defendants made false representations in their advertising.<sup>17</sup>

17. Section 402B of the Restatement of Torts Second provides:

"§ 402B. MISREPRESENTATION BY SELLER OF CHATTELS TO CONSUMER

ONE ENGAGED IN THE BUSINESS OF SELLING CHATTELS WHO, BY ADVERTISING, LABELS OR OTHERWISE, MAKES TO THE PUBLIC A MISREPRESENTATION OF A MATERIAL FACT CONCERNING THE CHARACTER OR QUALITY OF A CHATTEL SOLD BY HIM IS SUBJECT TO LIABILITY FOR PHYSICAL HARM TO A CONSUMER OF THE CHATTEL CAUSED BY JUSTIFIABLE RELIANCE UPON THE MISREPRESENTATION, EVEN THOUGH IT IS NOT MADE FRAUDULENTLY OR NEGLIGENTLY."

Cf. *LeBlanc v. Louisiana Coca Cola Bottling Co.*, 1952, 221 La. 919, 60 So.2d 873 and *Cooper v. R. J. Reynolds Tobacco Co.*, 1 Cir., 1956, 234 F.2d 170; 1958, 1 Cir., 256 F.2d 464, cert. den'd 358 U.S. 875, 79 S.Ct. 112, 3 L.Ed.2d 105.

18. Prosser writes: "There is no need to borrow a concept from the contract law of sales; and it is only by some violent pounding and twisting that 'warranty' can be made to serve the purpose at all. Why talk of it? If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask." Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1134 (1960).

19. "Art. 2316. Every person is responsible for the damage he occasions not

[8-11] To recover in this case, it is not necessary for the plaintiff to resort to the redhibition articles.<sup>18</sup> Article 2315 ("Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it") is broad enough to allow a consumer to recover damages against a manufacturer, either on negligence or, in food products cases, on strict liability without negligence. In Louisiana under Articles 2315 and 2316,<sup>19</sup> as in other states, a manufacturer of an injurious or defective product is liable to a consumer, when he fails to use due care in manufacturing a product. In the case of decayed foodstuffs or food products containing deleterious substances, the manufacturer is held to strict liability, without regard to negligence.<sup>20</sup>

merely by his act, but by his negligence, his imprudence, or his want of skill."

20. "[N]egligence law and 'fault' are different concepts. The attempt to identify them as the same can only result in endless confusion. Negligence law was evolved at the beginning of the industrial revolution, when enterprise was financially weak, for the purpose of relieving defendants of heavy economic liabilities. \* \* \* 'Fault' gave way to the protection of our basic economic enterprises, and the victims of enterprise activities were for the most part left to lick their own wounds. "More lately and since enterprise has become financially strong and able to spread many of its risks among others, the policy of the law has steadily changed until negligence law is tending to make liability—in fact in many areas it has already become—even stricter than it was under the common law actions." Green, A Reply to Mr. Gay's Rejoinder, 34 Tex.L.Rev. 651 (1956).

Professor Malone, reviewing the Louisiana cases, writes: "Very often the determination of negligence or no negligence is not so much a matter of passing judgment upon the quality of the defendant's conduct as of seeking to elicit all hypotheses that point the finger of responsibility toward or away from him. \* \* \* The employment of *res ipsa loquitur* in [food products cases] does not then result in a logical inference of negligence; for the existence of negligence is an immaterial issue. \* \* \* It is obvious that resort to *res ipsa loquitur* is not necessary in this type of case, and its use by the courts amounts to little more than

Such liability is not inconsistent with the civilian requirement of "fault". Delictual responsibility without *dolus* (wilful harming) or *culpa* (negligent harming) is explainable in terms of presumption of fault. Stone, Tort Doctrine in Louisiana: The Concept of Fault, 27 Tul.L.Rev. 1, 14, 19 (1952). Delicts (torts) do not have to depend on negligence. In the Civil Code, as in the common law, there are a number of instances of strict delictual liability when the law conclusively presumes fault notwithstanding the fact that the party liable did not will the damage and was not personally negligent.<sup>21</sup>

In the food products cases the Louisiana courts have seldom cited the articles on redhibitory defects.<sup>22</sup> In *Doyle v. Fuerst & Kraemer, Ltd.*, 1911, 129 La. 838, 56 So. 906, 40 L.R.A., N.S., 480, one of the two leading cases in Louisiana, although the court used some of the codal language, the court did not mention the articles on redhibition. In that case a restaurateur was both the seller and the manufacturer or fabricator. The warranty against redhibitory vices was therefore unquestionably available to the plaintiff.<sup>23</sup> The court said:

"The principle which governs in this case is that every one ought to know the qualities, good or bad, of

window dressing in the opinion." *Malone, Res Ipsa Loquitur*, 4 La.L.Rev. 70, 80, 97 (1941). See also *Jaffe, Res Ipsa Loquitur Vindicated*, 1 Buffalo L.Rev. 1, 13 (1951).

21. For example: Article 177 (master liable for damage caused "by whatever is thrown out of his house into the street or road"); Article 667 (owner of land liable for new work causing damage to his neighbor); Article 2321 (owner who has "turned loose a dangerous or noxious animal \* \* \* must pay for all the harm done"); Article 2322 (owner of a building "answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction". See *Harris, Liability Without Fault*, 6 Tul.L.Rev. 337 (1932); *Stone, Louisiana Tort Doctrine: The Concept of Fault*, 27 Tul.L.Rev. 1

the things which he fabricates in the exercise of the art, craft, or business of which he makes public profession, and that lack of such knowledge is imputed to him as a fault, which makes him liable to the purchasers of his fabrications for the damage resulting from the vices or defects thereof which he did not make known to them and which they were ignorant of.

"This principle obtains both in the civil and the common law, as appears from the excerpts hereinafter given.

"The measure of damages in a case of this kind, where there was no actual knowledge of the vices of the things sold, but only an imputed knowledge, is not simply reimbursement of the price, as contended by defendant, but *liability on the part of the seller for all the damages that were foreseen, or could easily have been foreseen, as likely to result from the putting of the thing sold to the use for which it was sold.* This fully appears from the excerpts hereinafter given.

"It is common knowledge, to which the keeper of a public eating place must be held, that food in which the process of decomposition has begun

(1952). See also *Williams v. Employers Liability Assurance Corp.*, 5 Cir., 1961, 296 F.2d 569.

22. "The clear intent of the *Doyle* case was to apply the presumption of knowledge only to a preparer of foodstuffs." *Jumonville, Liability for Damages Resulting from Consumption of Deleterious Foodstuffs in Louisiana*, 22 La.L.Rev. 435, 438 (1962). See also *Leshar v. Great Atlantic & Pacific Tea Co.*, La.App. 2d Cir., 1961, 129 So.2d 96, 97.
23. In the common law the concept developed that an innkeeper merely provides a service for his guests; he does not sell food, a concept some courts still apply to restaurants and cafeterias. In Louisiana however, under Article 2439 of the LSA-Civil Code there is no doubt that a sale takes place when a customer dines in a restaurant. See Note, 37 Tul.L.Rev. 336 (1963).



*is liable to make the person who eats it ill.* Indeed, we do not think there can be any serious difference of opinion on the point that an eating establishment which *sells unwholesome food to be consumed by its customers must be held to have contemplated the probable effects* of such tainted food upon the customer. \* \* \*

"It can be considered to be also well settled at common law that the vendor of articles of food for consumption by the purchaser *warrants their wholesomeness.*" (We have supplied the emphasis in order to point out that this strict liability is nevertheless dependent on the foreseeability of harm.)

The court quoted Pothier, Dalloz, Baudry-Lacantinerie & Saignat, Laurent, and Troplong to the effect that when the seller is the one who fabricates the product, he is bound to repair the damage caused by hidden defects, even though ignorant of the defects. The Court's language, especially its frequent use of the words "fabricates" and "fabrication", indicate that the rationale of the decision is that because of the manufacturer's superior position his lack of knowledge is a "fault". This may be just another way of stating that, for purposes of a warranty against redhibitory vices, the same result may be reached by a conclusive presumption that a seller who is also a manufacturer knows the qualities of the article he fabricates and sells.<sup>24</sup> Under either view there is strict liability for a hidden defect, but Doyle's teaching is that in Louisiana the scope of the liability is limited to defects pro-

ducing "*damages that were foreseen, or could easily have been foreseen.*"

In *LeBlanc v. Louisiana Coca Cola Bottling Co.*, 1952, 221 La. 919, 60 So.2d 873, the other key case in Louisiana, there could not have been an implied warranty against redhibitory vices, even on an assignment theory: no sale was made to the plaintiff.<sup>25</sup> The plaintiff found a decomposed housefly in a bottle which a neighbor gave her. The court allowed recovery on the theory that the manufacturer of foodstuffs in sealed containers or capped bottles "by advertisements extolling the quality of its product" had warranted the "wholesomeness" of its product to consumers. Although the Court did not say so, the advertising might be regarded as the "declaration \* \* \* within the definition of fraud" referred to in Article 2547. In any event the warranty is not the warranty against redhibitory defects. "The theory of the case is based upon tort rather than contract law."<sup>26</sup> Justice McCaleb, for the Court said:

"It is to be borne in mind in these cases that the defendant company is engaged in the business of distributing its beverages to the public in sealed containers or capped bottles and that, by the very nature of its enterprise, it represents, we think, by advertisements extolling the quality of its product, that it is *fit for human consumption and free from deleterious matter.* And, while there is not a direct contract to this effect between the consuming public and the manufacturer (as it distributes to retailers or mid-

24. "[A] manufacturer who disposes of the things which he himself has manufactured can properly and legitimately be held presumptively to a knowledge of the qualities of the things he sells." *George v. Shreveport Cotton Oil Co.*, 1905, 114 La. 493, 505, 38 So. 432, 434. See also *Templeman Bros. Lumber Co. v. Fairbanks, Morse & Co.*, 1911, 129 La. 933, 1002, 57 So. 309, 315; *Radalec, Inc. v. Automatic Firing Corp.*, 1955, 223 La. 116, 125, 81 So.2d 830, 833.

25. Similarly, in *Miller v. Louisiana Coca-Cola Bottling Co.*, La.App.Orl.Div., 1954, 70 So.2d 409, a guest of the final purchaser's daughter was allowed to recover against the manufacturer.

26. Note, 27 Tul.L.Rev. 370. Professor Ferd Stone agrees. Stone, *Tort Doctrine in Louisiana*, 27 Tul.L.Rev. 1, 14 (1952).



Cite as 317 F.2d 19 (1963)

dlemen who in turn sell to the consumer), it is fair to imply that, since the manufacturer, in marketing its products in capped bottles, intends them to reach the consumer in the same condition in which they leave the factory, a *warranty of wholesomeness exists* between it and the consumer."

Contrary to previous food products cases in which *res ipsa* was invoked, the plaintiff was relieved of the burden of proving that a middleman or retailer had not tampered with the bottle; the defendant was saddled with the burden of proving that there was tampering after the bottle left his plant. "Applying the doctrine of implied warranty on a manufacturer of such bottled beverages is almost tantamount to making him an insurer and practically imposing absolute liability on him." <sup>27</sup>

In the interim between Doyle and LeBlanc <sup>28</sup> the Louisiana Supreme Court decided only one food case, *Mayerhefer v. Louisiana Coca-Cola Bottling Co.*, 1951, 219 La. 320, 52 So.2d 866. In that case the plaintiff became ill from drinking Coca-Cola containing free iodine. The

court treated the problem purely as one in tort. The only question was whether the evidence met the requirements necessary for application of *res ipsa loquitur*. "Each case", said the court, "involving tort liability stands or falls on the proof made of the facts alleged."

Before LeBlanc, Louisiana courts of appeal in food products cases usually based recovery on negligence.<sup>29</sup> After LeBlanc, courts of appeal have allowed recovery on breach of implied warranty treated as a tort.<sup>30</sup> They have had no trouble therefore with privity. In at least one food products case the court said unequivocally, "This is an action in tort by plaintiff." *Morrow v. Bunkie Coca-Cola Bottling Co.*, 1956, La.App. 2 Cir., 84 So.2d 851, 852.

In *Arnaud's Restaurant, Inc. v. Cotter*, 5 Cir., 1954, 212 F.2d 883, cert. den'd 348 U.S. 915, 75 S.Ct. 295, 99 L.Ed. 717, this Court reviewed the Louisiana food products cases. This Court noted that although there is a divergence of opinion among the State courts as to whether a manufacturer's liability is predicated upon negligence or an implied warranty, "under Louisiana jurisprudence a plain-

27. From the concurring opinion of Judge LeBlanc.

28. "Although the Doyle case appears to have been decided on a warranty basis, the jurisprudence dealing with deleterious food and drink in the ensuing forty years is an admixture of tort and contract principles, the tort doctrine of *res ipsa loquitur* being frequently employed." *Jumonville, Liability for Damages Resulting from Consumption of Deleterious Foodstuffs in Louisiana*, 22 La.L.Rev. 435 (1962).

29. *Moore v. Louisiana Coca-Cola Bottling Co.*, La.App.Orl.Cir., 1952, 58 So.2d 310; *Day v. Hammond Coca Cola Bottling Co.*, La.App. 1st Cir., 1951, 53 So. 2d 447; *Nichols v. Louisiana Coca-Cola Bottling Co.*, La.App.Orl.Cir., 1950, 46 So.2d 695; *Mayerhefer v. Louisiana Coca-Cola Bottling Co.*, La.App.Orl.Cir., 1950, 45 So.2d 442; *White v. Coca-Cola Bottling Co.*, La.App. 2 Cir., 1943, 16 So.2d 579; *Jenkins v. Bogalusa Coca Cola Bottling Co.*, La.App., 1st Cir., 1941, 1 So.2d 426; *Hollis v. Ouachita Coca-Cola Bottling Co.*, La.App. 2d Cir.,

1940, 196 So. 376; *Dye v. American Beverage Co.*, La.App.Orl.Cir., 1940, 194 So. 438; *Freeman v. Louisiana Coca-Cola Bottling Co.*, La.App.Orl.Cir., 1938, 179 So. 621; *Kelly v. Ouachita Dairy Dealers Cooperative Ass'n*, La.App. 2d Cir., 1937, 175 So. 499; *Hill v. Louisiana Coca-Cola Bottling Co.*, La.App.Orl.Cir., 1936, 170 So. 45; *Lee v. Smith*, La.App. 1st Cir., 1936, 168 So. 727; *Watts v. Ouachita Coca-Cola Bottling Co.*, La.App. 2d Cir., 1936, 166 So. 151; *King v. Louisiana Coca-Cola Bottling Co.*, La.App. Orl.Cir., 1933, 151 So. 252; *Dean v. Alexandria Coca-Cola Bottling Co.*, La. App. 2d Cir., 1933, 148 So. 448.

30. *Leshner v. Great Atlantic & Pacific Tea Co.*, La.App. 2d Cir., 1961, 129 So.2d 96; *Reine v. Baton Rouge Coca Cola Bottling Co.*, La.App. 1 Cir., 1961, 126 So.2d 635; *Walker v. American Beverage Co.*, La.App. 4 Cir., 1960, 124 So. 2d 157; *Miller v. Louisiana Coca-Cola Bottling Co.*, La.App.Orl.Cir., 1954, 70 So.2d 409; *Montz v. Louisiana Coca-Cola Bottling Co.*, La.App.Orl.Cir., 1953, 64 So. 2d 805.

tiff in such a case is entitled to rely upon the manufacturer's implied warranty." The warranty is that the "product is safe for human consumption." The Court held that the question of contributory negligence was for the jury, perhaps an indication that the Court recognized the tortious character of the action.<sup>31</sup>

[12] Our review of state cases indicates that in Louisiana the law imposes strict liability on a manufacturer for breach of the implied warranty of wholesomeness that a food product is safe for human consumption. This warranty of wholesomeness may co-exist with the warranty against redhibitory vices but the manufacturer's warranty is directly to the consumer and distinct from any conventional obligation he assumes to his immediate buyer or that is imposed upon him by the redhibition articles of the Code. The Doyle and Arnaud cases involved restaurateurs who were sellers as well as "fabricators". In the LeBlanc case the defendant was a manufacturer. The reasoning in all three cases indicates that the liability is delictual, imposed not because of the redhibition articles but because the party responsible for the product, in control of its preparation, and therefore in a superior position, breached his duty to the ultimate consumers who rely on him to furnish goods reasonably safe for human consumption.

C. The same public policy reasons which justify holding a manufacturer to strict liability for food products apply to cigarettes. Although there is some authority to the contrary,<sup>32</sup> courts have applied the rule to foreign substances in cigarettes (*Liggett & Myers Tobacco v. DeLape*, 9 Cir., 1940, 109 F.2d 598), smoking tobacco (*Foley v. Liggett & Myers Tobacco Co.*, 1930, 136 Misc. 468, 241 N.Y.S. 233, aff'd 232 App.Div. 822, 249 N.Y.S. 924), and chewing tobacco

(*Pillars v. R. J. Reynolds Tobacco Co.*, 1918, 117 Miss. 490, 78 So. 365). In *Pillars* the plaintiff sued a retailer and a manufacturer for damages alleged sustained as a result of finding a "human toe in a state of putrefaction" embedded in a plug of Brown Mule Chewing Tobacco. In allowing the retailer to escape liability but holding the manufacturer liable, the Court said:

"The fact that the courts have at this time made only the exceptions mentioned to the general rule does not prevent a step forward for the health and life of the public. The principles announced in the cases which recognize the exceptions, in our opinion, apply, with equal force, to this case.

"We believe that the way the tobacco is to be used furnishes the reason for great care in its preparation. \* \* \* Anything taken into the mouth there to be masticated should be free of those elements which may endanger the life or health of the user."

In recent years courts in some of the states have held the manufacturers liable to consumers on implied warranty not only for such articles as hair dye (*Graham v. Bottenfield's Inc.*, 1954, 176 Kan. 68, 269 P.2d 413), a permanent wave solution (*Markovich v. McKesson & Robbins*, 1958, 106 Ohio App. 265, 149 N.E. 2d 181), and a detergent (*Worley v. Proctor and Gamble Mfg. Co.*, 1952, 241 Mo.App. 1114, 253 S.W.2d 532), but also for cinder building blocks (*Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 1958, 353 Mich. 120, 90 N.W.2d 873), automobile tires (*B. F. Goodrich Co. v. Hammond*, 10 Cir., 1959, 269 F.2d 501), and automobiles (*Henningsen v. Bloomfield Motors*, 1960, 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1).<sup>33</sup> For purposes

31. On contributory negligence as a defense, see 1 *Frumer & Friedman* § 16.01 [3] (1961).

32. *Liggett & Myers Tobacco Co. v. Cannon*, 1915, 132 Tenn. 419, 178 S.W. 1009, L.R.A.1916A, 940; *Block v. Lig-*

*gett & Myers Tobacco Co.*, 1937, 162 Misc. 325, 296 N.Y.S. 922.

33. In *Henningsen* the Court said that it could "see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automo-

Cite as 317 F.2d 19 (1963)

of defining the scope of strict liability imposed on sellers, the American Law Institute in the Restatement of Torts Second classifies cigarettes with food and drink and other articles intended for human consumption as "*products intended for intimate bodily use*".<sup>34</sup>

[13] Louisiana courts were quick to get around the notion of privity as a necessary element in holding a manufacturer liable on his warranty. In this case it is not necessary to go as far as the court went in Henningsen. Making an Erie educated guess, we hold that for purposes of this litigation Louisiana courts would classify cigarettes with food and drink.

[14] D. Thus far we have been in accord with the plaintiff's theory of the case. At this point, however, we part company with the plaintiff. We agree that the manufacturer of tobacco should be classified with the food processor and held to warrant the wholesomeness of his product, (that is, he is strictly liable in tort for an unwholesome product)—but, as in the case of the food processor,

bile". A number of commentators believe that Henningsen will be as important in the implied warranty cases as *McPherson v. Buick Motor Co.* was in the negligence cases. See Restatement of the Law of Torts Second, § 402A, Tent. Draft No. 7 (1962); 1 Frumer & Friedman, *Products Liability* § 16.04, p. 406 (1960).

34. "*Intimate Bodily use*. Products intended for intimate bodily use, as that phrase is used in this Section, include all food and drink, and everything intended for internal human consumption, whether or not it has nutritional value. Thus the term includes candy, chewing gum or chewing tobacco, snuff, cigarettes, and all raw materials, such as unground coffee, from which the consumer or some intermediate party is expected to prepare food or drink ultimately to be consumed. It includes drugs which are to be taken internally, and such an article as a surgical pin for setting bone fractures, which is to be incorporated inside of the body.

"Intimate bodily use" also includes products intended for external application or contact with the human body, where

the strict liability should apply only when, in the words of the Doyle opinion, "the damages \* \* \* were foreseen, or could easily have been foreseen, as likely to result from the putting of the thing sold to the use for which it was sold." No case in Louisiana has applied the rule of strict liability, even in food cases, except when harm from the defective condition was a foreseeable consequence of the defect. As suggested, this language, although often used with reference to negligence, is basic to the trial court's duty here of explaining the scope of the warranty of wholesomeness.

[15] Under the doctrine of strict liability it is not necessary for the plaintiff to show that the defendant failed to use due care or that the defendant had knowledge of the defective condition. However, it is necessary to show that the warranted product contained an element from which, on the basis of existing human knowledge, harm might be expected to flow. Thus, in *Doyle* the plaintiff had ptomaine poisoning from eating the defendant's spoiled cakes. In *LeBlanc* and *Mayerhefer* there was a foreign sub-

such application or contact is of an 'intimate' character. This does not mean that everything which may be expected to come in contact with the person is to be included. A nail is not intended for intimate bodily use, merely because the user may be expected to hold it in his fingers while he drives it with a hammer. On the other hand, products such as clothing, intended to have close and continued contact with the body, are for intimate bodily use. So are soap and cosmetics, liniments or other medical preparations for external application, hair dye, solutions for imparting a permanent wave to the hair, and similar products intended to affect in some manner the body itself. In determining whether a product is for intimate bodily use, the question is one of whether it is intended for a purpose which involves long continued contact with the person, or such close and personal contact or application, even in a single instance, that the ordinary man would recognize that something more than a casual touching, something amounting to an intimate approach to his person, is involved." Restatement of Torts Second § 402A Comment (Tent. Draft No. 7 (1962).



stance, a decomposed housefly in a bottle of Coca-Cola. In *Arnaud* there was a piece of crab shell, natural to the crab but foreign to *pompano en papillote*. In *McAvin v. Morrison Cafeteria Co. of La.*, La.App., 1956, 85 So.2d 63, and in *Ogden v. Rosedale Inn*, La.App.1939, 189 So. 162, shrimp salad was spoiled. In *McLehan v. Loft Candy Stores*, La.App., 1937, 173 So. 367 mincemeat was spoiled. Bottled drinks seem to have a special affinity for foreign substances.<sup>35</sup> *Walker v. American Beverage Co.*, La.App., 1960, 124 So.2d 157; *Kelly v. Ouachita Dairy Dealers Cooperative Association*, La.App., 1937, 175 So. 499; *Dye v. American Beverage Co.*, La.App., 1940, 194 So. 438; *Hollis v. Ouachita Coca-Cola Bottling Co.*, La.App., 1940, 196 So. 376. Walker found a vegetable stalk in his Coca-Cola, Kelly found maggots in a milk bottle, Dye found some vegetable matter in his R. C. Cola, and Hollis found in his Coca-Cola—just part—of a black widow spider.

[16] In all of these cases the injury was caused by a foreign substance or by spoiled food. The risk of their being such injuries is incident to the business and known to all. When a manufacturer or a processor places food products in the channels of commerce for human consumption he assumes a special responsibility to the public. The consumer, helpless to protect himself, has the right to

35. "[T]he rats of Hamlin were as nought in comparison with that horde of mice which has sought refreshment within Coca-Cola bottles and died of a happy surfeit." Spruill, *Privity of Contract as a Requisite on Warranty*, 19 N.C.L.Rev. 551, 566 (1941).

36. "A more difficult problem [then damage] is that of what Professor Ehrenzweig has called 'typicality' of the injury. Put in more ordinary language, this means the foreseeability of the harm—the seller's reasonable anticipation of it as a normal consequence of the consumption or use of his product if it should turn out to be defective. It is the sort of issue that is likely to be buried under the name of 'proximate cause.' There has been virtually no consideration of this problem in the cases with

expect, in the case of products so vitally important to human existence and the health of the community as food and other products for intimate bodily use, that the products are reasonably fit for the purposes for which they were sold; the goods therefore must comply with reasonable and ascertainable standards of safety. The manufacturer presumably exercises due care to comply with proper standards, but he also knows that a "wee, sleekit, cow'rin, tim'rous" mouseie may outwit his bestlaid plans for a clean plant. Public policy demands that the burden of any accidental injuries caused by such products be placed upon those who produce and market the products and know the risks. The injuries from knowable risks are a cost of production for the industry to bear; they are passed on to consumers. The consumer of such products is entitled to a maximum of protection at the hands of some one, and the proper persons to afford it are those who receive the benefits from manufacturing and marketing the products.

[17] But it is reasonable to draw a line somewhere: a manufacturer of food products is not like one who keeps a tiger for a pet in a crowded city. Louisiana draws the line at unknowable risks. For strict liability to apply there must be foreseeability of harm.<sup>36</sup> In every decided Louisiana case the food was unreasonably dangerous because of

which we are dealing, undoubtedly because food poisoning is such an obvious result of bad food. We are thrown back upon two reasonably close analogies: the direct warranty from the retailer to his purchaser, and the negligence action against the manufacturer. \* \* \*

[T]he problem is reduced to one of what the consumer has a right to expect, which is a product reasonably fit for the purposes for which it is sold; and strict liability should call for no different conclusion. \* \* \* Few products can ever be made entirely safe, and the producer cannot be made an insurer of every one who may possibly be hurt." Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)* 1099, 1143, 1145 (1960).



Cite as 317 F.2d 19 (1963)

a defective condition, not contemplated by the ultimate consumer; in every case risk of harm could reasonably be foreseen as a consequence of the existence of the defect. As stated in Justice LeBlanc's opinion in *LeBlanc*, the effect of the warranty of the manufacturer's warranty is "almost tantamount to making him an insurer." He is an insurer against foreseeable risks—but not against unknowable risks.

[18] Strict liability on the warranty of wholesomeness, without regard to negligence, "does not mean that goods are warranted to be foolproof or incapable of producing injury \* \* \* By and large, the standard of safety of the goods is the same under the warranty theory as under the negligence theory."<sup>37</sup> The article sold must be unreasonably dangerous to the ordinary consumer, with the knowledge common to the community as to its characterization. For example, sugar is unwholesome to diabetics. Ice cream and butter may contain sufficient cholesterol to be unwholesome to persons with high blood pressure and heart trouble. Whiskey is unwholesome to alcoholics. Diabetics who eat sugar, heart cases who cannot resist ice cream or butter, and alcoholics who drink too much whiskey know that the strict warranty of wholesomeness puts no money in the bank for them. Thus, in a concurring opinion in *Pritchard v. Liggett & Myers*, 3 Cir., 1962, 295 F.2d 292, Judge Good-

rich made a cogent comment which the court acted on:<sup>38</sup>

"If a man buys whiskey and drinks too much of it and gets some liver trouble as a result I do not think the manufacturer is liable unless (1) the manufacturer tells the customer the whiskey will not hurt him or (2) the whiskey is adulterated whiskey—made with methyl alcohol, for instance. The same surely is true of one who churns and sells butter to a customer who would be on a nonfat diet. The same is true, likewise, as to one who roasts and sells salted peanuts to a customer who should be on a no-salt diet. Surely if the butter and the peanuts are pure there is no liability if the cholesterol count rises dangerously.

"In this case there was no claim that Chesterfields are not made of commercially satisfactory tobacco. See Restatement (Second), Torts § 402A (Tent. Draft No. 6, 1961)."

In *Green v. American Tobacco Co.*, 5 Cir., 1962, 304 F.2d 70, this Court had before it a Florida case of lung cancer allegedly caused by smoking.<sup>39</sup> The jury returned a general verdict for the defendant. In answer to special interrogatories, the jury found that the decedent had cancer and that smoking was a proximate cause of his cancer, but that the defendant "by the reasonable application of human skill and foresight" could not have known prior to February 1, 1956, when it was first discovered that Green

37. 2 Harper & James, Law of Torts § 28-22, p. 1584 (1961).

In a recent California case the Court said "The essential inquiry, thus, is the same in respect to the breach of warranty theory as to the negligence claim: whether the defendant complied with the standard of reasonable care in ascertaining the fitness of the chattel for the use for which he knew it was hired." *Tierstein v. Licht*, 1959, 174 Cal.App.2d 835, 845 P.2d 341.

38. The Court cautioned the trial judge on remand to submit the case to the jury on interrogatories to ascertain the basis

of liability, if any, "[i]n light of the concurring opinion."

39. The trial judge's charge in the case before us is similar to the charge in *Green*. On an important point, however, it is more favorable to the plaintiff here, since the jury was required to find that the "implied warranty does not cover substances in the manufactured products, the harmful effects of which no developed human skill or foresight can afford". In *Green* the interrogatory allowed the manufacturer to escape liability if the jury found that the defendant had used "reasonable application of human skill and foresight."

had cancer that users of cigarettes would be in danger of contracting cancer. A majority of the Court affirmed the judgment.<sup>40</sup> On rehearing, the Court "remain[ed] of the same views as expressed \* \* \* on the original hearing" although it certified the question to the Supreme Court of Florida.<sup>41</sup>

The plaintiff's main insistence in that case was similar to the plaintiff's argument in this case:

"The fundamental point upon which the plaintiffs rely on this appeal is that the Trial Court erred, as a matter of law, in ruling that the implied warranty of fitness which a manufacturer of products for human consumption is held by Florida law to make does not cover deleterious substances in its products, the *harmful effects of which are unknown to*

*the manufacturer and could not have been known by any developed human skill or foresight.* Plaintiffs contend that the knowledge of the manufacturer is irrelevant and immaterial to the manufacturer's liability on an implied warranty under Florida law, and that a manufacturer's implied warranty is not limited to harmful substances of which the manufacturer either had knowledge, or should have had knowledge, or could have had knowledge according to developed human skill and foresight."

This Court ruled that the defendant "could not be held liable as an absolute insurer against consequences of which no developed human skill and foresight could afford knowledge."<sup>42</sup> In language suggestive of the opinions in the Lou-

40. The Court divided into three classes the cases dealing with products intended for human consumption: (1) "those believed by all to be wholesome, for example, most foods; (2) those known by all to be injurious to some while perhaps beneficial or pleasurable to others, for example, alcoholic beverages; (3) those heretofore thought by all to be wholesome or tolerable, but which constantly expanding scientific research, thought and knowledge have now proved, or at least convinced many, to be injurious, such as cigarettes in the smoke of which appear polycyclic aromatic hydrocarbons and minute quantities of arsenic, and eggs, milk and butter with their high cholesterol content". In all three classes the consumer relies on the superior skill and knowledge of the seller, but in the last class it is a question of fact to be determined by the jury whether the seller, in the estimation of the parties, had a superior opportunity to gain knowledge of the product and whether the buyer relied on the judgment of the seller.

It seems to us that the Court properly classified the products. Cigarettes (possibly causing cancer) and dairy products (possibly causing high cholesterol) are different from foods containing foreign substances: (1) The defendant tobacco companies have no more knowledge of the risk of harm than the plaintiff; (2) the defendants' cigarettes are an established product containing commercially acceptable tobacco; (3) nobody

has to smoke. These distinctions may not be valid in later cigarette cases or in a case involving a different kind of product, for example, a polio vaccine which functions in reverse and contains a virus not in other polio vaccines. In such cases a different result may be reached consistent with Green and the instant case. In addition, the advance of scientific knowledge and the forward movement of public policy may suggest a different result in later cases.

41. 304 F.2d 85, question certified to Supreme Court of Florida, Civil No. 19003, 5 Cir., Aug. 8, 1962. See Fla.Stat. Ann. § 25.031 (1961). This Court certified the following question: "Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer \* \* \* could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung?"

42. Accord *Pritchard v. Liggett & Myers Tobacco Co.*, D.C.W.D.Pa.1962, on remand.

isiana cases, Judge Rives, speaking for the Court, said:

"With that insistence we cannot agree. To the contrary, we are convinced that the doctrine of implied warranty by a manufacturer and seller of the qualities and fitness of the thing sold for the purpose for which it is intended or desired is founded on his superior opportunity to gain knowledge of the product and to form a judgment of its fitness. That principle can clearly be deduced from all of the Florida cases on implied warranty whether by the manufacturer or by the dealer."

Here the manufacturer "had no opportunity to gain knowledge, or to form a judgment as to the dangerous qualities of the product". The manufacturer was in no better position than the consumer.

[19] E. We recognize, as the appellant points out, that the trial judge instructed the jury on the "warranty of general quality" against redhibitory vices. The warranties of quality and wholesomeness, however, partly overlap: the fitness of cigarettes for use, under Article 2520 of the Code, is essentially the same as their fitness for human consumption. The trial court specifically charged that the manufacturer warrants wholesomeness:

"The manufacturer of products which are offered for sale to the public in their original package for human consumption use, impliedly warrants that its products are *reasonably wholesome* or fit for the purpose for which they are sold."

The appellant complains that the trial judge defined the scope of the warranty of wholesomeness in terms of the foreseeable risk of harm. The trial judge said:

"But such implied warranty does not cover substances in the manufactured products, *the harmful effects of which no developed human skill or foresight can [avoid]* \* \* If you find that at the time Mr. Lartigue's cancer started, the ciga-

rettes manufactured by the defendants were usable as such, and that the state of medical knowledge was then such that the defendants could not have anticipated in the exercise of reasonable care that their products would cause cancer, then your verdict on the issue of implied warranty, would be in favor of the defendants."

This is the language of Doyle and LeBlanc, the leading cases in Louisiana. It is also the language of Green which this Court has approved. Moreover, there is no qualification to the requirement that the harmful effects must be of such a character that "no developed human skill or foresight" could have avoided them.

[20-22] Assuming facts favorable to the plaintiff in this case, recovery might be grounded on (1) negligence, (2) fraud for misrepresentation, (3) implied warranty against redhibitory vices, and (4) strict liability or implied warranty of wholesomeness of articles of intimate bodily use. Possibly the trial judge might have surveyed these grounds and marked off the boundary lines more precisely than he marked them off in his charge to the jury. But the law of products liability is still developing, guidelines are not sharp and clear, and the warranties (such as they now are) overlap. Reading the charge as a whole, it seems to us that the plaintiff received the full benefit of the manufacturer's implied warranty of wholesomeness. At this stage of the law and of human knowledge, in Louisiana a manufacturer of food and cigarettes is strictly liable for foreseeable harm resulting from a defective condition in the product when the consumer uses the product for the purposes for which it was manufactured and marketed. Thus far, public policy has not decreed absolute liability for "the harmful effects of which no developed skill or foresight can avoid." At this point, it cannot be said that cigarette smokers who started smoking before the great cancer-smoking debate relied on the tobacco companies' "warranty" that



their cigarettes had no carcinogenic element. Today, the manufacturer is not an insurer against the unknowable.

### III.

[23] The principal aspect of the negligence claim which the appellant asks the Court to consider is that the trial judge erred in giving the following instruction:

"The plaintiff contends that the defendants were negligent in not warning the public, and particularly Frank J. Lartigue, that the use of their tobacco would cause or precipitate cancer of the vocal cord or lung. As a fundamental principle of law, before any person can be charged with negligence of this sort, it must be established that he had knowledge of some inherent danger or defective condition of his product. This knowledge may be either actual knowledge or such knowledge as a reasonably prudent man should have acquired under the circumstances. Plaintiff must prove that defendants knew or should have known before Mr. Lartigue's lung cancer started, that their product could cause that disease. Under the circumstances of this case, such knowledge can only be had by these defendants if medical science also had it and had made it publicly known at the time that Mr. Lartigue's lung cancer started. The mere failure to warn against the result which could not have been reasonably anticipated, is not actionable negligence. The defendants cannot be held guilty of negligence on the basis of medical opinion, surveys, or other similar materials not announced until after that time."

The contention is that the instruction placed an impossible burden of proof on

the plaintiff and erroneously limited the time when the defendants were required to give warning.

The instruction seems fair to us. It amounts to saying that a manufacturer charged with negligence for some inherent danger or defective condition in his product is held to the standard of reasonable care. In determining this standard it is proper for the jury to take into account the state of medical knowledge before Lartigue's cancer started. The tobacco companies cannot be held liable for negligence on the basis of medical studies yet to be published. The trial judge was careful not to limit his instructions on knowledge to the defendants' knowledge. He charged:

"[Y]ou should consider that even if defendants did not know of the dangerous substances in their products, you should consider from the evidence whether they should have taken steps to ascertain the effects of their products when used for human use, especially as to whether their products would cause or be a contributing cause in the development of cancer of the lung and larynx."

The timing of any warning and the effect of a failure to warn, both before and after Lartigue's cancer started, were matters for the jury to decide. The instructions gave the jury sufficient latitude to have decided these matters in favor of the plaintiff.

Taking the charge as a whole, we find that it was fair, balanced, and free from reversible error.

The Court has carefully considered all of the appellant's contentions whether or not discussed in this opinion.

The judgment is  
Affirmed.





**John T. ROSS, Appellant,**

**v.**

**PHILIP MORRIS & COMPANY, Ltd., a  
Corporation, Appellee.**

**No. 17202.**

**United States Court of Appeals  
Eighth Circuit.**

**Feb. 26, 1964.**

**Rehearing Denied March 20, 1964.**

Cigarette consumer's action against manufacturer for injuries allegedly sustained as result of smoking manufacturer's cigarettes. The United States District Court for the Western District of Missouri, Floyd R. Gibson, Chief Judge, entered a judgment for the manufacturer and the consumer appealed. The Court of Appeals, Matthes, Circuit Judge, held that where cigarette consumer developed cancer after smoking manufacturer's cigarettes since 1934, under circumstances, manufacturer's implied warranty, under Missouri law, was that of being reasonably fit for intended use and it was liable only if harmful effects of cigarettes could have been anticipated by use of any developed human skills or foresight, but under proper factual circumstances, Missouri courts would apply strict liability.

**Affirmed.**

**1. Courts** ⇨370

In action based on diversity of citizenship federal court's function is limited to ascertaining and applying applicable state law and not in formulating it, and court is required to determine what Supreme Court of state would have declared the law to be if case were before it.

**2. Sales** ⇨255

Under Missouri law, lack of privity between manufacturer and consumer of cigarettes is not in itself a bar to recovery for alleged breach of implied warranty.

**3. Sales** ⇨255, 427

Under Missouri law, when implied warranty claim is asserted by purchaser based on injuries from food or beverages manufactured for human consumption, rule of strict liability prevails, with or without privity, regardless of negligence.

**4. Sales** ⇨279, 427

Where cigarette consumer developed cancer after smoking manufacturer's cigarettes since 1934, under circumstances, manufacturer's implied warranty, under Missouri law, was that of being reasonably fit for intended use and it was liable only if harmful effects of cigarettes could have been anticipated by use of any developed human skills or foresight, but under proper factual circumstances, Missouri courts would apply strict liability.

**5. Negligence** ⇨27

Even in negligence actions against manufacturer for injuries resulting from use of products, manufacturer is held to skill of expert, is charged with superior knowledge of its products, and is obligated reasonably to keep abreast of scientific information.

**6. Courts** ⇨403.5(18)

Admission or exclusion of evidence on grounds of relevancy, is in the federal courts a matter primarily for trial court's judgment, and its ruling will not be disturbed except for clear and prejudicial abuse of discretion. Fed.Rules Civ.Proc. rule 61, 28 U.S.C.A.

**7. Evidence** ⇨208(2)

An admission in pleading in one action may be received in evidence against pleader on trial of another action to which he is a party, in favor of party to latter action, provided admission is relevant and material to issue being litigated.

**8. Courts** ⇨406.5(18)**Evidence** ⇨205(1)

Statements made by cigarette manufacturer on advertising and use of materials in motion to dismiss Federal Trade Commission proceeding did not constitute admissions against interest and their exclusion from consumer's action against manufacturer for breach of implied warranty was not a clear and prejudicial abuse of discretion. Fed. Rules Civ.Proc. rule 61, 28 U.S.C.A.

---

Charles L. Carr, Kansas City, Mo., Clay C. Rogers and Lyman Field, Rogers, Field & Gentry, Kansas City, Mo., of counsel, for appellant.

David R. Hardy, Kansas City, Mo., William W. Shinn, Kansas City, Mo., John Vance Hewitt and Alexander Holtzman, New York City, Carl E. Enggas, Kansas City, Mo., Conboy, Hewitt, O'Brien & Boardman, New York City, and Shook, Hardy, Ottman, Mitchell & Bacon, Kansas City, Mo., for appellees.

Before VAN OOSTERHOUT,  
MATTHES and MEHAFFY, Circuit  
Judges.

MATTHES, Circuit Judge.

This so-called cigarette-cancer case originated in the Circuit Court of Jackson County, Missouri, on November 23, 1954, was removed to the United States District Court for the Western District of Missouri on the ground of diversity of citizenship and the requisite amount in controversy, and was tried in that court before a jury in June and July, 1962. From a judgment entered pursuant to a verdict for defendant-appellee (hereinafter referred to as defendant), plain-

tiff-appellant (hereinafter referred to as plaintiff) has perfected this appeal.

Count I of the complaint upon which the action was tried was for breach of an implied warranty; Count II sounded in negligence; and Count III for fraud and deceit by false advertising. Defendant's motion for summary judgment on Count III was sustained before trial, thus eliminating that count from jury consideration. In addition to answers which essentially amounted to a general denial, defendant also interposed as defenses: (1) the statute of limitations, (2) assumption of risk, and (3) contributory negligence. (1) was determined adversely to defendant in a pre-trial conference, and (2) and (3) were not submitted to the jury and are not in issue on appeal. The implied warranty and negligence counts were submitted, and by general verdict, both were resolved adversely to plaintiff. On this appeal plaintiff has abandoned the fraud and deceit issue, and—except as to the court's refusal to admit certain evidence, seeks no review of the disposition of the negligence count.

The nature of the points relied upon as grounds for reversal does not necessitate a detailed recitation of the evidence. For purposes of this opinion, the following factual résumé will suffice.

Plaintiff was born on November 20, 1899, and began smoking cigarettes when he was 28 or 29 years old. He became a confirmed smoker in 1934, and from that time until his cancer operation in 1952, he smoked Philip Morris brand cigarettes almost exclusively. Plaintiff increased his consumption of smoking cigarettes from the early 1930s and within four or five years was smoking two packages a day. Again, he increased to the point where in 1939 and 1940 he smoked as many as three and sometimes four packages a day. He did not reduce his smoking until he went to Mayo Clinic for the cancer operation in 1952.

1. The testimony of defendant's six distinguished doctors was to the effect that smoking of cigarettes was not the cause of plaintiff's cancer of the pyriform fossa.

In 1951 plaintiff first experienced a throat irritation. As a result of a medical examination and biopsy performed upon him in January or February, 1952, plaintiff was informed that he had cancer of the throat. He immediately went to Mayo Clinic at Rochester, Minnesota, for a complete examination. There, on February 16, 1952, upon the basis of medical advice, he submitted to an operation which included a laryngectomy, a neck dissection, and a tracheotomy. Since the operation plaintiff has had to breathe through an opening in his neck, and can speak only with the aid of an electric device attached to his throat.

Plaintiff's own testimony reveals a history of indulgence, heavy at times, in alcoholic liquor. He is a former member of Alcoholics Anonymous, was arrested several times on charges involving intoxication, and with the exception of the year when he was a member of Alcoholics Anonymous, indulged—in varying degrees—in the consumption of liquor.<sup>1</sup>

Plaintiff's contentions here bring into question (1) the nature and scope of defendant's warranty of Philip Morris cigarettes, and (2) the propriety of the trial court's action in excluding certain proffered evidence. More precisely, on the crucial implied warranty issue, plaintiff challenges the validity of the court's charge to the jury. Plaintiff contends that his offered instruction properly declared the applicable Missouri law of implied warranty and that prejudicial error resulted in the court's refusal to give such instruction. In pertinent part, this refused instruction declared:

*"the law to be that one who manufactures, processes and markets cigarettes for consumption and smoking by the general public, such as the defendant Philip Morris Company, Ltd. \* \* \* owes to consumers of its product the duty to provide cigarettes which, including the smoke therefrom, do not contain any*

At least four of these doctors stated that suspected factors in the cause of cancer of the pyriform fossa include alcohol.

*harmful, dangerous or deleterious substances to human health when smoked and used by consumers, that is to say, cigarettes that are fit and wholesome for human consumption. In this respect, the law implies a warranty of fitness for human consumption to the smoker of such product irrespective of whether the manufacturer did not know, or even could not have known in the exercise of the ultimate in care, skill and foresight, that the product may have contained any harmful, dangerous and deleterious substances or ingredients."* (Emphasis supplied).

The refused instruction authorized a verdict for plaintiff on the implied warranty count if the jury found—

*"on the basis of reasonable probability, there were harmful, dangerous and carcinogenic substances in the tobacco smoke of defendant's cigarettes, \* \* \* and that such smoking of defendant's cigarettes, on the basis of reasonable probability, directly caused plaintiff's cancer \* \* \*."*

*"And this is true, and is the law, \* \* \* irrespective of whether the defendant did not know, nor in any way could have known, that its product contained any such harmful, dangerous and carcinogenic substances and ingredients. \* \* \*."*

Instead of giving plaintiff's offered instruction, the court submitted the issue of alleged breach of implied warranty to the jury by an instruction which stated, inter alia:

*"A manufacturer of products, such as cigarettes, which are offered for sale to the public in their original package for human use or consumption, impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold, but such implied warranty does not cover substances in the manufactured product the harmful effects of which no developed human skill or foresight can*

*afford knowledge."* (Emphasis supplied).

The given instruction then authorized a verdict for plaintiff upon a finding that there were harmful, dangerous, carcinogenic substances in the tobacco smoke of defendant's cigarettes that caused or contributed to cause cancer in the plaintiff.

*"Provided, however, that if you find and believe from the evidence that there were cancer causing substances in defendant's cigarettes, and that the harmful effects of such substances could not have been anticipated by the use of any developed human skill or foresight before the commencement of plaintiff's cancer, then your verdict should be for the defendant on Count I, dealing with the alleged breach of implied warranty."* (Emphasis supplied).

It should be observed that plaintiff, in objecting to the instruction that was given, did not in the trial court and does not here seriously challenge the sufficiency of the evidence to support the instruction. The principal objection to the italicized portion of the instruction made in the trial court was that it—

*"misstates the law of implied warranty in Missouri in that it permits the defendant to escape, if the jury found and believed from the evidence that harmful effects and substances in the defendant's product could not have been anticipated by the use of any developed human skill or foresight, because under the law of Missouri, \* \* \* the defendant is under a duty of absolute liability under implied warranty once it is shown that the product for human consumption contained harmful, dangerous or carcinogenic substances, and it would make no difference whether the defendant knew or could have known of such substances in its product, \* \* \*."*

Plaintiff also objected to that portion of the instruction submitting the issue of "reasonableness," asserting that under



the law of Missouri "the defendant is not permitted to escape under implied warranty on the reasonableness of its product being wholesome or fit, but it is again a question of *absolute liability* whether it is wholesome or is fit." (Emphasis supplied.)

Defendant asserts that the given instruction on implied warranty submitting the elements of "reasonableness" and "developed human skill or foresight" was a proper one, and also claims that the court properly refused to permit introduction of the questioned evidence. Additionally, however, defendant argues that: (A) under Missouri law, a cigarette manufacturer does not impliedly warrant its product to an ultimate consumer and that, consequently, the breach of implied warranty issue should not even have been submitted to the jury, and (B) the evidence was insufficient as a matter of law to make a submissible case on the essential question whether the smoking of defendant's cigarettes caused plaintiff's cancer.

[1] Of course, in this diversity action, our function is limited to ascertaining and applying the law of Missouri—not in formulating it. Explicitly, we are required to determine what the Supreme Court of Missouri would declare the law to be if this case were before it.

Turning to the Missouri cases with this function in mind, we find that issue (A) above was authoritatively resolved against defendant by the Missouri Supreme Court in *Morrow v. Caloric Appliance Corporation*, en banc, 372 S.W.2d 41 (November 11, 1963). In *Morrow*, damages were sought by the purchasers of a gas range from the manufacturer on the theory of breach of an implied warranty of reasonable fitness for use. In upholding the trial court's action in submitting this issue and in permitting recovery on this theory, the Supreme Court struck down the privity requirement rule which had previously been applied in Missouri except in a limited number and type of cases hereinafter more fully considered.

[2] When the case before us was argued and submitted on November 14, 1963, neither counsel nor this court was aware of the opinion in *Morrow*. Thereafter, in forwarding copies of the *Morrow* opinion to this court, counsel for defendant tacitly conceded that the holding therein was dispositive of issue (A), stating:

"The *Morrow* case imposed liability upon a manufacturer of a defective gas range on the theory of implied warranty despite lack of privity of contract with the plaintiffs. This case is contrary to the position taken by appellee in Point IA of its Brief that liability for breach of implied warranty in Missouri in the absence of privity extends only to food and drink, \* \* \*."

In light of the teachings of the court in *Morrow*, further discussion of this point is deemed unnecessary. We are satisfied that in Missouri lack of privity between the manufacturer and the consumer of cigarettes is not in itself a bar to recovery for alleged breach of an implied warranty.

Inasmuch as defendant prevailed below on the merits, and in view of our disposition of plaintiff's assignments of error here, defendant's point (B) is rendered moot, and we pretermitt consideration of it.

Here, plaintiff's central attack upon the trial court's instruction on implied warranty follows the same theme as it did below. Plaintiff argues that under Missouri law the manufacturer of cigarettes owes the ultimate consumer the "absolute duty" to have its product "fit and wholesome for human consumption;" that the manufacturer is "absolutely liable" and is "an insurer of the fitness and wholesomeness of its product;" and that the manufacturer acts "at its peril," irrespective of knowledge, "actual or constructive" and "even regardless of the possibility or impossibility of the manufacturer obtaining knowledge, that its product contains harmful, dangerous, deleterious or carcinogenic substances and ingredients."

[3] We recognize that in Missouri it has with finality been judicially determined that when an implied warranty claim asserted by the purchaser is based on injuries from food or beverages manufactured for human consumption, the rule or doctrine of strict liability prevails, with or without privity, regardless of negligence. For example, in *Williams v. Coca-Cola Bottling Co.*, Mo.App., 285 S.W.2d 53, 55 (1955), a Missouri intermediate appellate court, after citing numerous Missouri cases imposing strict liability in implied warranty without privity, stated:

"Considerations of public policy, \* \* \* and the protection of the health of the consuming public require that an obligation be placed upon the manufacturer of Coca-Cola to see to it, *at his peril*, that the product he offers the general public is fit for the purpose for which it is intended, namely, human consumption. The 'demands of social justice' require that his liability should be made *absolute*." (Emphasis supplied.)

The definite trend in Missouri—even in cases not involving the typical food for human consumption situation—has been away from the privity requirement in actions by the ultimate consumer against a manufacturer for breach of implied warranty of fitness. See and compare, *Worley v. Proctor & Gamble Mfg. Co.*, 241 Mo.App. 1114, 253 S.W.2d 532 (1952) (soap detergent); *Midwest Game Company v. M. F. A. Milling Company*, Mo.Sup., 320 S.W.2d 547 (1959) (food for fish); *Albers Milling Company v. Carney*, Mo.Sup., 341 S.W.2d 117 (1960) (feed for turkeys); *Borman v. O'Donley*, Mo.App., 364 S.W.2d 31 (1962) (corn silage for cattle); *Morrow v. Caloric Appliance Corporation*, supra, 372 S.W.2d 41 (1963) (gas range).

[4] In light of this history, we conclude that under the proper factual situation the Missouri courts would impose the same strict liability upon a manufacturer of cigarettes as has been applied in the food and beverage cases.

But, in our considered view, if presented with the *facts in this case*, the Missouri courts would not apply the strict rules of the "fly in the bottle cases" but—on the contrary, would limit absolute liability to the same extent that such liability was limited here by the district court.

It is enlightening to note the reasoning employed by the courts in the cases imposing an absolute liability upon a manufacturer for breach of an implied warranty. Emphasis is placed upon "social justice," for "only the manufacturer \* \* \* can know of the contents \* \* \*." *Williams v. Coca-Cola Bottling Company*, supra, 285 S.W.2d at 55; *Worley v. Proctor & Gamble Mfg. Co.*, supra, 253 S.W.2d at 537; *Degouveia v. H. D. Lee Mercantile Company*, 231 Mo.App. 447, 100 S.W.2d 336, 337-338, 339 (1936) (manufacturer not a party; remanded for submission against retailer). Here, however, we fail to comprehend how the ends of justice could be served by adopting the fiction that the manufacturer of cigarettes was—as early as 1934 (when plaintiff began smoking defendant's cigarettes exclusively)—in a better position, except in theory, than the consumer to ascertain the now highly-publicized causative relationship between smoking and cancer of certain areas of the body. It is perhaps tempting in the light of knowledge of today to create the thought that defendant should have been aware of the cancer-smoking relationship; that the controverted instruction unduly stresses the scientific knowledge or foreseeability factor; and that the instruction has no evidentiary basis—not to mention the lack of *specific* legal precedent in the field of implied warranty in Missouri. However, it should be carefully noted that this case must be decided on the facts as they existed in the light of the knowledge of the early 1930s to 1952.

Examination of the "fly in the bottle" or food cases in Missouri readily reveals significant distinctions between them and the instant case. For example, a mouse in a bottled soft drink—*Holyfield v. Jop-*

Cite as 328 F.2d 3 (1964)

lin Coca Cola Bottling Co., Mo.App., 170 S.W.2d 451 (1943); broken glass in buttermilk—Carter v. St. Louis Dairy Co., Mo.App., 139 S.W.2d 1025 (1940); particles of glass in soup—Bell v. S. S. Kresge Co., Mo.App., 129 S.W.2d 932 (1939) (soup purchased at defendant's lunch counter); a fly in a can of salmon—Degouveia v. H. D. Lee Mercantile Co., supra, 100 S.W.2d 336 (manufacturer or packer not a party defendant); formaldehyde in buttermilk—Fantroy v. Schirmer, Mo.App., 296 S.W. 235 (1927); or even moldy feed for turkeys—Albers Milling Company v. Carney, supra, 341 S.W.2d 117, present rather flagrant deviations from what a consumer expects when he buys a product and what the manufacturer intends his product to contain. These cases involve products containing readily identifiable foreign matter, inherently nauseous, deleterious, or putrid; in every case the risk of harm could reasonably have been foreseen as a consequence of the presence of the defect.

And although not as obviously distinguishable, there also are significant differences between this case and both *Worley v. Proctor & Gamble Mfg. Co.*, supra, 253 S.W.2d 532—involving a detergent alleged to contain an ingredient which caused a skin infection,<sup>2</sup> and *Midwest Game Company v. M. F. A. Milling Company*, supra, 320 S.W.2d 547—involving a fish food which, contrary to trade custom, was not a "complete" food. In *Worley*, defendant made no contention

that it was scientifically impossible to have known of the alleged danger in using its detergent, but rather defended in part on the ground that plaintiff failed to show that the detergent contained any ingredient or chemical compound injurious to the skin. In reversing in favor of defendant, the court stressed the possibility of an allergy, stating that "plaintiff failed to sustain the burden \* \* \* to prove that she was one of the class covered by the warranty."<sup>3</sup> Likewise, in *Midwest Game*, plaintiff could point to no deleterious, foreign matter in the fish food, but was able to state a claim upon which relief could be granted because plaintiff could specifically allege that the food lacked certain ingredients, was an incomplete food, and thus—most importantly—did not measure up to the standards and customs of the trade.<sup>4</sup>

Contrarily, here plaintiff has made no contention that defendant's cigarettes do not conform to the standard of the cigarette industry, but rather has presented evidence in an attempt to prove not only that smoking defendant's cigarettes caused his cancer, but also to show the *general* causative relationship between smoking cigarettes—of *any brand*—and cancer of certain portions of the body. Plaintiff does not attempt to isolate a foreign, deleterious substance peculiar only to defendant's cigarettes. Nor does he contend that the cigarettes contained a substance which—like the fish bone in the seafood cases<sup>5</sup>—was inherent to the original material or food

2. Our research discloses that most authorities consider *Worley* as involving implied warranty, although some have associated it with express warranty law. See, e. g. *Williams v. Coca-Cola Bottling Company*, supra, 285 S.W.2d at 55.

3. Compare also, *Merrill v. Beaute Vues Corporation*, 10 Cir., 235 F.2d 893 (1956) (allergy to home permanent wave lotion).

4. Compare *Simmons v. Rhodes & Jamieson, Ltd.*, 46 Cal.2d 190, 293 P.2d 26 (1956), where the Supreme Court of California, en banc, affirmed a judgment granting a nonsuit in an action brought by the buyer of cement against the seller and its agent to recover damages for burns sustained by

328 F.2d—14

the buyer while handling the cement. The court found that since the cement was fit for the purpose of laying a basement floor (the purpose for which it was sold), and since there was no showing that the cement contained any unusual substance or was different from ordinary cement in any way, there was no breach of warranty although the cement, due to its inherent nature, produced burns on the buyer who handled it. See also, the discussion in *Baker v. Stewart Sand & Material Company*, Mo.App., 353 S.W.2d 108 (1961) (negligence case).

5. Compare, for example, *Shapiro v. Hotel Statler Corporation*, S.D.Cal., 132 F. Supp. 891 (1955) (fish bone in fish food



but was not intended by the manufacturer to be included in the finished product that was sold to the consumer. Here, plaintiff's position is that even though defendant's cigarettes may have conformed to cigarettes generally; even though the cigarettes contained no foreign matter that defendant intended to exclude from its product; even though defendant may have had no reason to suspect that smoking its cigarettes could produce cancer; even though there may have been no immediate harm from smoking a package of cigarettes, but that the smoking-cancer relationship was a cumulative one; and even though no developed human skill or foresight could afford knowledge of the cancer-smoking relationship,<sup>6</sup> defendant should be held absolutely liable as an insurer if smoking its cigarettes caused or contributed to cause plaintiff's cancer. No Missouri case has imposed such a strict responsibility upon a manufacturer.

Turning to the controverted instructions themselves, *supra*, we note that plaintiff objected to the "reasonableness" portion of the charge as well as to the submission of the element of "developed human skill or foresight." In *Morrow v. Caloric Appliance Corporation*, *supra*, 372 S.W.2d 41, the Missouri Supreme Court approved the verdict-directing instruction on implied war-

ranty which required the jury, as a prerequisite to a finding for plaintiff, to find the gas range "was not *reasonably* fit and suitable for its intended purpose." The court also emphasized the consumer's dependence "upon processed food and manufactured articles" and the consumer's reliance on "the processor or manufacturer" who holds out such food or articles "to the public as fit and *reasonably* safe." (Emphasis supplied.) 372 S.W.2d at 55.

The foregoing pronouncements are, in our view, sound and fundamental, and indicate persuasively that the instant submission of "reasonableness" is the standard the Missouri courts would adopt and apply under like circumstances.<sup>7</sup>

Focusing our attention next on the foreseeability or scientific knowledge issue, three cases involving similar factual circumstances as the one before us are worthy of brief review even though they were decided under the law of states other than Missouri. In these cases, the instructions on foreseeability and the state of human knowledge were either identical with or similar to the controverted instruction here. In *Pritchard v. Liggett & Myers Tobacco Company*, *supra*, 295 F.2d 292 (Pennsylvania law), the Third Circuit reversed the trial court's judgment of dismissal of a warranty count and a directed verdict for

serving is not a foreign substance—no implied warranty recovery against restaurant), and *Allen v. Grafton*, 170 Ohio St. 249, 164 N.E.2d 167 (1960) (piece of oyster shell in serving of oysters—no implied warranty recovery against restaurant), with *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913, 143 A.L.R. 1417 (1942) (oyster shell in canned oysters—submissible implied warranty case made against retailer), and *Paolinelli v. Dainty Foods Manufacturers*, 322 Ill.App. 586, 54 N.E.2d 759 (1944) (bone in noodle soup mix—negligence recovery from manufacturer).

6. Again, it should be noted that plaintiff did not, in objecting to the given instruction, challenge the *sufficiency of the evidence* to support that portion of the charge regarding scientific knowledge or foreseeability.

7. It is noteworthy that in *Green v. American Tobacco Company*, 325 F.2d 673 (December 11, 1963), after certification of the foreseeability issue to the Florida Supreme Court, 154 So.2d 169 (1963), the Fifth Circuit, in light of the Florida Court ruling, reversed the position it had taken earlier, 304 F.2d 70, on the foreseeability issue, but the court still asserted that under Florida law a cigarette manufacturer impliedly warrants that its cigarettes are "*reasonably* wholesome or fit for human consumption," and remanded for jury determination on the question of "reasonableness." See also, *Lartigue v. R. J. Reynolds Tobacco Company*, 5 Cir., 317 F.2d 19 (1963), cert. denied, 375 U.S. 865, 84 S.Ct. 137, 11 L.Ed.2d 92 (1963); *Pritchard v. Liggett & Myers Tobacco Company*, 3 Cir., 295 F.2d 292 (1961).



defendant as to a negligence count, and remanded for a new trial. Judge Goodrich—although concurring in the decision to reverse and remand the case for submission to the jury—expressed his views as to certain limits beyond which he would be “unwilling to go” in holding a manufacturer liable. He stated:

“If a man buys whiskey and drinks too much of it and gets some liver trouble as a result I do not think the manufacturer is liable unless (1) the manufacturer tells the customer the whiskey will not hurt him or (2) the whiskey is adulterated whiskey—made with methyl alcohol, for instance. The same surely is true of one who churns and sells butter to a customer who should be on a nonfat diet. The same is true, likewise, as to one who roasts and sells salted peanuts to a customer who should be on a no-salt diet. Surely if the butter and the peanuts are pure there is no liability if the cholesterol count rises dangerously.

“In this case there was no claim that [the cigarettes] are not made of commercially satisfactory tobacco.” 295 F.2d at 302.

The retrial in Pritchard resulted in a judgment for defendant cigarette company based upon answers to specific interrogatories submitted to the jury, and the case is again on appeal.<sup>8</sup>

In Lartigue v. R. J. Reynolds Tobacco Company, supra, 317 F.2d 19 (Louisiana law), the Fifth Circuit affirmed a judgment rendered on a jury's general verdict for defendant cigarette manufacturers in an action brought for the death of plaintiff's husband—a heavy smoker—from cancer. Approving the instruction that the “implied warranty does not cover substances in the manufactured products, the harmful effects of which no developed

human skill or foresight can afford,” the court stated:

“Here the manufacturer ‘had no opportunity to gain knowledge, or to form a judgment as to the dangerous qualities of the product’. The manufacturer was in no better position than the consumer.

\* \* \* \* \*

“Thus far, public policy has not decreed absolute liability for ‘the harmful effects of which no developed skill or foresight can avoid.’ At this point, it cannot be said that cigarette smokers who started smoking before the great cancer-smoking debate relied on the tobacco companies’ ‘warranty’ that their cigarettes had no carcinogenic element. Today, the manufacturer is not an insurer against the unknowable.” 317 F.2d at 39–40.

The proceedings in the third pertinent court of appeals case—Green v. American Tobacco Company, supra, 304 F.2d 70, on statutory certification to the Supreme Court of Florida, supra, 154 So.2d 169, on reconsideration by the Fifth Circuit, supra, 325 F.2d 673 (December 11, 1963)—are relied upon heavily by plaintiff, primarily because of the trial court's reference in the instant case to the first decision rendered by the Fifth Circuit in Green. In an unreported order denying plaintiff's motion for new trial, the court below, applying Missouri law, stated:

“\* \* \* when applied to a substance which is a natural constituent of a product, which has not been previously considered harmful, it is the opinion of the Court that the proper rule of law should require that a manufacturer should be shown to have knowledge of the harmfulness of the substance or reason to

make any express warranty upon which plaintiff relied and by which he was induced to purchase defendant's cigarettes; that there was not a breach of warranty implied by law; and that plaintiff assumed the risk of injury by his smoking of cigarettes.

8. We have been advised that the jury found that smoking defendant's cigarettes was the cause or one of the causes of the cancer in plaintiff's right lung; that defendant was not chargeable with negligence which was a proximate cause of plaintiff's injury; that defendant did not

have such knowledge imputed to him, and that the rule of absolute liability should be qualified to this extent."

The court then pointed out that, in its view, if this case were presented to the Supreme Court of Missouri, that court would approve of the instruction regarding foreseeability that was given here and in the Green case. But subsequent to this statement, the Florida Supreme Court on statutory certification ruled that under Florida law, "implied warranty liability is not limited by the foreseeability doctrine, the 'reasonable application of human skill and foresight' test of tort liability,"<sup>9</sup> supra, 154 So.2d at 172, and consequently the Fifth Circuit has reversed and remanded Green for further proceedings.

However, merely because the court below referred to Green with approval before the Florida Supreme Court responded contrarily in the certification proceeding, we are not compelled to hold that the Missouri Supreme Court would arrive at the same conclusion as the Florida court. Judge Gibson—in the court below—decided that "the better rule of law" was that enunciated in the first Green decision by the Fifth Circuit, and that "if the case were presented to the Supreme Court of Missouri, that court would apply the rule followed in the Green case and given to the jury by the instructions of this Court." Judge Gibson did not even imply that the Missouri courts would blindly follow Florida law on this

subject—if such law should (as it has) subsequently turn out to be contrary to the first enunciations by the Fifth Circuit. Indeed, as noted previously, this case is to be decided under Missouri law, and neither the Green case, the Lartigue case (which approved a similar instruction as is controverted here), nor the Pritchard case (which also used a similar instruction below and is now again on appeal) is dispositive or decisive of the present controversy.

The field of implied warranty is in a state of flux, and it is obvious that Missouri has joined the liberal trend toward allowing recovery from a manufacturer for breach of such a warranty under factual situations once governed by the rigid *caveat emptor* doctrine—let the buyer beware. However, after exhaustive study of all relevant Missouri authorities, we are convinced that, on the facts of this case, the trial court correctly charged the jury and properly refused plaintiff's instruction which would have made defendant an absolute insurer—without regard to "reasonableness" and without regard to "developed human skill or foresight."<sup>10</sup>

And the burden that the foreseeability instruction placed upon defendant was not a light one. For defendant was required to offer evidence affording proof that no one, not even the most renowned scientist or the most eminent medical authority in the world, could have foreseen the cancer-producing danger that

9. For purposes of this opinion, we need not involve ourselves in the controversy concerning whether an implied warranty sounds in contract or in tort as strict liability. See Prosser, Torts, § 83, pp. 493-494 (2d ed. 1955); Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)," 69 Yale Law Journal 1099, 1124-1134 (1960). It is, however, interesting to observe that in *Morrow v. Caloric Appliance Corp.*, supra, 372 S.W. 2d 41, 55, the Missouri Supreme Court mentioned and quoted from *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1962), a case which imposed strict liability in tort on a manufacturer.

10. It is interesting—although certainly not controlling—to note that Missouri has approved the Uniform Commercial Code as of August 15, 1963, effective July 1, 1965. Under the section of the Code dealing with implied warranty of merchantability, V.A.M.S. § 400.2-314, emphasis is placed upon usage of the trade, and among other requirements, goods to be merchantable must "pass without objection in the trade under the contract description." Plaintiff here does not contend that defendant's cigarettes could not pass without objection in the trade as cigarettes. See also, V.A.M.S. § 400.2-315 (implied warranty of fitness for particular purpose).

smoking cigarettes can—under certain circumstances—apparently create.<sup>11</sup>

While certainly not decisive of Missouri law, it is not entirely without significance that recognized authorities in the field of implied warranty have expressed views which lend support to our determination of the foreseeability issue. In Harper & James, *The Law of Torts*, Vol. 2, § 28.22, pp. 1584–1586 (1956), the following statement appears:

“Food sold for immediate consumption is warranted as fit for consumption by ordinarily healthy and normal people under ordinary circumstances. This means that it is not contaminated and that it is free from impurities that might *foreseeably* prove injurious, such as pebbles, glass or mice.” (Emphasis supplied.)<sup>12</sup>

In the proposed revision of Restatement (2d ed.) Torts, § 402A (Tentative Draft No. 7, 1962), the writer classifies cigarettes with foods for the purpose of imposing strict liability on the manufacturer, but further states:

“The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the consumer. Many products cannot possibly be made safe for consumption, and any

food or drug necessarily involves some risk of harm, even if only from over-consumption. \* \* \*

\* \* \* \* \*

“Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or which the consumer would reasonably not expect to find in the product, 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.” (Emphasis supplied.)

[5] We have carefully read and studied these and a vast array of other non-judicial authorities—some of which would limit the liability of a cigarette manufacturer for reasons other than are in issue in this case. There is, however, no need for further elaboration, for while these authorities are not without import in the field of implied warranty *generally*, our task here is a more limited one and is confined to the application of Missouri law. Under such law, a manufacturer, in the proper factual situation, is held as an absolute insurer against *knowable* dangers, and thus has an incentive to keep abreast of scientific knowledge.<sup>13</sup>

11. Although no question is raised here as to the measure of damages we note that in an action based upon breach of contract, the traditional *Hadley v. Baxendale*, 9 Exch. 341, rule limits recovery to such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. If an implied warranty under Missouri law sounds strictly in contract (but see, *supra*, fn. 9), a plaintiff seeking to recover from a manufacturer of cigarettes alleging that smoking caused plaintiff's cancer, might still be required to show that the possibility of such a consequence might reasonably be supposed to have been within the “contemplation” of the parties at the time of the sale.

12. See also, “General Products—Should Manufacturers Be Liable Without Negligence?”, 24 *Tenn.L.Rev.* 923, 925, 927

(1957), an article by Fleming James (co-author of *The Law of Torts*, Harper & James, and Professor of Law at Yale Law School) in which he argued for an extension of liability without fault but concluded that the liability of a manufacturer should—as to hazards injected into society by the manufacturer—be limited to the extent that such hazards are “reasonably foreseeable.” “Liability should extend to anyone who is hurt by a foreseeable use of the product. The foreseeability here involved is different from that required in negligence cases. It is not the foreseeability of unreasonable risks, but rather the foreseeability of the kinds of risks which the enterprise is likely to create.”

13. Even in a negligence case, a manufacturer is held to the skill of an expert, is charged with superior knowledge of the nature and qualities of its products, and



But, in our view, the Missouri courts would not—under the facts of this case—go still further and eliminate knowledge altogether as a condition of liability, regardless, for example, of whether any ingredient in a cigarette was known or could have been known to be an irritant or deleterious substance that could cause cancer.

In summary, we are satisfied that the trial court properly determined the applicable Missouri law and that its charge was correct. In any event, the court's conclusion was a permissible one and is invulnerable to successful attack on appeal.

[6] We approach the question whether the exclusion of evidence offered by plaintiff was prejudicial error, mindful that under Rule 61, Fed.R.Civ.P., no error in the admission or exclusion of evidence is ground for granting a new trial or for vacating a judgment, unless a refusal to do so is inconsistent with substantial justice. See *Great American Insurance Company v. Horab*, 8 Cir., 309 F.2d 262 (1962). In *Hawkins v. Missouri Pac. R. Co.*, 8 Cir., 188 F.2d 348, 351-352 (1951), in speaking for the court, Judge Johnsen, now Chief Judge, stated the applicable rule in this manner:

“\* \* \* [T]he admission or exclusion of any evidence, as being properly relevant or being too remote, is in the federal courts a matter primarily for the trial court's judgment, and its rulings in this respect will not be disturbed except for clear and prejudicial abuse of the discretion.”

Proceeding to the question, we find that in 1942 a complaint was filed before the Federal Trade Commission which apparently formed the basis for an investigation by that Commission of defendant's dissemination of certain advertising of its cigarettes. On February 2, 1959, defendant filed before the Federal Trade Commission its motion to dismiss that

case. The supporting affidavit of defendant's president stated:

“The respondent has abandoned its advertising that the smoke from its ‘Philip Morris’ brand of cigarettes is less irritating to the throat than the smoke from cigarettes of the other leading brands. It has also abandoned the use of the hygroscopic agent mentioned in the said order and which was the basis of the said advertising. It has also abandoned any advertising representing that the smoke from its said cigarettes will not leave an after-taste.

“It is not the intention of respondent to resume said advertising or the use of the said hygroscopic agent.”

Plaintiff sought unsuccessfully to introduce the motion to dismiss and supporting affidavit in effect as admissions against interest.

Additionally, plaintiff offered, again basically as admissions against interest, the testimony of defendant's former Director of Research (dead at the time of this trial) adduced in 1943 in the same proceeding before the Federal Trade Commission. In denying both offers—i. e., the motion to dismiss the Federal Trade Commission complaint and the testimony of the Director of Research, the trial court expressed the opinion that such evidence did not constitute admissions against interest and was not relevant to establish any pertinent fact.

[7] In taking issue with the trial court's exclusion of the offered evidence, plaintiff relies upon the general rule, undisputed here, that any statement made by a party to an action which is against his own interest and which in its nature tends to establish or disprove any material fact in the case is competent to be put in evidence against him in the trial of the action. 31A C.J.S. Evidence § 272; 20 Am.Jur., Evidence § 544. Under

is obligated reasonably to keep abreast of scientific information, discoveries, and advances. *LaPlant v. E. I. Dupont De*

*Nemours And Company*, Mo.App., 346 S.W.2d 231 (1961).



this principle, an admission in a pleading in one action may be received in evidence against the pleader on the trial of another action to which he is a party, in favor of a party to the latter action, provided the admission is relevant and material to the issues being litigated. See 31A C.J.S. Evidence § 303; 20 Am. Jur., Evidence § 630; cf. *Albertson v. Wabash R. Co.*, 363 Mo. 696, 253 S.W.2d 184 (1952).

[8] The difficulty and weakness of plaintiff's position is that the excluded evidence does not, in our considered view, meet the test encompassed within the foregoing rule. We are unable to comprehend how the statement in the motion to dismiss the Federal Trade Commission proceedings to the effect that defendant intended to abandon portions of its advertisements and to abandon the use of the hygroscopic agent in the manufacture of its cigarettes, constituted an admission, or could have been so regarded, that its product was not reasonably wholesome or fit, or that defendant had been guilty of the alleged negligence in the manufacture of its cigarettes.<sup>14</sup> The refused testimony of its former Research Director, when considered in light of the issues that were litigated, falls in the same category.

The materiality and admissibility of all of the refused evidence was first the

subject of exhaustive pre-trial consideration during the time that the case was pending before Judge Ridge (now a member of this Court). After thorough analysis of plaintiff's contentions, Judge Ridge ruled that the proceedings before the Federal Trade Commission and the questioned evidence were not admissible. But in so doing, the court did not foreclose plaintiff's right to offer evidence if it was in fact relevant to establish a material fact or constituted an admission against interest.<sup>15</sup> During the trial the same evidence was again offered, was carefully examined by Judge Gibson who, after a plenary hearing on the question of its admissibility, ruled that it was not material, did not constitute an admission against interest, and refused to allow its introduction.

Plaintiff was permitted to introduce numerous advertisements promulgated by defendant and which appeared in national magazines, newspapers and other advertising media during the period of time relevant to the case. The evidence took a wide range and afforded the jury a panoramic view of the litigated issues. The admission of the controverted evidence would not, in our opinion, have influenced or caused the jury to arrive at a different result. Its rejection was not prejudicially erroneous, and manifestly there is no basis for us to hold that the

14. Compare, *Albertson v. Wabash R. Co.*, supra, 253 S.W.2d 184 (although not controlling in a federal court action involving a question of admissibility of evidence), where the Missouri Supreme Court held it was prejudicial error to admit application filed by the railroad company before Public Service Commission for permission to eliminate an existing grade crossing, characterized in the application as "dangerous." The action was brought against the railroad company for damage resulting from collision between an automobile and a standing railroad car at that same crossing, claimed by plaintiff to be "unusually hazardous."

15. The pre-trial proceedings indicate clearly that plaintiff's purpose at that time in securing a favorable ruling on the admissibility of the controverted evidence was

to establish his fraud and deceit action—Count III. In its memorandum opinion granting summary judgment on Count III, the court stated:

"Seemingly, what plaintiff is attempting in this case is to get before the jury at the trial, as primary evidence, excerpts from the pleadings and record made before the F.T.C., as proof to sustain the charge of fraud and deceit which he alleges in Count III. \* \* \*

"Plaintiff cannot in this action use as primary evidence, the 'Specific Admissions Against Interest by Defendant and Its Officers, Contained in Plaintiff's Exhibits 9, 10, 11, 12 and 13, Record Before the Federal Trade Commission, Docket No. 4794,' (filed herein December 10, 1960) in proof of the claim of fraud and deceit made in Count III."

court's ruling constituted a clear abuse of discretion.

authorizing officers to make search at night.

The record demonstrates that the case was fairly tried, free of prejudicial error. Consequently, we

Affirmed.

Affirm.

MYRTLE MEHOCHKO, Appt.,

v

GOLD SEAL COMPANY, a Corporation

Illinois Appellate Court — January 11, 1966  
66 Ill App 2d 54, 213 NE2d 581, 19 ALR3d 1003

### SUMMARY OF DECISION

Recovery for bodily injuries resulting from the use of a product distributed by the defendant was sought in the instant action. A physician testified for the plaintiff that the burns suffered by the plaintiff could have been caused by a material spilled on her foot. A biochemist in the employ of the manufacturer of the product testified concerning the results of certain tests performed on the product under his direction and supervision and, over the objection of the plaintiff, was permitted to give further testimony of the report of a test conducted on the product by an independent laboratory.

On an appeal by the plaintiff, a judgment rendered by the Circuit Court, St. Clair County, Illinois, Harold O. Farmer, J., on a verdict for the defendant, was reversed, and the cause remanded with directions for a new trial and other relief, by the Appellate Court of Illinois, Fifth District, which, in an opinion by George J. Moran, J., held that testimony of the report of the test by a third person was inadmissible hearsay and that the plaintiff was prejudiced by its admission in evidence.

### HEADNOTES

Classified to ALR Digests

Appeal and Error § 250 — admission of evidence — sufficiency of objection

1. An appellate court may refuse to consider the appellant's claim of reversible error in the admission of certain evidence, where his objection to the testimony is not sufficiently specific.

Evidence § 1039 — hearsay — report of test by third person

2. In a products liability action in which a biochemist in the employ of the manufacturer testifies concerning the results of certain tests performed on the product under his direction and supervision, error is com-

### SUBJECT OF ANNOTATION

Beginning on page 1008

Admissibility, as against hearsay objection, of report of tests or experiments carried out by independent third party

66 Ill App 2d 54, 213 NE2d 581, 19 ALR3d 1003

mitted in admitting hearsay evidence consisting of his further testimony of the report of a test conducted on the product by an independent laboratory.

[Annotated]

**Appeal and Error § 205 — questions raised — sufficiency of evidence**

3. An appellant who alleges the insufficiency of the evidence to support the verdict thereby indicates that the other party failed to prove his case.

**Appeal and Error § 202 — questions raised — prejudice in admission of hearsay evidence**

4. An appellant who alleges prejudicial error in the admission of inadmissible hearsay thereby alleges that the admission probably or substantially controlled the result.

**Appeal and Error § 781 — hearsay — report of test by third person — prejudicial error**

5. In a products liability action in which a biochemist in the employ of the manufacturer testifies concerning the results of certain tests performed on the product under his direction and supervision, error committed in admitting hearsay evidence consisting of his further testimony of the report of a test conducted on the product by an independent laboratory is prejudicial, since the effect on the jury of the independent laboratory's test lent an air of impartial veracity to the test results and opinion of the witness.

[Annotated]

## BRIEFS OF COUNSEL

**Meyer & Meyer, of Belleville, for appellant:**

The defendant failed to prove a similarity of conditions between the experiment performed by it and the condition of defendant's product at the time of the injury. *Hammer v Slive* (1962) 35 Ill App 2d 447, 183 NE 2d 49, 52; *Handley v Erb* (1941) 314 Ill App 207, 212; *Smith v Strover Mfg. Co.* (1917) 205 Ill App 169, 175; *Downing v Metropolitan* (1941) 314 Ill App 222, 226; *Chicago City Ry. Co. v Brecher* (1904) 112 Ill App 106, 108.

The introduction into evidence by the defendant of the results of an experiment made by a third party constituted hearsay which was of a prejudicial nature. *McCoy v Union Elevated* (1916) 271 Ill 490, 498; *People v Capoldi* (1957) 10 Ill 2d 261, 268; *Coal Creek Drainage & Levee Dist. v Sanitary Dist. of Chicago* (1929) 336 Ill 11, 43; *Novicki v Dept. of Finance* (1940) 373 Ill 342, 344; *Adkins v Blue Bird Coach Lines, Inc.* (1960) 27 Ill App 2d 34; *McCormick, Handbook of the Law of Evidence* 460 (1954); 5 *Callaghan's Illinois Evidence* 213, 214 (1964).

**Oehmke, Dunham, Boman & Leskera, and**

**John W. Leskera, both of East St. Louis, for appellee:**

There was no abuse of discretion by the trial court in permitting the defendant to show experiments on a product made by the manufacturer of the product. *Hardman v Helene Curtis Industries, Inc.* (1964) 42 Ill App 2d 42, 198 NE2d 681; *Freisland v City of Litchfield* (1960) 24 Ill App 2d 390, 164 NE2d 606; *Saldania v Atchison, T. & S. F. Ry. Co.* (1957) 241 F2d 321; *Downing v Metropolitan* (1941) 314 Ill App 222; *Hammer v Slive* (1962) 35 Ill App 2d 447, 183 NE2d 49; 20 *Am Jur, Evidence*, 758; Section 68.1 (2), Ch 110, Ill Rev Stats, 1963.

No prejudicial error was committed by the introduction of evidence of tests made by an independent laboratory confirming experiments of the manufacturer of the product. *Smith v Broschied* (1964) 46 Ill App 2d 117, 196 NE2d 380; *Hickey v Chicago Transit* (1964) 52 Ill App 2d 132, 201 NE 2d 742; *Ward v Cozzi* (1959) 20 Ill App 2d 297, 156 NE2d 222; *Ciskoski v Michalsen* (1958) 19 Ill App 2d 327, 152 NE2d 479; *Melford v Gaus & Brown Const. Co., Inc.* (1958) 17 Ill App 2d 497, 151 NE2d 128; *Feeley v McAuliffe* (1948) 335 Ill App 99.



## OPINION OF THE COURT

George J. Moran, J.

This is a products liability action in which the plaintiff charges that she was injured because the defendant, a distributor of a product known as Firewax, negligently and carelessly failed to warn that this product was dangerous to the human body when it came into contact with the skin. The jury found the issues in favor of the defendant and the court entered judgment in favor of the defendant on the jury's verdict. Plaintiff appeals from the denial of her post trial motion for a new trial.

On August 19, 1961, John M. Arnold purchased a can of Firewax at plaintiff's request and took it to the home of the plaintiff in O'Fallen, Illinois. Arnold sprayed this on some charcoal in a portable grill, with the plaintiff standing just a few inches away. Arnold "miscued" and allowed some of the Firewax to fall over the grill. Plaintiff did not notice any on her shoe at that time. One-half an hour to forty-five minutes later, while she was barbecuing, plaintiff felt a burning sensation at her foot. She then noticed a substance on her shoe that looked like the remains of the substance sprayed on the charcoal. Plaintiff wiped off the substance, took off her shoe, then put the shoe on again and continued to barbecue. About forty-five minutes to one hour later, after she finished barbecuing, she went indoors, removed her shoe, washed her foot, and applied medication.

Plaintiff did not have the substance in the can which she purchased tested, and it was not tested to her knowledge. Her examining physician did not test the substance and did not know the ingredients of Firewax.

Firewax is manufactured by R. M. Hollingshead Corporation. The defendant is the distributor. Firewax is sent to the defendant in cases, ready for resale. The label is on the product when it leaves Hollingshead Corporation.

[1] Plaintiff claims that the court committed reversible error in permitting Dr. Harold C. Lederer, a biochemist and toxicologist employed by the Hollingshead Corporation to testify concerning the results of certain tests performed on this product under his direction and supervision. We do not believe plaintiff's objection to this testimony was specific enough to make this point available for review, so we will not consider it in this opinion.

[2] Plaintiff also claims the trial court committed reversible error in admitting inadmissible hearsay evidence on behalf of the defendant over plaintiff's specific objection. In addition to giving testimony of his own on behalf of defendant, Dr. Lederer also read the results of a test conducted on Firewax by an independent biological laboratory into evidence over the objection of the plaintiff.

McCormick, Evidence, p 460, defines hearsay as ". . . such offered to show the truth of matters asserted therein and thus resting for its value on the credibility of the out-of-court assenter."

Appellants cite numerous cases to the effect that it is hearsay to read the reports of another into evidence. Appellees do not contest the point that

this was hearsay, but urge that the report was admissible as an exception to the hearsay rule.

Appellees rely principally upon *Smith v Broscheid*, 46 Ill App 2d 117, 196 NE2d 380 (1964) and upon *Hickey v Chicago Transit Authority*, 52 Ill App 2d 132, 201 NE2d 742 (1964). In *Smith* a doctor testified as to the facts shown in an X-ray after another doctor had pointed out the indications and interpreted the results for the testifying doctor. The first doctor testified concerning things visible to him and within his own knowledge and expertise, i. e., he pointed out facts and indications on an X-ray which the second doctor who testified then saw and recognized. The second doctor was allowed to testify based on matters within his own knowledge which were first shown him or interpreted to him by the first doctor. He was allowed to base his expert opinion of what the pictures showed upon his own knowledge plus another expert's opinion.

In *Hickey* the court concluded 52 Ill App 2d at page 139, 201 NE2d at page 146 that "it is proper for an attending physician to testify with respect to the pathology revealed by a myelogram or X-ray, even though he did not perform the myelogram or take the X-ray, and had sought the advice of a specialist in its interpretation, but the myelogram or X-ray must be produced and put in evidence so as to furnish the basis for cross-examination."

In tests, the essential elements are the results, methods and qualifications of the tester. The method and qualification of the tester (to conduct the test and correctly read its results) give the results their veracity. Dr. Lederer was not testifying from his own knowledge about an exhibit (like the X-ray or myelogram) before the court. He could not be cross-examined about an exhibit before the court. He was not testifying from his own knowledge about an exhibit before the court; he knew no more about the independent tests than he had read (been told). The tests were not before the court and he could not be cross-examined about the method (save what he read about it) nor about the tester's qualifications to perform the experiments and correctly interpret the results. Dr. Lederer was a stranger to the evidence he introduced. He knew nothing about it save through hearsay; he could not be cross-examined about the essence of the independent tests.

The lower court erred in admitting this inadmissible hearsay evidence. Dr. Lederer's testimony did not come within the hearsay exception in *Smith v Broscheid*, *supra*, or *Hickey v Chicago Transit*, *supra*.

[3, 4] Is this error so prejudicial to plaintiff that she is entitled to a new trial? When an appellant alleges there is insufficient evidence to support a verdict, he indicates the other party failed to prove his case. When an appellant alleges prejudicial error in the admission of inadmissible hearsay, he alleges the admission probably or substantially controlled the result. 5 Callaghan's Illinois Evidence, 214 (1964).

[5] Reviewing the various testimony, a physician testified for plaintiff-appellant that the injury "might or could have been caused by the material spilled on her foot"; Dr. Lederer, a biochemist-toxicologist, testified that Fire-

wax as usually produced will not burn the skin; and finally, Dr. Lederer read the results of an independent testing firm.

The inadmissible hearsay was approximately one-half of the defendant-appellee's case. Whether a jury, faced with a physician's contrary testimony would have believed defendant's witness cannot be known. The effect of an independent laboratory's test on the jury, however, lent an air of impartial veracity to Dr. Lederer's opinion and test results; it did not come to light through a representative of that laboratory called by the defendant. The independent test results appeared, through hearsay, as an impartial imprimatur to Dr. Lederer's expert opinion.

The inadmissible hearsay verified his results and opinion. Prior to the admission of the hearsay results, both plaintiff and defendant had expert opinion to support their allegations. Following the erroneous admission, the defendant had the apparent blessing and confirmation of an independent laboratory. These independent results have a misleading air of impartiality about them because defendant did not have to call the tester as a witness.

The error in admitting inadmissible hearsay was prejudicial to the plaintiff-appellant. The judgment is therefore reversed and the cause is remanded with directions to grant the motion for a new trial, and for such other and further relief as is not inconsistent with the views herein expressed.

Judgment reversed and cause remanded with directions.

Goldenhersh and Eberspacher, JJ., concur.