

NOTES

THE WHOLESALER'S LIABILITY TO THE CONSUMER FOR INJURY DUE TO DEFECTIVE GOODS

The liability of sellers of goods to their immediate vendees, both in tort and in contract, for injury resulting from defects in the goods, is fairly clearly defined.¹ Likewise, the liability of manufacturers to the ultimate consumer has been the subject of much legal thought.² Little attention has been focused, however, upon the tort and contract liability of that other member of the merchandising chain, the wholesaler, who is neither retailer nor manufacturer, but who serves as a distributive link between the manufacturer and the retailer.³ Under what conditions may these intermediate sellers of goods be held liable to the ultimate consumer, whether in tort or in contract for breach of warranty, for losses sustained as the result of a defect in the goods distributed?

In this note the wholesaler is considered to be an independent dealer⁴ who purchases goods, handles them himself,⁵ and sells them to

1. UNIFORM SALES ACT §§ 11-16; PROSSER, TORTS § 83 (2d ed. 1955); 4 SHEARMAN & REDFIELD, NEGLIGENCE §§ 653-58, 893 (rev. ed. 1941); 1 WILLISTON, SALES §§ 178-257 (3d ed. 1948). The least settled aspect of sellers' liability to their immediate vendees seems to be where the goods, particularly food, are packed in sealed containers by the manufacturer. In many jurisdictions it is held that a vendor of such goods who has not himself packed them into the containers will not be held liable to the consumer for injuries due to deleterious contents of the container, since there is no opportunity for the seller to inspect the goods and discover the defects. For a discussion of the "sealed container" doctrine as it affects wholesalers, see note 76 *infra*.

2. See, e.g., Bohlen, *Liability of Manufacturers to Persons Other Than Their Immediate Vendees*, 45 L.Q. REV. 343 (1929); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Notes, 22 WASH. U.L.Q. 406, 536 (1937); 25 WASH. U.L.Q. 293 (1940).

3. The scarcity of legal literature dealing with the liability of wholesalers and other "middlemen" is doubtless due to the lack of any great number of cases having arisen in the area. Unquestionably, many claims are settled without resort to litigation; in addition, if a remedy exists against the retailer or the manufacturer, the injured consumer is far more likely to bring his action against one of them without looking to the wholesaler, upon whom it is often difficult to impose liability. It is only when retailer and manufacturer are insolvent, inaccessible, or immune due to some judicial doctrine, or when the wholesaler is particularly attractive as a defendant, due, for example, to a national reputation, that an injured consumer will bring his action against the wholesaler.

4. As the scope of this note extends only to dealers in goods, the liability of the casual seller to the sub-vendee will not be explored. In passing, however, it should be noted that in regard to liability for breach of warranty the privity requirement has been relaxed only where the courts have felt that public interest requires it, and the relaxation has not extended to casual sellers. Therefore, any action against a remote casual seller for breach of warranty must fail for lack of contractual privity. In the tort area authority is scanty, but the unforeseeability of harm to a sub-vendee will be an obstacle to recovery in most negligence actions. See 1953 WASH. U.L.Q. 443.

5. In addition to those wholesalers who handle the goods in which they deal, there are others who deal in negotiable documents of title, such as order bills of lading and warehouse receipts, who do not handle the goods in which they deal.

others for the purpose of further resale. The distinction between such a wholesaler and a retailer, then, is an obvious one: while the retailer sells goods directly to the consumer, there are no direct dealings between the wholesaler and the consumer; in the language of the courts, the two are not in contractual "privity."⁶ The distinction between wholesaler and manufacturer, however, is often not so easily drawn. While, for example, the dealer who purchases canned goods in cases and, without changing their condition, sells them to a retailer, is clearly a wholesaler and not a manufacturer, some doubt arises as to how to classify one who purchases a commodity in barrels and re-sells it in bottles under a private label. Although the criteria are neither precise nor exhaustive, on the whole it may be said that those enterprises which process food and pack it in sealed containers, assemble component parts to form a finished product sold under the trade name of the assembler, or employ processes which alter the form or the nature of the goods handled, are generally considered manufacturers.⁷ Thus, a wholesaler may exercise such minor functions as placing private labels upon goods or repackaging goods without be-

It is well established that one who merely takes a negotiable document of title as security or with an attached draft for collection incurs no liability for implied warranties of quality upon the goods represented by the document. See, e.g., *Bank of Italy v. Colla*, 118 Ohio St. 459, 161 N.E. 330 (1928); *Stacey-Vorwerk Co. v. Buck*, 42 Wyo. 136, 291 Pac. 809 (1930).

Where a middleman sells goods by negotiating a document of title, however, he will be held to the same implied warranty liability as a wholesaler who handles the goods himself. UNIFORM BILLS OF LADING ACT § 35; UNIFORM WAREHOUSE RECEIPTS ACT § 44; Federal Bills of Lading Act § 34, 39 STAT. 538 (1916), 49 U.S.C. § 114 (1952).

Where he has made an express warranty, the middleman-dealer in negotiable documents of title may be more vulnerable to the consumer. Two recent federal cases have held that express warranties made in dealing with such negotiable documents are assignable by an immediate vendee to a sub-vendee. *Hunter-Wilson Distilling Co. v. Foust Distilling Co.*, 181 F.2d 543 (3d Cir. 1950); *Esbeco Distilling Corp. v. Owings Mills Distillery, Inc.*, 43 F. Supp. 380 (D. Md. 1942).

Since he has had no dealings with the goods themselves, it is unlikely that a middleman-dealer in negotiable documents of title will be held liable in negligence to the ultimate consumer. But where a statute places an absolute duty upon him in regard to the goods he may be held liable to the consumer. In *Kearse v. Seyb*, 200 Mo. App. 645, 209 S.W. 635 (1919), a fuel wholesaler who had merely handled a bill of lading was held liable under statute to a consumer for failing to inspect the carload of fuel he had sold.

6. For a discussion of privity of contract, see 4 CORBIN, CONTRACTS §§ 773, 778 (1951).

7. Among those enterprises which the courts have held to be manufacturers are: a dairy, which pasteurizes and bottles milk received from farmers, *Carlson v. Turner Centre System*, 263 Mass. 339, 161 N.E. 245 (1928); one who bakes pie crusts and fills them with a prepared mixture purchased elsewhere, *Sullivan v. Manhattan Market Co.*, 251 Mass. 395, 146 N.E. 673 (1925); one who combines ingredients to make sandwiches, *Klein v. Duchess Sandwich Co.*, 14 Cal. 2d 272, 93 P.2d 799 (1939); a caterer, *Bishop v. Weber*, 139 Mass. 411, 1 N.E. 154 (1885); an assembler of component parts to make a finished product, *Martin v. Studebaker Corp.*, 102 N.J.L. 612, 133 Atl. 384 (Ct. Err. & App. 1926); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

coming classified as a manufacturer.⁸ Where serious doubt exists as to categorization, the courts seem to favor calling borderline enterprises manufacturers; conceivably, this results in greater protection for the purchasing public, since, as will be shown, the liability of the manufacturer is often more extensively recognized than that of the wholesaler.⁹

Where an injured consumer is in a position to maintain an advantageous suit against the retailer or the manufacturer of the goods which caused his injury, there is often little reason for his considering an action against the wholesaler. However, if circumstances are such as to make an action against the retailer or the manufacturer inadvisable, it may be that an action against the wholesaler is the injured consumer's only feasible source of recovery. For example, the retailer may be execution-proof, as with a corner grocer operating on a hand-to-mouth basis,¹⁰ or the manufacturer may be a non-resident of the state unwilling to submit to local jurisdiction.¹¹ Under these circumstances the wholesaler may remain the sole possible source of recovery. In other situations, the particular position of the wholesaler may make him a more attractive defendant than the retailer or the manufacturer. Thus, the large wholesaler owning a famous brand-name is a prime target for consumer claims, since his financial condition is usually good, and he is particularly vulnerable in wishing to avoid unflattering publicity.¹²

8. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 2.26 (1951), lists, without attempting to classify absolutely, a number of enterprises of different kinds as representing the various shadings of degree between the food manufacturer and the food wholesaler.

9. In Missouri, for example, an action for breach of implied warranty of quality is allowed by the consumer against the manufacturer, *Madouros v. Kansas City Coca-Cola Bottling Co.*, 230 Mo. App. 275, 90 S.W.2d 445 (1936), but a similar action against the wholesaler will fail because privity is required. *De Gouveia v. H.D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S.W.2d 336 (1936).

10. But even the smallest and least affluent corner grocer is not necessarily execution-proof; he may carry products liability insurance. See DICKERSON, *op. cit. supra* note 8, § 5.15.

11. The extreme seems to be presented in *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932), where an Argentine manufacturer sold to an Argentine distributor, who in turn sold to Armour for distribution in the United States. Had the wholesaler not been held liable, the consumer would undoubtedly have been left without recovery. See also *H.J. Heinz Co. v. Duke*, 196 Ark. 180, 116 S.W.2d 1039 (1938), as illustrative of the difficulties in obtaining jurisdiction over nonresident manufacturers.

A somewhat novel situation was presented in the 1953 Kansas case of *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953), in which the consumer joined retailer, wholesaler, and manufacturer in a negligence action utilizing *res ipsa loquitur*. See Note, 1954 WASH. U.L.Q. 215.

12. DICKERSON, *op. cit. supra* note 8, § 5.17, says, Where plaintiffs may recover directly against any seller to whom or through whom defective goods can be traced, claims tend naturally to gravitate to the closest available Big Name in the chain of manufacture and distribution, whether he is the retailer, intermediate distributor, or manufacturer. See also Note, 2 MO. L. REV. 235, 238 (1937).

Theories of Liability

The consumer who chooses to bring an action against the wholesaler for injury resulting from a defect in the goods may proceed either (1) in tort, where negligence is nearly always alleged, or (2) in contract for breach of warranty, almost invariably for breach of implied warranty of quality. Since in practice the measure of damages is substantially the same under both theories,¹³ the consumer-plaintiff will proceed according to the available remedy which may best be adapted to his case. If he is in a jurisdiction in which lack of contractual privity is not a bar to a suit against the wholesaler for breach of warranty,¹⁴ he will probably go forward on a theory of warranty, since to recover he need only establish that the warranty existed and that its breach caused his injury. Unquestionably, a breach of warranty action is more attractive to an injured consumer than is a negligence action. The drawback to the warranty action is simply that to date, the great majority of states have refused to allow a warranty action by the consumer against the wholesaler because of lack of privity. In an action based upon a theory of negligence, on the other hand, not only must the plaintiff establish that the wholesaler in dealing with the goods owes him a duty of due care, but the plaintiff must also prove that it was the wholesaler's failure to exercise such due care which caused the injury. Proving this element of fault—the failure to exercise due care—and establishing its causal connection to the plaintiff's injury often causes great difficulty.¹⁵ In summation, warranty liability is strict liability, imposed without the need of an element of fault, while traditionally there must be an element of fault in order to establish liability for negligence, although, as will be shown, in many areas what is called "negligence" actually amounts to strict liability.¹⁶

A. Liability in Tort

Virtually all tort actions by consumers against wholesalers for losses due to defects in goods have involved allegations of negligence. The few actions based upon other tort theories have been singularly

13. MCCORMICK, DAMAGES §§ 137, 176 (1935); DICKERSON, *op. cit. supra* note 8, § 52. RESTATEMENT, TORTS § 917 (1939), provides that the measure of damages in negligence cases is that the defendant is responsible for all damages foreseeable at the time of the wrongful act; UNIFORM SALES ACT § 69(6) provides "The measure of damages for the breach of warranty is the loss directly and naturally resulting in the ordinary course of events, from the breach of warranty." RESTATEMENT, CONTRACTS §§ 329, 330 (1932), is fundamentally the same.

14. See text supported by note 67 *infra*.

15. See, *e.g.*, Mellace v John P. Squire Co., 306 Mass. 515, 29 N.E.2d 26 (1940); Kusick v. Thorndike & Hix, Inc., 224 Mass. 413, 112 N.E. 1025 (1916).

16. See text supported by notes 39-44 *infra*.

unsuccessful, primarily because of the added difficulty of proof encountered with the more complex intentional torts such as deceit.¹⁷

The early history of the negligence liability of persons who supply goods to consumers is well known. Little more than a century ago it was held that only where there was privity of contract between supplier and consumer was there a duty of due care raised on the part of the supplier in favor of the consumer in regard to the treatment of the goods.¹⁸ Since there was no privity of contract between the wholesaler or manufacturer and the consumer, it was held that these suppliers of goods owed no duty of due care to the consumer. Exceptions to this harsh rule were coined early, the chief being that the supplier of an "inherently dangerous" instrumentality, such as drugs or volatile liquid fuels, could not take advantage of lack of privity to escape liability to the consumer for negligence in handling the goods.¹⁹ With the passage of time, the exceptions grew, and at last became almost coextensive with the rule itself.²⁰ At present, it is safe to say that lack of contractual privity is no longer a bar to an action for negligence against either the wholesaler or the manufacturer for injury caused by a defect in the goods.²¹

Liability to the consumer for negligence in supplying deleterious goods may be imposed upon the wholesaler either: (1) for the wholesaler's negligence, whether it be his own actual negligence, or the "negligence" created by his failure to fulfill an absolute standard set by statute; or (2) for the negligence of the manufacturer, where, by

17. For example, in fraud actions the burden of proving wilful intent has proved insurmountable. *Dobbin v. Pacific Coast Coal Co.*, 25 Wash. 2d 190, 170 P.2d 642 (1946), was an unsuccessful action for fraud against a wholesaler for statements made in a circular showing how a furnace should function. *Chanin v. Chevrolet Motor Co.*, 89 F.2d 889 (7th Cir. 1937), involved the same kind of an action, also unsuccessful, against an advertising manufacturer. See Note, 7 WASH. L. REV. 351 (1932).

18. The leading case is *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842). American cases generally followed its holding. See, e.g., *Lebourdais v. Vitriified Wheel Co.*, 194 Mass. 341, 80 N.E. 482 (1907); *Burkett v. Studebaker Bros. Mfg. Co.*, 126 Tenn. 467, 150 S.W. 421 (1912).

19. *Davidson v. Nichols*, 63 Mass. (11 Allen) 514 (1866) (drugs); *Thomas v. Winchester*, 6 N.Y. 397 (1852) (drugs); *Elkins, Bly & Co. v. McKean*, 79 Pa. 493 (1875) (liquid fuel).

20. The real turning-point came in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), where the privity requirement was dropped almost completely by a holding to the effect that lack of privity was not a bar not only where the instrumentality involved was inherently dangerous, but also if the goods themselves were dangerous if defectively made. Since a reasonable user will seldom be hurt by defective goods which are not rendered dangerous by reason of their defect—the very fact that the consumer was injured is evidence of that danger—the *MacPherson* case opened the door to negligence actions against the manufacturers of virtually all types of goods.

21. PROSSER, TORTS 500 (2d ed. 1955); 4 SHEARMAN & REDFIELD, NEGLIGENCE §§ 653-55 (rev. ed. 1941).

representing goods to be his own product, the wholesaler assumes the manufacturer's negligence.²²

1. Wholesaler's Liability for His Own Negligence

When an injured consumer brings what is truly a negligence action against the wholesaler, that is, one in which there is no statutory standard of care involved, or, if such a standard is involved, its violation is only evidence of negligence and not conclusive as to liability, the standard of care required of the wholesaler is that which the reasonable man would have exercised under similar circumstances. Thus, the jury is called upon to ascertain both what the standard of care should have been under the circumstances, and whether the wholesaler in fact maintained that standard.

From a survey of the cases, it is seen that the wholesaler may be held liable to the consumer for failure to use due care in discharging the following duties: (1) the duty to purchase goods from reputable manufacturers; (2) the duty to do no act which renders the goods potentially harmful; (3) the duty to inspect the goods for defects; (4) the duty to warn of a deleterious condition in the goods of which the wholesaler has knowledge.

(1) The wholesaler's duty to purchase his goods from a reputable manufacturer has not been defined with any degree of exactitude by the courts. Originally, it was held that if this duty were satisfied, there was no corresponding duty to make a reasonable inspection of the goods; more recently, there is indication that the wholesaler must satisfy both duties. Thus, in early cases, particularly those brought against manufacturers, the purchase of component parts from reputable sources when shown by the defendants allowed them to escape liability for failure to inspect such parts which had proved faulty and injured consumers.²³ For example, where a motor-car manufacturer purchased completed spoke wheels from another manufacturer, and a consumer brought action against the motor-car manufacturer for injury caused by the collapse of one of those spoke wheels due to a defect which reasonable inspection would have revealed, the motor-car manufacturer successfully excused such lack of inspection

22. The distinction between the two categories is not always clear, since, where a statute imposes strict liability upon the wholesaler for merely handling deleterious goods, it may be that the wholesaler is in fact being held liable for the fault of the manufacturer. In that case, however, it is the wholesaler's disobedience of the absolute command of the statute which imposes a primary liability on the wholesaler, rather than the negligence of the manufacturer imposing a vicarious liability.

23. *Martin v. Studebaker Corp.*, 102 N.J.L. 612, 133 Atl. 384 (Ct. Err. & App. 1926) (defective automobile wheel); *Taylor v. Berner*, 7 N.J. Misc. 597, 146 Atl. 674 (Sup. Ct. 1929) (defective bottle); *Favo v. Remington Arms Co.*, 67 App. Div. 414, 73 N.Y. Supp. 788 (3d Dep't 1901) (defective gun barrel).

by showing that he purchased the wheels from a reputable source.²⁴ Such showing was made simply by establishing that other motor-car manufacturers purchased their wheels from the same wheel-maker.²⁵ The decline of the use of the duty to purchase from a reputable source as an alternative to the duty to inspect goods for defects was signaled in *MacPherson v. Buick Motor Co.*,²⁶ where Judge Cardozo rejected the reputable source test as an alternative to the duty to inspect, asserting that the assembler of component parts was responsible for the entire finished product. Cardozo's view was later to be adopted through the wide-spread acceptance of Section 400 of the *Restatement of Torts*,²⁷ which makes one who represents himself to be the manufacturer of goods assume the same liability as though he were, in fact, the manufacturer. More recently, insofar as wholesalers are concerned, at least one court has imposed the duty to purchase from a reputable manufacturer in addition to the duty to inspect the goods.²⁸

(2) Cases involving the duty of the wholesaler to exercise reasonable care to do no act which renders the goods potentially harmful to the consumer usually arise only where the wholesaler, through such functions as repackaging, has an opportunity to confuse or contaminate the goods with which he deals. If the wholesaler occupies a purely distributive link in the merchandising chain, handling pre-packaged goods, there may be few acts he can do which affect the goods adversely. For this reason, most cases in this category have involved wholesale fuel dealers or wholesale druggists. Thus, where a wholesale fuel dealer erroneously combines gasoline with kerosene, producing a fuel of whose high volatility the consumer is unaware, it is clearly the negligent act of the wholesaler which causes the consumer's injury or death through a flash fire or explosion resulting from attempted use of the fuel for heating purposes.²⁹ Likewise,

24. *Martin v. Studebaker Corp.*, 102 N.J.L. 612, 133 Atl. 384 (Ct. Err. & App. 1926).

25. *Ibid.*

26. 217 N.Y. 382, 111 N.E. 1050 (1916). In the course of the opinion, Judge Cardozo said:

We think the defendant was not absolved from a duty of inspection because it bought the wheels from a reputable manufacturer. It was not merely a dealer in automobiles. It was a manufacturer of automobiles. It was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests.

217 N.Y. at 394, 111 N.E. at 1055.

27. See text supported by notes 47-55 *infra*. Although the New Jersey cases cited in note 23 *supra* were decided after *MacPherson*, they came before the adoption of the *Restatement* position in *Slavin v. Francis H. Leggett & Co.*, 114 N.J.L. 421, 177 Atl. 120 (Sup. Ct. 1935), *aff'd*, 117 N.J.L. 101, 186 Atl. 832 (Ct. Err. & App. 1936), which overruled the earlier New Jersey cases in that it made the assembler of component parts vicariously liable for the negligence of any manufacturer of those parts.

28. *Fleetwood v. Swift & Co.*, 27 Ga. App. 502, 108 S.E. 909 (1921).

29. *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159 (1909); *Kentucky Independent Oil Co. v. Schnitzler*, 208 Ky. 507, 271 S.W. 570 (1925); *Frazier v. Ayres*,

where a wholesale druggist labels linseed oil as cod-liver oil, liability is properly imposed when the consumer, an unsuspecting farmer, mixes what he believes to be a nutritious vitamin with his chicken feed, with the resultant death of half his flock.³⁰

(3) A third duty the wholesaler owes the consumer is that of inspecting the goods for defects. Of course, it is to be realized that with a great number of modern products more than a cursory examination is impossible. Because the wholesaler of canned goods, for example, cannot thoroughly ascertain the condition of the contents of the cans without destroying the salability of the goods, he will be required only to make a reasonable inspection that is consistent with the nature of the goods.³¹ Where the goods are open to inspection, however, a thorough inspection must be made.³² Thus, where a wholesaler could have discovered a defect in a gasoline stove by reasonable inspection, he was held liable to a consumer injured when the stove exploded.³³

(4) Closely related to the duty to inspect for defects is the duty to warn the consumer of a deleterious condition in the goods of which the wholesaler has knowledge. In other words, when, by inspection or otherwise, the wholesaler learns of a defect in the goods, and he nevertheless determines to go ahead and sell the goods, he must warn the consumer of the dangers involved.³⁴ Oftentimes, of course, the wholesaler, upon learning of the deleterious condition, will not attempt to sell the goods. With many products the market for avowedly defective goods is nonexistent. Where, for example, spoiled food is involved, the warned consumer is no consumer at all. But for various reasons,

20 So. 2d 754 (La. App. 1945); *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870); *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N.W. 227 (1905); *Kearse v. Seyb*, 200 Mo. App. 645, 209 S.W. 635 (1919); *Elkins, Bly & Co. v. McKean*, 79 Pa. 493 (1875).

30. *Ellis v. Lindmark*, 177 Minn. 390, 225 N.W. 395 (1929). Other cases involving the liability of wholesale druggists for mislabeling include: *Davidson v. Nichols*, 63 Mass. (11 Allen) 514 (1866); *Darks v. Scudders-Gale Grocer Co.*, 146 Mo. App. 246, 130 S.W. 430 (1910).

31. That the nature of the goods makes inspection for defects difficult or even impossible, however, does not bring these negligence cases within the "sealed container" doctrine, which only applies to breach of implied warranty of quality. See note 76 *infra*.

32. *King Hardware Co. v. Ennis*, 39 Ga. App. 355, 147 S.E. 119 (1929). In *Howson v. Foster Beef Co.*, 87 N.H. 200, 177 Atl. 656 (1935), evidence of federal inspection of pork, pursuant to statute, was held not to be conclusive in relieving the defendant wholesaler from liability, but merely evidence in the defendant's favor. Cf. *Catani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 931 (1915), where the trial court gave judgment notwithstanding the verdict to the defendant meat packer on the basis that evidence of government inspection was conclusive in the defendant's favor; the Pennsylvania Supreme Court reversed, holding that federal inspection alone was not enough—the defendant's duty was absolute.

33. *King Hardware Co. v. Ennis*, 39 Ga. App. 355, 147 S.E. 119 (1929).

34. See *Ahrens v. Moore*, 206 Ark. 1035, 178 S.W.2d 256 (1944), where the wholesaler of a new anti-freeze had reason to suspect its deleterious nature, but did not warn either retailers or consumers; *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 143 N.W. 48 (1913), where the wholesaler of dyed fur coats knew that the dye had an adverse effect upon about one percent of the wearers, but gave no warning.

and with certain products, the wholesaler may choose to go ahead and sell the defective goods. If he does so, he must accompany the goods with a warning. In order for the warning to be of effect, it must reach the consumer. The fact that the wholesaler has warned the retailer would seem to be no legal defense to an action by a consumer whom the retailer failed to warn.³⁵ Although only a small percentage of consumers may be adversely affected by the defect, a warning is nonetheless necessary. Thus, where a dye used in fur coats was known by the wholesaler to have ill effects upon one percent of the wearers, it was incumbent upon the wholesaler to give a warning to prospective purchasers.³⁶

The standard of care imposed upon the wholesaler may not always be what a jury would determine to be that of the reasonable man. Where the plaintiff-consumer is able to demonstrate, somewhere in the wholesaler's handling of the goods which caused his injury, the violation of a statute which, if obeyed, would have prevented the injury, the problem arises as to the weight such evidence of statutory violation is to have. Of course, there must be some connection between the purpose for which the statute was passed and the consumer's injury; in other words, the statute must have been enacted in order to protect the consumer from the type of injury he incurred.³⁷ It is possible to say that such violation is merely evidence of the wholesaler's negligence, to be considered along with all the other evidence presented.³⁸ In that case, the function of the jury remains two-fold: to ascertain a standard of care, and to determine whether, in fact, the wholesaler maintained that standard. On the other hand, a great number of states have held that violation of statute is negligence per se, and conclusive as to the standard of care to be applied.³⁹ In such jurisdictions the jury's function is solely to determine whether, in fact, the wholesaler maintained the standard of care established by the statute.

35. In *Kentucky Independent Oil Co. v. Schnitzler*, 208 Ky. 507, 271 S.W. 570 (1925), where the wholesaler's truck driver unwittingly poured several gallons of gasoline into a tank of kerosene at the retailer's place of business, the driver warned the retailer not to sell any of the fluid. Instead, the retailer sold a quantity to the plaintiff consumer, who thought it to be kerosene, and who was injured in an explosion caused by the fuel. The wholesaler was held liable to the plaintiff in spite of the warning to the retailer, since the wholesaler should have anticipated that the retailer would sell some of the fuel without warning the consumer. For a similar case, see *Frazier v. Ayres*, 20 So. 2d 754 (La. App. 1945).

36. *Gerkin v. Brown & Sehler Co.*, 177 Mich. 45, 143 N.W. 48 (1913).

37. PROSSER, *TORTS* § 34 (2d ed. 1955).

38. *Howson v. Foster Beef Co.*, 87 N.H. 200, 177 Atl. 656 (1935).

39. *Howson v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940); *Hoskins v. Jackson Grain Co.*, 63 So. 2d 514 (Fla. 1953); *Kearse v. Seyb*, 200 Mo. App. 645, 209 S.W. 635 (1919); *Darks v. Scudders-Gale Grocer Co.*, 146 Mo. App. 246, 130 S.W. 430 (1910); *Nelson v. West Coast Dairy Co.*, 5 Wash. 2d 284, 105 P.2d 76 (1940). In *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870), the statute stipulated civil liability for its violation.

Where violation of statute is held to be negligence per se, the effect is to impose strict liability upon the wholesaler. Thus, the wholesaler may be liable to the consumer not only when he has committed no negligent act himself, but also when he could not have acquired knowledge of the deleterious nature of the goods through any feasible procedure. Such a statute may not be satisfied by taking what appear to be reasonable precautions; its command is absolute, *i.e.*: *Sell no unwholesome food*.⁴⁰ When confronted by such a statute, no matter how great a measure of precaution the wholesaler takes, if he is found to have sold food which is unwholesome, he will be held liable to any consumer injured thereby.

Pure food and drug acts are the primary statutes confronting the wholesaler under which he may be held to absolute liability.⁴¹ In such a case, decided upon the basis of Ohio law, a wholesaler of canned meat was held liable to an injured consumer under the pure food statute, although it was clear that no act of the wholesaler's had caused the defect in the goods, and, in fact, it would have been impossible for the wholesaler to have discovered the defect without opening the can, thereby making the goods unsalable.⁴² Likewise, statutes governing the volatility of liquid fuels are applied so as to impose absolute liability.⁴³ Occasionally, wholesalers have been held to an absolute degree of liability in regard to miscellaneous statutes, such as those regulating the sale of seeds.⁴⁴

40. The typical food and drug statute incorporates equivalent language. For example, MO. REV. STAT. § 196.015 (1949), provides:

The following acts and the causing thereof within the state of Missouri are hereby prohibited:

(1) The manufacture, sale, or delivery, holding, or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded. . . .

41. *Hunter v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940); *Darks v. Scuders-Gale Grocer Co.*, 146 Mo. App. 246, 130 S.W. 430 (1910); *Nelson v. West Coast Dairy Co.*, 5 Wash. 2d 284, 105 P.2d 76 (1940).

42. *Hunter v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940).

43. *Kearse v. Seyb*, 200 Mo. App. 645, 209 S.W. 635 (1919); *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870). *Kearse v. Seyb* is an excellent illustration of just how strict it is possible for strict liability to be. In that case, a Missouri statute placed a duty upon all fuel dealers to inspect the fuel sold. The defendant, a wholesale fuel dealer, ordered a carload of kerosene from the refinery; due to some confusion between the refiner and the railroad carrier, a carload of gasoline mixed with kerosene was sent under a bill of lading which declared the contents to be kerosene. Upon receipt of the order bill of lading, the defendant fuel dealer immediately negotiated it to another fuel dealer. The defendant did not handle the carload which had originally been consigned to him, as it was delivered directly to the other dealer pursuant to the negotiation of the bill of lading. Nevertheless, when an ultimate consumer was injured when the highly volatile fuel exploded, recovery was allowed against the defendant fuel dealer on the basis that, being a dealer who sold the fuel, he was under an absolute statutory duty to make an inspection.

44. In *Hoskins v. Jackson Grain Co.*, 63 So. 2d 514 (Fla. 1953), a seed wholesaler was held liable under a statute for selling incorrectly labeled tomato seeds, in spite of the fact that his function in the distributive chain was only to handle bags of seed already labeled by a previous vendor. Upon a retrial of the case,

2. Wholesaler's Liability for the Manufacturer's Negligence

Where a wholesaler sells goods in such a manner as to make it appear that he is the manufacturer, he may be found liable to the consumer not only for his own negligence, but also for that of the manufacturer, which the wholesaler is said to assume. The wholesaler's representation to the effect that the goods are his own product raises a vicarious liability for the acts of the manufacturer. This vicarious liability arises most commonly where the wholesaler labels and sells, under his own private brand-name, goods produced for him by a manufacturer. Of course, where the wholesaler does nothing more than handle the goods, and in no way identifies himself as the manufacturer, he will not be held to have assumed liability for the manufacturer's negligence.⁴⁵ While food cases make up the bulk of the litigation in this area, liability extends to all products potentially harmful, including paints and cigars.

Before 1930, there were only a few cases involving actions against the wholesaler which even remotely considered the problem of placing the manufacturer's liability upon the wholesaler when the latter represented the goods to be his own product.⁴⁶ In 1930, Section 400 of the *Restatement of Torts* was promulgated, perhaps being as much dependent upon a notion of what the law ought to be as upon what the law actually was at that time:

One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.⁴⁷

the ultimate purchaser, a farmer, won a verdict of over \$50,000, but this was reversed because the jurors had employed an improper means to determine the amount of the award. *Jackson Grain Co. v. Hoskins*, 75 So. 2d 306 (Fla. 1954).

45. *Elmore v. Grenada Grocery Co.*, 189 Miss. 370, 197 So. 761 (1940); *Cornelius v. B. Filippone & Co.*, 119 N.J.L. 540, 197 Atl. 647 (Sup. Ct. 1938); *Singer v. Zabelin*, 24 N.Y.S.2d 962 (N.Y. City Ct. 1941).

46. Two cases involving wholesalers clearly anticipated the *Restatement* rule. *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N.E. 474 (1915); *Darks v. Scudders-Gale Grocer Co.*, 146 Mo. App. 246, 130 S.W. 430 (1910). On the other hand, one case seems clearly to have taken the contrary view. *Fleetwood v. Swift & Co.*, 27 Ga. App. 502, 108 S.E. 909 (1921).

47. RESTATEMENT, TORTS § 400 (1934). *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932), cited below as adhering to the *Restatement* rule, was decided under § 270 of the *Restatement's Tentative Draft #5*, which appeared in 1930.

Ostensibly, at least, under § 400 the wholesaler is being held vicariously liable for the negligence of the manufacturer. In practice, however, this amounts almost to strict liability. As DICKERSON, *op. cit. supra* note 8, § 2.23 observes,

Theoretically, putting the wholesaler in the shoes of the manufacturer has no legal consequences unless the manufacturer himself is shown to be responsible. In warranty cases causation is a problem, and in negligence cases the plaintiff also has the burden of showing culpability. Where the manufacturer is in Argentina the task of establishing this responsibility might seem formidable. Practically, it has not been so. An Ohio plaintiff by-passed the Argentina problem altogether by showing the wholesaler's own "negligence" from a violation of the pure food law. [*Hunter v. Derby Foods, Inc.*, 110 F.2d 970 (2d Cir. 1940).] Two cases inferred the manufacturer's negligence from the fact of causation. [*Armour & Co. v. Leasure*, 177 Md. 393, 9

Beginning in 1932, the courts have given wide recognition to the rule of the *Restatement*.⁴⁸ The only dispute has arisen not in regard to the validity of the rule, but as to whether it should be applied to various factual situations.

The situation most clearly falling within Section 400 is one where no indication is given that the wholesaler could be anything but the manufacturer of the goods. Thus, for example, where the label on goods simply sets out the wholesaler's name without words to qualify his capacity, and the manufacturer's name is absent, the case is squarely within the plain meaning of Section 400, since the consumer will reasonably infer that the name on the goods is that of the manufacturer.⁴⁹

When qualifying words appear on the label, however, such as "packed for" or "distributor," or when the name of the manufacturer is set out in small letters on a label which is clearly that of the wholesaler, the question naturally arises whether such cases fall under Section 400, or whether the qualification makes it clear that the wholesaler is not putting the goods "out as his own product."⁵⁰

In a Missouri case involving deleterious canned salmon labeled as "packed for" the wholesaler, without the manufacturer's name appearing on the label, it was held that the qualifying words negated the idea that the wholesaler could be the manufacturer, and therefore the wholesaler would not be burdened with the manufacturer's liability.⁵¹ Likewise, in a Massachusetts case, the fact that the wholesaler was identified as "distributor" on a catsup label and the lack of evidence sufficient to show a connection between the wholesaler and the brand name on the label were held to be enough to relieve the wholesaler from the manufacturer's liability.⁵² The latter case is not an unequivocal holding that the use of the qualifying word "distributor"

A.2d 572 (1940); *Swift & Co. v. Blackwell*, 84 F.2d 130 (4th Cir. 1936).]

Three others simply ignored the problem. [*Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932); *Swift & Co. v. Hawkins*, 174 Miss. 253, 164 So. 231 (1935); *Slavin v. Francis H. Leggett & Co.*, 114 N.J.L. 421, 177 Atl. 120 (1935), *aff'd*, 117 N.J.L. 101, 186 Atl. 832 (1936).] In net result the difference between negligence and breach of warranty is, once more, hardly discernible.

48. Whether the adoption of § 400 by the framers of the *Restatement* actually caused the sudden increase in the number of cases in this area after 1932 is problematical. It would seem, however, that the cases would have arisen anyway, due to the creation of a nation-wide market for "name-brand" products, and that the timely appearance of the *Restatement* provided the courts with a well-reasoned rule.

49. *Thornhill v. Carpenter-Morton Co.*, 220 Mass. 593, 108 N.E. 474 (1915); *Gittelsohn v. Gotham Pressed Steel Corp.*, 266 App. Div. 866, 42 N.Y.S.2d 341 (2d Dep't 1943); *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130 (1936).

50. As can be gathered from the text supported by notes 51-54 *infra*, "distributor" is neither a stronger nor a weaker qualification than "packed for."

51. *De Gouveia v. H.D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S.W.2d 336 (1936).

52. *Hamson v. Standard Grocery Co.*, 328 Mass. 263, 103 N.E.2d 233 (1952).

will relieve the wholesaler, however, as the court indicated that had stronger evidence been presented linking the brand name with the wholesaler, a wholly different result might have ensued.

On the other hand, the majority of courts have not allowed such qualifications as "distributor" or "packed for" to relieve the wholesaler from the manufacturer's liability.⁵³ Especially has this been so where an action could not be maintained successfully against the retailer or the manufacturer, and to exonerate the wholesaler from this added liability would be to deny all recovery to the injured consumer.⁵⁴ So, where the label on a can of deleterious corned beef named the wholesaler as "distributor," and also bore the name of the Brazilian packing company, the court did not hesitate in imposing the manufacturer's liability upon the wholesaler.⁵⁵

B. Liability in Contract for Breach of Warranty

Sales warranties are of two kinds, express and implied. An express warranty, under the sales act, is a promise or an affirmation of fact made by the seller which relates to the nature of the goods, upon which the buyer reasonably relies.⁵⁶ As it is generally held that express warranties do not run with the goods, but are effective only as between the parties to the transaction in the course of which the warranty was made, it is clear that the consumer, having had no direct dealings with the wholesaler, has virtually no chance of recovery in an action against the wholesaler based upon what is alleged to be an express warranty.⁵⁷

An implied warranty, on the other hand, is an obligation which the

53. *Swift & Co. v. Blackwell*, 84 F.2d 130 (4th Cir. 1936) ("distributor"); *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932) ("distributor"); *Armour & Co. v. Leasure*, 177 Md. 393, 9 A.2d 572 (1939) ("packed for"); *Swift & Co. v. Hawkins*, 174 Miss. 253, 164 So. 231 (1935) ("distributor"); *Slavin v. Francis H. Leggett & Co.*, 114 N.J.L. 421, 177 Atl. 120 (Sup. Ct. 1935), *aff'd*, 117 N.J.L. 101, 186 Atl. 832 (Ct. Err. & App. 1936) ("distributor"). In *Fleetwood v. Swift & Co.*, 27 Ga. App. 502, 108 S.E. 909 (1921), decided before the publication of the *Restatement of Torts*, it was held that the word "distributor" on the label was sufficient, in the absence of any evidence showing the brand name to be that of the defendant, to relieve the wholesaler from liability for the manufacturer's negligence.

54. Thus, in *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932), the manufacturer was in Argentina; in *Armour & Co. v. Leasure*, 177 Md. 393, 9 A.2d 572 (1939), the manufacturer was in Brazil.

55. *Armour & Co. v. Leasure*, 177 Md. 393, 9 A.2d 572 (1939).

56. UNIFORM SALES ACT § 12.

57. Recently, there seems to be growing acceptance on the part of the courts that, under certain circumstances, an express warranty may be assignable, and therefore may in effect run with the goods. See, e.g., *Jeffery v. Hanson*, 39 Wash. 2d 855, 239 P.2d 346 (1952). Other cases involve the assignment of an express warranty upon the negotiation of a bill of lading. *Hunter-Wilson Distilling Co. v. Foust Distilling Co.*, 181 F.2d 543 (3d Cir. 1950); *Esbeco Distilling Corp. v. Owings Mills Distillery, Inc.*, 43 F. Supp. 380 (D. Md. 1942). In *Cochran v. McDonald*, 23 Wash. 2d 348, 161 P.2d 305 (1945), the wholesaler apparently could have adopted the manufacturer's express warranty, but did not. See 1 WILLISTON, SALES § 244 (3d ed. 1948).

law places upon the seller of goods,⁵⁸ and is not dependent upon any representation by the seller. Implied warranties are of two kinds, warranties of title⁵⁹ and warranties of quality;⁶⁰ the consumer injured by a defect in the quality of the goods will naturally bring his contract action for breach of implied warranty of quality.

Since warranty liability is strict, and fault need not be proved in order to recover,⁶¹ an action for breach of implied warranty of quality is a more attractive means of recovery to the injured consumer than is a negligence action. Establishing the existence of such an implied warranty upon which to base an action, however, provides great difficulty in actions brought against wholesalers and manufacturers with whom there has been no contractual dealing, for the sales warranty is recognized as a creature of contract.⁶² Although in tort actions the requirement of privity of contract between the supplier and the injured consumer has been abandoned,⁶³ in actions for breach of a sales warranty privity is still a requirement in virtually all jurisdictions, with very few exceptions. The traditional expression has been that implied warranties, as well as express warranties, do not run with the goods to sub-vendees; hence, no privity of contract, no warranty.⁶⁴

In a small but growing number of states the privity requirement has been either discarded or avoided in implied warranty actions by injured consumers against food manufacturers.⁶⁵ In actions by consumers against the manufacturers of goods other than food, however, the privity requirement has not been relaxed.⁶⁶ This development has been extended to food manufacturers in order to protect the great public interest in this area; there is little indication that in actions against the manufacturers of other goods the privity requirement is on the verge of repudiation.

In regard to actions by consumers against food wholesalers for

58. VOLD, SALES 440 (1931).

59. UNIFORM SALES ACT § 13.

60. UNIFORM SALES ACT § 15.

61. 1 WILLISTON, SALES § 237 (3d ed. 1948).

62. 4 SHEARMAN & REDFIELD, NEGLIGENCE § 893 (rev. ed. 1941).

63. See text supported by notes 18-21 *supra*.

64. Farlow v. Jeffcoat, 78 Ga. App. 653, 52 S.E.2d 30 (1949) (implied warranty of title).

65. DICKERSON, *op. cit. supra* note 8, § 2.2; MELICK, THE SALE OF FOOD AND DRINK c. 9 (1936).

66. That the relaxation of the privity of contract requirement is generally limited to food cases is apparent from the fact that states which have extended warranty liability to manufacturers of food have refused to follow this extension in cases dealing with other products. See, e.g., Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954) (insecticide); Paull v. McBride, 273 Mich. 661, 263 N.W. 877 (1935) (kerosene); Cochran v. McDonald, 23 Wash. 2d 348, 161 P.2d 305 (1945) (anti-freeze). See text supported by note 79 *infra* for a discussion of the effect of the Uniform Commercial Code upon warranty liability of manufacturers and wholesalers. See also Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. REV. 551 (1941). In McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954), the relaxation of privity was significantly advanced from human food cases to dog food cases.

breach of implied warranty of quality, on the other hand, only in Kansas has the privity requirement expressly been discarded.⁶⁷ It cannot be clearly determined from the relatively small number of reported cases whether in setting aside the privity requirement the courts have made any distinction between wholesalers and manufacturers, by requiring privity in actions by consumers against the one and discarding it in similar actions against the other.⁶⁸ Thus, it may be that in many of those states where actions for breach of implied warranty by consumers against food manufacturers have been allowed by disregarding the privity requirement, actions by consumers against food wholesalers would be permitted on the same basis.

In Kansas, a series of three cases, beginning in 1933, has placed liability for breach of implied warranty of quality first upon the food wholesaler, and subsequently upon the wholesaler of cosmetics. The earliest case, *Challis v. Hartloff*,⁶⁹ dealt with an action for breach of implied warranty against a retailer and a "broker" for personal injuries occasioned by the presence of arsenic in flour sold to a consumer. The "broker" appeared to be a wholesaler who purchased the flour from a miller and sold it to the retailer. The court found that the "broker" could be found liable for violation of the implied warranty, because when he had sold the flour to the retailer he had intended that it be for the purpose of resale, and he had fully known the effects that deleterious flour might have on consumers' health. Therefore, upon a theory roughly analogous to that of the third-party beneficiary, the implied warranty of the "broker" extended beyond the retailer to the ultimate consumer.

The second Kansas case, *Swengel v. F. & E. Wholesale Grocery Co.*,⁷⁰ was decided in 1938, and dealt with a can of unwholesome sauerkraut juice which the defendant wholesaler had merely handled in the course of distribution; the can had been labeled by, and bore the brand name of, the packer. Holding that there had been a breach of an implied warranty of quality, the court gave judgment for the plaintiff against the defendant wholesaler. In reaching this conclusion, the Kansas court leaped two legal hurdles with apparent ease: first, there was no privity of contract between the parties; second, the product was in a sealed can, impervious to the defendant's inspection efforts.⁷¹ In other jurisdictions, either of these standing alone has

67. See text supported by notes 69-73 *infra*.

68. See, *e.g.*, note 9 *supra*, for the current status of Missouri law.

69. 136 Kan. 823, 18 P.2d 199 (1933).

70. 147 Kan. 555, 77 P.2d 930 (1938).

71. See note 76 *infra*.

been sufficient to relieve the wholesaler from liability.⁷² The court relied heavily upon *Challis v. Hartloff*; it also stressed the possible difficulty of obtaining jurisdiction over the manufacturer, who might be a non-resident, and the possibility of the retailer's insolvency, which, in the court's view of the public interest, justified the result.

The 1954 Kansas decision of *Graham v. Bottenfield's, Inc.*⁷³ went considerably beyond both prior Kansas cases, as it allowed recovery against the distributor of a hair preparation for injury to the consumer where there was no privity. The reasoning of the case parallels that of the *Swengel* decision; however, the fact that not food but a hair preparation was involved represents a considerable extension of the doctrine rejecting the privity requirement. In fact, the *Graham* case has dropped the privity requirement in actions against wholesalers in an area in which it still stands in actions against manufacturers.

Texas, one of the first states to discard the privity requirement in warranty actions by consumers against food manufacturers,⁷⁴ has not yet committed itself as to food wholesalers' liability for breach of implied warranty to the consumer, although the question arose in the 1952 case of *Bowman Biscuit Co. v. Hines*,⁷⁵ where the plaintiff was injured by a wire in a cookie. The consumer's action against the wholesaler was dismissed, not for lack of privity of contract, but because the court concluded that the wholesaler should not be held liable under the "sealed container" doctrine, the manufacturer having packaged the cookies in a sealed container.⁷⁶ Where the goods were in a sealed package, said the court, both the wholesaler and the retailer should be immune to a negligence or breach of implied warranty action based upon a defect in the goods which they could not have discovered by inspection. That the court did not dismiss the action against the wholesaler for lack of privity, however, is an indication that it does

72. See notes 75, 78 *infra*.

73. 176 Kan. 68, 269 P.2d 413 (1954).

74. *Jacob E. Decker & Sons, Inc. v. Capps*, 144 S.W.2d 404 (Tex. Civ. App. 1940).

75. 151 Tex. 370, 251 S.W.2d 153 (1952), 1953 WASH. U.L.Q. 327.

76. The "sealed container" doctrine is said to be an exception to the rule which imposes an implied warranty of quality upon the retailers and wholesalers of food. The development of this doctrine in recent years represents what appears to be the only turning away by the courts from the trend toward the imposition of strict liability upon suppliers of goods. It must be pointed out, however, that to date only a minority of states have adopted the sealed container doctrine. *DICKERSON, op. cit. supra* note 8, § 1.15.

Insofar as wholesalers are concerned, only in those states which have abolished the privity requirement in breach of contract actions has the sealed container doctrine been considered. In Kansas, the doctrine was considered and rejected. *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P.2d 930 (1938). In Texas, where "public policy" has done away with the privity requirement, the sealed container doctrine was adopted by a divided court. *Bowman Biscuit Co. v. Hines*, 151 Tex. 370, 251 S.W.2d 153 (1952), 1953 WASH. U.L.Q. 327.

not consider lack of privity a bar to implied warranty actions against food wholesalers.⁷⁷

In other jurisdictions where actions for breach of implied warranty of quality have been brought by the consumer against the wholesaler, whether of food or of other goods, the lack of privity of contract between the parties has put the plaintiff out of court.⁷⁸

As mentioned above, there is little indication that the wholesaler's liability for breach of implied warranty will be universally expanded in the near future through the complete abolition of the privity of contract requirement. It was hoped that the new Uniform Commercial Code would provide a sweeping solution to the privity problem; instead, the liability of the wholesaler and the manufacturer can be extended under the new code only by judicial legislation, for the code is strictly neutral as to the warranty liability of wholesalers and manufacturers to the ultimate consumer.⁷⁹

In order to escape the strict and often harsh privity requirement, novel approaches have sometimes been suggested, such as making the consumer a third-party beneficiary of the contract between wholesaler and retailer,⁸⁰ or imposing a fictitious agency upon the sale by the retailer to the consumer, so as to make the wholesaler the retailer's principal, and therefore a party to the contract of sale.⁸¹ If the privity requirement is to be set aside, however, a more frank approach to the problem is to be preferred. Such an approach is to be found where the privity requirement has not been deviously avoided, but squarely faced and expressly rejected.

In summation, in the vast majority of jurisdictions the lack of privity of contract stands as a bar to breach of warranty actions by injured consumers against wholesalers. Only in Kansas, where both food wholesalers and cosmetic wholesalers have been found liable for breach of warranty, has the privity requirement been relaxed so as to allow recovery by the consumer.

77. Apparently the Texas court had decided to affirm the judgment against the wholesaler on the basis of the *Decker* case, note 74 *supra*, when the sealed container argument won a majority of the court to the view that the wholesaler is not liable. See 151 Tex. 370, 251 S.W.2d 153 (1952).

78. *De Gouveia v. H.D. Lee Mercantile Co.*, 231 Mo. App. 447, 100 S.W.2d 336 (1936); *Howson v. Foster Beef Co.*, 87 N.H. 200, 177 Atl. 656 (1935); *Cornelius v. B. Filippone & Co.*, 119 N.J.L. 540, 197 Atl. 647 (Sup. Ct. 1938); *Singer v. Zabelin*, 24 N.Y.S.2d 962 (N.Y. City Ct. 1941); *Dobbin v. Pacific Coast Coal Co.*, 25 Wash. 2d 190, 170 P.2d 642 (1946); *Cochran v. McDonald*, 23 Wash. 2d 348, 161 P.2d 305 (1945).

79. UNIFORM COMMERCIAL CODE § 2-318 has extended the warranty liability of the vendor to the immediate family and guests of the vendee, but has not made any vertical extension of liability in the distributive chain.

80. *Amalgamated Packaging Industries, Ltd. v. National Container Corp.*, 14 F.R.D. 194 (S.D.N.Y. 1953); *Jeffery v. Hanson*, 39 Wash. 2d 855, 239 P.2d 346 (1952).

81. *Green v. Equitable Powder Mfg. Co.*, 95 F. Supp. 127 (W.D. Ark. 1951); *Jordan v. Worthington Pump & Mach. Co.*, 73 Ariz. 329, 241 P.2d 433 (1952).

Conclusion

In summation, we have seen that when injured consumers have chosen to seek recovery from the wholesalers of the goods which caused their injury they have customarily brought actions for negligence or for breach of implied warranty of quality. Occasionally, the adoption of relatively novel theories of agency or third-party beneficiary has been urged by consumers in actions against wholesalers, but these actions have rarely been successful.

Negligence actions against wholesalers have been most successful in areas where the consumer has not had to prove an element of culpability in the wholesaler in order to recover, *viz.*, where statutory violation is negligence *per se*, or where the wholesaler may be vicariously liable for the manufacturer's negligence. Where some degree of fault must be shown in the wholesaler, recovery is naturally more difficult, since the wholesaler's function is usually only to handle the goods, thus making it harder for the consumer to demonstrate acts of the wholesaler which have caused the goods to be deleterious.

Actions by consumers against wholesalers for breach of implied warranty of quality have been successful in only one state; in other states, the lack of contractual privity has been held to be a bar to breach of warranty actions by consumers against wholesalers.

From an examination of the judicial trend of the past forty years, insofar as actions against suppliers of goods have been increasingly based upon a strict liability basis, it would seem that eventually all suppliers of goods may find themselves held strictly liable to consumers. This development may come through a relaxation of the privity of contract requirement in breach of warranty actions, or by an extensive increase in the number and scope of statutes designed to protect consumers. This evolution will probably be completed first with food and drugs; strict liability as to other products will lag more or less behind, depending upon the degree of potential harm to the general public inherent in each.

There is no clear moral issue in the question whether wholesalers should be made absolutely liable to consumers for defects in the goods sold. The individual's interest in being held liable only when at fault may be overridden by the public interest in compensating individuals injured by defects in goods which, if perfectly produced, would be wholesome and harmless.

In the final analysis, the issue may be an economic one: where shall the loss ultimately fall? Occasionally, goods which are normally wholesome turn out to be deleterious, to the hurt of some consumer. Should he bear the cost of this injury alone, or should the rest of the consuming public contribute financially to him, in order to render him whole? By imposing liability at levels where the cost may be spread to

the many, a form of social insurance is provided which, in the final accounting, puts upon society as a whole the burden for society's inability to produce non-harmful merchandise, not simply *most* of the time, but *all* of the time.

Viewed in this light, it cannot be said to be an unjust imposition to make the wholesaler absolutely liable to the consumer for the quality of the goods sold. The current position of the courts denying such absolute liability much of the time will not be changed overnight; the gradualness of change within the judicial processes is not unknown. But that the courts will ultimately arrive at such a position seems assured.

T. LAUER