1960

Personal Injury Damages in Products Liability

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IV.

VENDORS’ LIABILITY IN NEGLIGENCE

It has already been observed that doctrines which place increased burdens on manufacturers have been developed in response to strict liability trends and that these developments fit conveniently with better risk-bearer theories which attempt to impose ultimate liability on persons strategically situated to absorb and redistribute losses. The better risk-bearer theory works fairly well in relation to manufacturers who constitute a discrete class of potential defendants who are very generally in a strong financial position. The main reasons for this are that the imposition of liability on a class, being less offensive to democratic notions, is more acceptable to judges, and that, insofar as they do constitute a class, it is possible to reach this result by means of express rules of law and doctrines of universal application, which avoid the necessity for articulating policy grounds for decisions.

It has, however, been argued¹⁸⁶ that this justification for holding all manufacturers liable is too facile in that it fails to discriminate between different types of situations. It is true that the manufacturer-jobber-retailer combination predominates. But, as the writer of the

¹ Lecturer in Law, University of Tasmania. LL.B., University of Melbourne; LL.M., University of Pennsylvania.

¹⁸⁶. Note, 37 Colum. L. Rev. 77 (1937).

(123)
note points out, a large amount of business is done by powerful chain stores — the future given for 1933 was 25% of the total volume of retail business\(^\text{187}\) — and this shows signs of increasing. Another writer puts the 1939 figure at 21.7%, but he equates “chain” with three-or-more units.\(^\text{188}\) Equating a “chain” with 11 or more units, chain stores did 20.64% of the total retail business for the first 11 months of 1957, and 21.58% for the same period of 1958.\(^\text{189}\) If we regard the 3- or 4-or-more unit as representing a chain, the current figure would be closer to 30%; if “voluntary” chain groups are to be included, the figure would approach 40%. Under any definition of chain group, the percentage is substantial. Here the financial position of the manufacturer may be comparatively weak, and the conventional policy arguments for the imposition of ultimate liability on the manufacturer rather than on the retailer may therefore not always hold water. Of course, most contemporary manufacturers, however small, will have products liability insurance. But there are some marginal manufacturers in highly competitive industries who cannot afford the cost of premiums or who have limited insurance coverage and for whom liability may spell insolvency. In these situations it is the retailer, not the manufacturer, who can best bear the cost of liability.

This is merely to delineate the nature of the problem. Perhaps it is due in part to the unwillingness of the bench to articulate the better risk-bearer policy. Assuming, however, that judges are going to continue concealing the policy basis for their decisions, how can the difference in the financial standing of various types of retailers be incorporated into doctrine so as to produce different results on a rational basis?

In the area of negligence, there are various possible avenues by which retailers’ liability may be reached. Certainly the retailer may be liable for positive conduct in relation to the good by which an undue risk of harm is created — such as where he negligently mislabels a prescription or mishandles a beverage in a glass container so as to weaken the container and increase the likelihood of explosion. If the defect has been caused by negligence on his part, he will not have an action over against his supplier. In such a case ultimate liability will rest on his shoulders whether he is in the strongest financial position in the chain of distribution or not. This is not

\(^{187}\) Id. at 79, n.15, citing U.S. BUREAU OF THE CENSUS, RETAIL DISTRIBUTION 25 (U.S. Dept. of Commerce 1935).


\(^{189}\) Computed from figures obtained from U.S. Bureau of the Census, Monthly Trade Report (Nov. 1959).
felt to be unjust, however, for the desirability of discouraging the retailer and other retailers from such negligent conduct is in this situation overriding.

A handy line of thought is suggested by some cases which deal with liability of retailers of refrigerators, washing machines, automobiles and other complicated mechanical products. In answer to the frequent assertion that the retailer in the modern commercial setting merely performs the function of a "conduit," it is properly observed that this, while true of most food products and all other products contained in sealed containers, is not true of the more complicated mechanical articles. Retailers of such articles, it is pointed out, maintain large inspection and pre-sales servicing departments to check on products before letting them out into the community. It is common practice for the manufacturer of automobiles to make specific allocation of an amount roughly representing 5% of the price of each car for the very purpose of compensating the retailer for repairs and other routine checks on the roadworthiness of the car before it is sold. Realistically, the retailer in such a situation is not a mere conduit, and his functions of repairing, servicing and inspection are things for which the consumer is paying. In such cases, it is easy for the court to reach the conclusion that the retailer has "assumed" the duty of inspection and cannot be heard to say that he should not be liable for a defect which reasonable care in inspection would have revealed.

This line of thought will not, however, help solve the problem of differentiating between the chain and the single retailer. Indeed this reasoning tends to cut the other way, for the chain store system is most frequently used for the sale of food — almost half of the volume of business done by the 11-or-more unit chains in the figures given below was represented by food products — and seldom used for the sale of automobiles and electrical goods.

It will later be argued that some retailers owe a minimal duty of inspection to the consumer or others foreseeably affected by his negligent failure to perform this duty. This much at least can be said — the imposition of such a duty will in no way interfere with our arguments for generally imposing ultimate liability on the manufacturer. Of course the retailer can only be held liable for failure to detect defects by reasonable inspection where the defect existed when the product reached him. In such a case he will have an action over against his supplier for breach of warranty, in which, however, the measure of damages may be different.

190. Ibid.
Perhaps the problem of differentiating between the small corner retailer and the chain group can best be solved by way of the warranty action. Normally, the retailer will have an action over against his supplier, and ultimate liability will be imposed on the manufacturer — a generally desirable result. But, by stressing the methods of inspection undertaken by large chain groups, courts may be able to prevent the action over in such cases, so that liability will rest with the retailer. Chain groups, and even “voluntary” chains — formed by individual retailers grouping together for bargaining and freight purposes — are very often in a dominant bargaining position and prescribe to the manufacturer exactly what they want and even the manner of manufacture. Sometimes such chains maintain an inspection department by which statistical samples are taken — a sample number of cans will be opened and inspected — and some even send a representative along to the manufacturer’s factory to inspect for defects as the products are being manufactured or as they are coming off the assembly line. Even if it would be too much of a strain to find an agency relationship in such cases, it is possible to argue that by maintaining such control and by inspecting so rigorously the retailer has precluded himself from complaining of any defects which exist.

Another, though partial, solution may be found in the “trade mark” cases, which impose liability on the distributor who has held himself out as manufacturer or packer, by placing his brand on the product and using national advertising to instill faith in such a brand in the consumer population. Such reasoning may here be useful, for in many instances chain store merchandise is sold under brands belonging to the retailing group. It may be that by utilizing both the “waiver by inspection and control” basis and the trademark-estoppel basis the desired result of differentiating between differences in economic standing of various retailers may be achieved.

Situations where warranty action against vendor would prove inadequate.

Should it be wondered why a tort action is needed against the vendor in view of the considerable protection provided by the warranty action, we will now examine situations in which the warranty action would provide negligible or inadequate protection for the victim of the defective product and in which, therefore, legal doctrine or tactics would dictate the bringing of an action in tort.

191. For this suggestion see 37 Colum. L. Rev. supra note 186 at 85 n.48.
The statutory warranties would not protect the purchaser where:

1. he must rely on the implied warranty of merchantable quality, but the vendor does not regularly deal in goods of that description;\(^\text{192}\)

2. he must rely on the implied warranty of fitness, but
   
   (a) he has used the product for an unusual purpose, and failed to make known to the vendor the particular purpose for which he required the goods,\(^\text{193}\) or
   
   (b) the goods were sold "under" a patent or trade name,\(^\text{194}\) or
   
   (c) in some other way the purchaser has not relied, or at least is unable to show that he did rely, on the skill and judgment of the vendor;\(^\text{195}\)

3. he has examined the goods, or even where he has simply had an opportunity to examine them,\(^\text{196}\) and the defect was one which such examination ought to have revealed";\(^\text{197}\)

4. the contract contains a disclaimer clause by which the vendor has excluded implied warranties.\(^\text{198}\)

In addition, the statutory warranties may not adequately protect the purchaser where remedies for breach of such warranties have been contractually limited, or consequential damages have been sustained by the purchaser where such have been excluded or limited by the contract. And while the difference in the tort and contract measures of damage will rarely be significant in the sale situation, since the courts usually hold that the vendor has notice from the nature of the transaction that damages will exceed the value of the article sold,\(^\text{199}\) there are some situations where it is conceivable that the choice of action would make a difference in this respect, as for example where a person in a high-income bracket sought damages for impairment of earning power. In such situations a delictual action against the vendor would be preferable from the plaintiff's point of view.

\(^{192}\) **Uniform Sales Act** § 15 (2).

\(^{193}\) Id. § 15 (1).

\(^{194}\) Id. § 15 (4).

\(^{195}\) Id. § 15 (1).


\(^{197}\) **Uniform Sales Act** § 15 (3).

\(^{198}\) The possibility of doing this is expressly recognized in section 71 of the Uniform Sales Act.

\(^{199}\) *E.g.*, Ryan v. Progressive Grocery Stores, 225 N.Y. 388, 175 N.E. 105 (1931).
The statutory warranties would not protect the victim, despite the existence of all the foregoing elements necessary to satisfy the statutory requirements, where he cannot satisfy the privity requirement. This may happen where the victim is contemplating purchase but the sale has not yet been completed, where the victim is an employee of the purchaser, or even, according to some strict authorities, where the victim is a member of the purchaser's family, but did not himself purchase the goods.

Situations where action against manufacturer would provide inadequate protection.

We have already seen that legal doctrines provide considerable remedies against the manufacturer and that these doctrines are expanding. For this reason the possibility of a tort action against the vendor will often be an academic question. But this is not always true. Sometimes it will happen that not only will the victim be unprotected by the statutory warranties, for reasons already given, but he will lack any adequate remedy against the manufacturer so that if there

200. Tourte v. Horton, 108 Cal. App. 22, 290 Pac. 919 (1930) (plaintiff forced to sue vendor in tort, because defective washing machine merely supplied to her on trial); Lasky v. Economy Stores, 319 Mass. 224, 65 N.E.2d 365 (1946) (customer in self-service store injured when bottle exploded before payment made at cash-desk; the result follows logically from the contractual analysis that display is only an invitation to treat — cf. Pharmaceutical Society v. Boots, 1953 1 Q.B. 401 — but appears unduly harsh); Santise v. Martins, Inc., 258 App. Div. 663, 17 N.Y.S.2d 741 (1940) (plaintiff injured in trying on pair of shoes with protruding nail — sale not yet completed); cf. Loch v. Confair, 361 Pa. 158, 63 A.2d 24 (1949) facts similar to those in Lasky v. Economy Stores, supra, but court allowed plaintiff to join vendor and manufacturer as defendants on theory that vendor's active negligence may have weakened bottle; it is noteworthy that vendor, a financially strong chain store, was a more desirable defendant than the manufacturer; cf. discussion supra at notes 186-89; cf. also Day v. Grand Union Co., 280 App. Div. 253, 113 N.Y.S.2d 436 (1952).


202. Connor v. Great Atlantic & Pacific Tea Co., 25 F. Supp. 855 (W.D. Mo. 1939) (wife and sister-in-law of purchaser injured by bad meat); Cleary v. First Nat'l Stores, 291 Mass. 172, (1935) (wife of purchaser injured by defective canned cocoa); Brussels v. Grand Union Co., 187 Atl. 582 (N.J. 1936) (son of purchaser injured by defective canned peas). There are many other cases denying recovery to members of the vendee's family collected in Dickerson, Products Liability and the Food Consumer 63 n.1 (1951). Other courts have been more lenient frequently allowing the case to go to the jury on the question of agency, especially where the husband has been injured. See Dickerson, supra at 66 n.5. The Uniform Commercial Code makes the limited amelioration of extending the vendor's warranty to members of the purchaser's family and guests of the purchaser injured by a defect in the product, remaining neutral as to situations beyond these relationships, preferring not to "enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." See, Uniform Commercial Code § 2-318, especially comment 3.
is no possibility of a tort action against the vendor the victim will be without a remedy. This may happen where:

1. the manufacturer is undiscoverable,\(^2\) or inaccessible;
2. the manufacturer is out of the jurisdiction;\(^3\)
3. it is at least possible that the defect was introduced into the product after the product left the hands of the manufacturer,\(^4\)
4. action against the manufacturer is precluded by a statute of limitations;\(^5\)
5. the manufacturer is insolvent.\(^6\)

It should be obvious from this discussion that there are a number of situations where the possibility of a tort action against the vendor will assume considerable practical importance. In some of these situations the absence of such an action will mean that the victim of the defective product is left without a remedy. In others, while a concurrent action may exist against the vendor for breach of warranty, or against the manufacturer in negligence or for breach of warranty, there may nevertheless be tactical or practical financial reasons for preferring to sue the vendor in tort.

There is no doubt, as we have already observed,\(^7\) that a vendor can be held liable for positive acts of negligence, such as negligent compounding, labeling or handling, in relation to the goods. Two writers have joined issue on the question whether the retailer may be

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\(^2\) Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932) (distributor placed his trademark on cans of meat without indicating who the manufacturer was); Walker v. Great Atlantic & Pacific Tea Co., 131 Texas 57, 112 S.W.2d 170 (1938) (can of corn injuring buyer so labeled as to conceal manufacturer's identity; note against judicial readiness to impose liability on powerful chain store; cf. comments supra note 200); Deguevela v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1936) (similar).

\(^3\) Burkhardt v. Armour, supra note 203 (packer and first purchaser in Argentina, distributor in Chicago, retailer in Connecticut). The manufacturer will often stand behind the retailer when the latter is sued in the interest of maintaining good relations with his vendee; where he does not do so voluntarily the "vouching in" letter may offer a solution; cf. Part I, 6 VILL. L. REV. 2-3, notes 5 & 6. This is open, however, to the following comments; (a) the manufacturer may refuse to comply with the suggestion made in the letter, and if he does so refuse, some courts do not regard the matter as having been concluded by the first suit, so that a new suit may have to be commenced; (b) in any case, whether this step is taken or not depends upon the retailer; the plaintiff cannot initiate such a procedure. Some manufacturers have taken advantage of this position by setting up separate wholesale companies in each state (e.g., Goodyear tires). Recent Supreme Court decisions giving a broad interpretation to "minimum contacts" for the purpose of states' jurisdiction over foreign corporations, e.g., McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957), may render such devices ineffective.


\(^6\) Even where the manufacturer is not actually insolvent, he may be in a weaker financial position than the vendor, and it may be preferable to sue the latter. Cf. text accompanying notes 186-189.

\(^7\) Text at notes 189, 190.
sued for mere omission to inspect for defects. Professor Eldredge says that he cannot, relying on the ancient distinction between misfeasance and nonfeasance. But affirmative duties are often, as Eldredge admits, imposed as the price of a benefit, and it is difficult to see why the sale situation cannot be classified as one containing a benefit to the occupier justifying his liability to invitees.

The following position will be taken in this discussion:

1. Professor Farage has the better argument on the authorities, which warrant the conclusion that a vendor may in appropriate cases be held liable for failure to inspect for defects.

2. (a) This duty is of limited scope, normally obliging the vendor to do no more than make a visual inspection for defects; (b) there is, however, no hard and fast rule that the vendor can never be held liable for a defect unless it could have been discovered by ocular inspection.

3. The duty of the vendor to test and inspect for defects is certainly less stringent than the duty of the manufacturer.

4. The existence of certain features, such as the case of detection, the position of the vendor in the commercial structure and the traditional functions he exercises in the particular kind of business, may predispose courts into finding that a duty exists.

There are many authorities which superficially support Eldredge in that they deny recovery to plaintiffs. But Farage has argued convincingly that the basis for these decisions is that defendant complied with his reasonable-care duty of inspection, rather than that he had no duty to inspect. Many of the cases are expressly decided on this basis, and the facts of such cases give us no reason for not


210. Farage, supra note 209.

211. Noble v. Sears-Roebuck & Co., 12 F. Supp. 181 (W.D. Wash. 1935) ("The complaint does not allege as against the seller . . . that such dangerous condition, if any, was known or should have been known to the seller, nor that the seller in any way failed to exercise good faith and fair dealing."); Stone v. Van Noy R.R. News Co., 153 Ky. 240, 244, 154 S.W. 1092, 1094 (1913) ("[T]he uncontradicted facts leave no doubt that plaintiff's injury so far as the News Company is concerned was the result of an accident which ordinary prudence on its part could not have guarded against."); Flaccomio v. Eysink, 129 Md. 367, 374, 100 Atl. 510, 513 (1916) ("[T]here is not the slightest evidence to show that Sonneborn or his agents knew, or by the exercise of reasonable care could have known that it [whiskey] contained wood alcohol."); Giberti v. Barrett Mfg. Co., 266 Mass. 70, 73, 165 N.E. 19, 20 (1929) ("Unless the defendant knew, or ought to have known, that boilers with bottoms soldered but not riveted together were unsafe, it could not be found to be negligent in supplying them."); Barrango v. Hinckley Rendering
taking the courts at their word. There are, it is true, some cases
decided in the plaintiff’s favor, where the court simply says that the
defendant was unaware of the defect.\textsuperscript{212} It is submitted that there is
no justification for drawing special significance from such statements,
as the courts in these cases were simply not adverting to the possibility
of an action for breach of duty to make a reasonable inspection — a
possibility which in the cases in question was probably not argued,
being untenable on the facts.

The strongest affirmative support for the view that the vendor
is under a duty to inspect for defects is provided by the case of
\textit{Ebbert v. Philadelphia Electric Co.},\textsuperscript{213} which was decided by a four
to one majority of the Supreme Court of Pennsylvania and which has
withstood challenge for the last twenty years.\textsuperscript{214} The plaintiff had
purchased an electrically driven washing machine which contained a
wringer equipped with a release bar. The plaintiff was injured when
the release bar failed to operate, leaving her fingers caught between the
rollers of the wringer. In an action brought in negligence and breach
of warranty, the jury returned a verdict in the plaintiff’s favor. This
judgment was affirmed on appeal to the Superior Court. Defendant
appealed further to the supreme court, citing, \textit{inter alia, West v. Emanuel.}\textsuperscript{215} The court distinguished the \textit{West} case as a sealed package
case stating, “While not differing with the trial court and the
Superior Court in basing defendant’s liability on breach of warranty,
we think an equally solid basis for recovery is defendant’s inadequate
performance of the duty of inspection and demonstration.”\textsuperscript{216}

The reliance placed by the lower courts on the express warranty,
which amounted merely to a promise to replace defective parts, seems
untenable, but it should here be noted that the supreme court is not
lending positive support to this basis, but merely saying that it does
“not differ” with this view.

It should also be noted that the same court, with a slight change
in personnel, stated a similar proposition in \textit{Coralknick v. Abbotts
Dairies}.\textsuperscript{217} “The limit of its [defendant's] duty was to provide against

\textsuperscript{212} E.g., Belcher v. Goff Bros., 145 Va. 448, 134 S.E. 588 (1926).
\textsuperscript{213} 330 Pa. 257, 196 Atl. 323 (1938).
\textsuperscript{214} Since it was decided, Ebbert has been cited forty times in various courts
and in no case which cites it has the decision been in any way questioned.
\textsuperscript{215} 198 Pa. 180, 47 Atl. 965 (1900).
\textsuperscript{216} 330 Pa. 257, 268-69, 196 Atl. 323, 329 (1938).
\textsuperscript{217} 337 Pa. 344, 11 A.2d 143 (1940).
Of the more recent cases which support the view that vendor owes a duty to inspect, *Witt Ice & Gas Co. v. Bedway*,219 provides strong support, at least in relation to the sale of used articles. That was an action by a barman to redress injuries sustained when the defective regulator of a beer keg, which had been sold to his employer by the defendant, caused the keg to explode. After quoting from the opinion in the *Ebbert* case, the court stated:

If the regulator were a new one the tests to which it was submitted would doubtless have been adequate to divulge any latent defects, but the jury apparently found that it was not a new regulator and as we have heretofore pointed out there was sufficient evidence to sustain that finding. Inasmuch as it was not a new mechanism and the explosion occurred we think it is self-evident that the tests to which it was subjected were not adequate to bring to light any latent defects. . . . We think it may reasonably be inferred from all the facts that the defect was one which a reasonably prudent dealer should have discovered before placing it upon the market and delivering it to a customer.220

In that part of the opinion relies on the fact that appellant dealt both in new and in used regulators, and had sold the article as new, it might, however, be said that this case is not authority for imposing a duty to inspect on retailers who deal exclusively in new articles.

It is worthwhile to compare the *Witt* case with a recent English case221 dealing with the liability of a used car dealer. The transfer from the defendant to the plaintiff was effected by means of a tripartite hire-purchase arrangement in which a finance company acted as intermediary. The plaintiff sued for damages for injuries resulting from an accident caused by a defect in the steering mechanism, bringing his action in breach of warranty and in negligence. The negligence argument was, of course, that the defendant “knew, or ought to have known” of the defective condition of the steering wheel. Sitting in the Queens Bench Division without a jury, Judge McNair accepted the express warranty argument, but went on to say:

Though this conclusion is sufficient to dispose of this action in the plaintiff’s favor, it is right that I should also state my views upon the second ground of complaint, namely, negligence. In *Herschtal v. Stewart & Arden, Ltd.*,222 Tucker J. held that motor

218. *Id.* at 345, 11 A.2d at 144.
220. *Id.* at 156-57, 231 P.2d at 954-55.
dealers who supplied for the plaintiff's use on hire purchase terms a car which they themselves had repaired, were liable to the plaintiff for personal injuries which he suffered when the near rear wheel of the car came off owing to faulty workmanship on the part of the defendant motor dealer's staff in the reconditioning of the car. . . . Though in Herschtal's case the negligence relied upon was negligence in actually effecting the repair, I see no reason why the motor dealer in the absence of such reasonable anticipation should not equally be held liable if he puts into circulation in the hands of his customer a motor-car which is in fact in a dangerous condition when the defect rendering the condition dangerous consists of a defect which could and ought to have been discovered by reasonable diligence on his part. 223

There are some American cases 224 which contain similar holdings — some even provide extensions in that they allow recovery to injured pedestrians 225 but almost all seem limited to the situation where the dealer has assumed the function of reconditioning the car sold. The recent case of Thrash v. U-Drive-It Co., 226 however, appears to impose liability when the car was not sold as a reconditioned car. In that case plaintiff was injured while riding in a defective truck sold to plaintiff's father by one of the defendants, who had in turn purchased the truck from the second defendant. The plaintiff sued both defendants alleging that the lock on the left front wheel did not fit the rim, and that it was negligent for both defendants to have failed to detect such a defect. The trial court had instructed the jury to return a verdict for both defendants, but the appellate court, while it had affirmed the judgment in relation to the second defendant, had remanded the action against the immediate dealer for a new trial. On further appeal, the court again affirmed the judgment for the second defendant on the basis that an intervening agency had broken the chain of causation and absolved the second defendants from liability. In dealing with the first defendant, however, the court commented that "Although a dealer in used motor vehicles is not an insurer of the vehicles he sells, he is generally under a duty to exercise reasonable care in making an examination thereof to discover defects therein which would make them dangerous to users or to those

223. [1957] 1 Q.B. 229, 236.
224. Egan Chevrolet Co. v. Bruner, 102 F.2d 373 (8th Cir. 1939); Banker v. Packard Motor Co., 297 Ill. App. 645 (1938); Kothe v. Tysdale, 233 Minn. 163, 46 N.W.2d 233 (1951); McClead v. Holt Motor Co., 208 Minn. 473, 294 N.W. 479 (1940); Bock v. Truck & Tractor Inc., 18 Wash. 2d 458, 139 P.2d 706 (1943). The principle expressed in most of these cases is, however, a wider one ignoring the reconditioning factor.
226. 158 Ohio St. 465, 110 N.E.2d 419 (1953).
who might come in contact with them, and upon discovery to correct these defects or at least give warning to the purchaser.\textsuperscript{227}

Of the more recent cases, \textit{Chitty v. Horne-Wilson, Inc.,}\textsuperscript{228} seems to rely strongly upon the express representations of safety, so that it does not support the inspection-duty very strongly, but \textit{Williams v. Oklahoma Tire & Supply Co.,}\textsuperscript{229} while it also contains frequent assurances of safety, does not appear to rely on these in reaching its decision; the court talks of a breach having been committed before any express assurances were made, and it would seem that it would have made no difference in the eyes of the court if the explosion of the stove had occurred immediately after the stove was delivered and before any complaints or assurances were made:

The defendant did not know whether the stove was in a safe condition for use when it was delivered to Redick because, notwithstanding it had been transported in some manner from somewhere to Hot Springs, the defendant did not even casually inspect it to ascertain whether the stove would leak fuel or whether it was in proper alignment or do anything than an ordinarily prudent dealer would have done.

The Redicks had the right to expect the defendant to use ordinary care to inspect and to deliver to them a stove suitable for the purpose for which they were purchasing it. The stove did not function properly and the cause of the mal-function could have been discovered by a reasonable inspection by an ordinarily competent dealer. This duty of inspection was owed by the defendant to the Redicks and it failed to make such inspection notwithstanding instructions from the manufacturer it was usually necessary to make an inspection and test the stove to determine whether or not it had been abused in transportation and whether all parts were in proper alignment. . . . The stove . . . was subject to inspection for such imperfections as might be discovered by the exercise of the care, skill and experience of an ordinarily competent dealer in stoves of that kind.\textsuperscript{230}

It is submitted that these cases, quite apart from the support they derive from a line of New York cases shortly to be discussed, justify the first point in the position taken above, that the vendor may in appropriate cases be held liable for failure to inspect for defects.

Most of the cases alleged to offset the effect of these authorities are concerned with defects which would have been extremely difficult to detect, and appear to be decided on the basis that, conceding a duty

\textsuperscript{227} Id. at 473-74, 110 N.E.2d at 423.
\textsuperscript{228} 92 Ga. App. 716, 89 S.E.2d 816 (1955).
\textsuperscript{229} 85 F. Supp. 260 (W.D. Ark. 1949).
\textsuperscript{230} Id. at 267-68.
of inspection in vendors, that duty was not in the circumstances of
the case breached. Far from militating against the view in the above
collection of cases, these cases lend indirect support to the view that
there is a duty of inspection by their very language. There are very
few cases which directly contradict this view; most of them are old,
and in any event it is doubtful if they do have this effect when properly
construed.

The second point, that the vendor's inspection duty is a narrow
one, is related to the first in that it explains why there are few cases
decided in the plaintiff's favor on this basis.\textsuperscript{231} The narrowness de-

rives partly from the vendor's position in the marketing structure — in
many products, such as food in sealed containers, he is merely a con-
duct and can neither detect the defect by ocular inspection nor test the
contents without rendering the product unsaleable. The application of
the standard of reasonable care to a person in such a situation is not
likely to create a very onerous duty. But even if the defect is one
which is visible or detectable by such simple tests as reasonable pru-
dence would dictate, it may be so obvious that the buyer cannot com-
plain of it. There are few defects which are obvious enough to be
detectable in the exercise of reasonable care by a person in the re-
tailer's position, yet not so obvious that the buyer will be regarded as
having assumed the risk which such defects present. Practically, such
defects will be limited to those which the peculiar position of the
retailer — including his experience or his opportunity to observe
handling the goods — places him in a better position to detect than the
average customer, or those belonging to complicated mechanical in-
struments which may more conveniently be tested by the dealer than
the average customer.

The New York cases, while they recognize the existence of a duty
to inspect, place an arbitrary limitation on such duty, confining it
to "defects which may be found by inspection alone," as distinguished
from dangers so concealed that mechanical tests are needed to disclose
them. This rule,\textsuperscript{232} while it represents the normal limit of the vendor's
obligation, is objectionable when stated as an inflexible limitation.
Furthermore, it would seem to be inconsistent with the factual result
reached in some of the cases which announce it.

\textsuperscript{231} Cf. Dickerson, \textit{Products Liability and the Food Consumer} 70 (1951):
"For the injured consumer, the negligence action against the retailer is small con-
solation. The successful plaintiff is comparatively rare."

\textsuperscript{232} This is referred to by Fleming James Jr. as "a better rule" — preferable,
that is, to the rule which categorically denies any obligation in the vendor to
The first of the New York cases was *Garvey v. Namm*\(^{233}\) in which plaintiff, while washing a flannel wrapper bought from the defendants, sustained injury from a large basting needle contained in the wrapper. The trial court accepted the defendant's evidence that an inspection had been made, but found that such inspection had not been made with ordinary care, having been of the most cursory character. Accordingly judgment was entered for the plaintiff. The Appellate Division of the New York Supreme Court affirmed this judgment, endorsing the view that a vendor is under a duty to inspect for defects. In dealing with two other cases, however, the court drew a distinction which has subsequently been taken to represent a rigid limitation on the vendor's duty to inspect. The distinction is drawn in the following passages:

[Defendant cites] *Bruckel v. Milhau's Sons*, 116 App. Div. 832. In that case, however, the injurious defect in the article sold by the druggist was not one that was patent and visible on mere inspection. It could have been discovered only by a mechanical test of the article. It was held by this court that a druggist selling articles on consignment was not obliged, in the exercise of ordinary care, to undertake mechanical tests to ascertain a latent defect, such as would not have been apparent on ordinary inspection. I think there is a very substantial difference in the facts in both cases.

The defendant further cited the decision of the Supreme Court of Wisconsin in *Hasbrouck v. Armour Co.*, 139 Wis. 357, 121 N.W. 157. In that case the defendant had manufactured toilet soap and placed it on the market for sale. A purchaser and user of one of the cakes of the toilet soap was injured by reason of the fact that there was imbedded in the cake of toilet soap a needle. . . . Its presence in the cake would not have been discovered by any ordinary examination. It was held that the presence of the needle in the cake of toilet soap would not in itself indicate a lack of ordinary care on the part of the defendant in putting the cake of toilet soap on the market for sale. Here, again, there is an obvious difference between the facts. In the case at bar, it would appear that the needle in question was a basting needle, and that it was sticking in an unfinished seam of the garment. If the garment had been examined with ordinary care before it was delivered to the plaintiff, the presence of this needle should have been discovered.\(^{234}\)

The first step in the process of crystallization was taken in *Santise v. Martins, Inc.*,\(^ {235}\) the second of the New York cases to

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234. Id. at 816-17, 121 N.Y. Supp. 443-44.
impose a duty of inspection. There, action was brought by a person who was injured by a nail protruding from the inner sole of a shoe being tried on in the defendant's department store. The Appellate Division of the Supreme Court allowed an appeal by the plaintiff, on the basis of a failure to satisfy the duty of inspection. Referring to Garvey v. Namm, the court indicated its interpretation of the distinction drawn in that case as setting the limits of the vendor's duty: "The extent of that duty is made clear in the opinion. It required the seller to discover defects which may be found by inspection alone, as distinguished from dangers so concealed that mechanical tests are needed to disclose them. Inspection would have revealed the danger here, and the defendant is liable for its omission."

This interpretation is questionable. A more likely reading of the Garvey case is that the court was merely distinguishing cases cited by defendant's counsel, and the observations that the defect in one of those cases could have been discovered only by a mechanical test was made merely to emphasize that reasonable care in that case would not have revealed the defect. It was not meant to erect a categorical distinction. Be that as it may, the obiter limitation stated in the Santise case was acted upon two years later in Heggblom v. Wanamaker, a case concerning the sale by the defendants of a rubber exercising device which broke causing injury to the plaintiff. The plaintiff, not being in privity with the defendants, brought his action in negligence, but was unsuccessful since the defect was not discoverable "by inspection alone."

The third case which follows this line is the recent one of Workstel v. Stern Bros. In that case the plaintiff, having sustained injuries when a bed he had purchased from the defendant collapsed, sued the dealer for breach of warranty and negligence, and the manufacturer in negligence. He succeeded in each claim, but as to the negligence of the vendor the court said:

As to the theory of negligence, the Court is of the opinion that the defective condition of the bed should have been readily discoverable by the defendant Stern Brothers by inspection alone. The defendant affixed the legs to the bed and at such time it could have inspected the bed to ascertain the nature and quality of its construction and whether it could support the weight of a person without collapsing.

238. 3 Misc. 2d 858, 156 N.Y.S.2d 335 (1956).
239. Id. at 860, 156 N.Y.S.2d 337.
In support of this New York rule, it may be that, in light of normal business expectations, the case will be a rare one in which it could be suggested that the vendor in addition to making an ocular inspection ought also to have carried out some tests to determine the soundness of the article. But this merely justifies the framing of a working rule that the reasonable care standard will normally be satisfied by ocular inspection. Is there any justification for making the normal rule an arbitrary limitation on recovery? It is submitted that such an arbitrary limitation represents an unfortunate premature rigidity. While the rule may be satisfactory as a working rule — we see a reasonable application of it in the *Ringstad* case,\(^\text{240}\) where the court rejected the plaintiff's argument that the defendant vendors should have tested the material in a cocktail robe sold to the plaintiff for resistance to flame or heat — but room should be left for allowing recovery for failure to test in an appropriate case. In the *Ringstad* case, the court did not state the proposition as an inflexible rule, but said that "the general rule is that there is no obligation on the retailer to make such a test in the absence of some circumstances suggesting the necessity therefor."\(^\text{241}\)

That reasonable care on the part of the retailer may under some circumstances dictate some kind of testing beyond mere visual inspection of the goods should be clear from an analysis of certain cases already discussed. In the *Andrews* case\(^\text{242}\) the fact that the defect could only have been detected by conducting a test of jacking up the car and pulling on the ball pin did not prevent recovery. Similarly, in the *Ebbert* case\(^\text{243}\) the defect in the release bar of the wringer could not have been observed "by inspection alone." It would have been necessary to operate the machine in order to discover the defect. The same may be said of the *Witt* case.\(^\text{244}\) Indeed, where any complicated mechanical device is concerned — and it is most likely, for reasons to be discussed below,\(^\text{245}\) that these problems will arise in the context of sales of such devices — it is highly improbable that defects will be detectable by simply looking at the article.

But even more significant is the decision on its facts of one of the New York cases, *Workstel v. Stern Bros.*\(^\text{246}\) It is true that the

\(^\text{240.} \) *Ringstad* v. I. Mangin & Co. 39 Wash. 2d 923, 239 P.2d 848 (1952).
\(^\text{241.} \) *Id.* at 926, 239 P.2d at 850. (Emphasis supplied.)
\(^\text{242.} \) See text supra at notes 221-23.
\(^\text{243.} \) See text supra at notes 213-16.
\(^\text{244.} \) See text supra at notes 219-20.
\(^\text{245.} \) It is mainly the importance of the factor of superior competence and experience of the vendor which is most prominent in such cases; see discussion in text, infra at notes 272-77.
\(^\text{246.} \) See text supra at notes 238-39.
court in that case paid lip services to the Garvey-Santise limitation, but how is it possible to "ascertain whether a bed could support the weight of a person without collapsing" by "inspection alone"? Some simple test would surely be necessary.

Let us now compare the vendor's inspection duty with the manufacturer's inspection duty. The manufacturer will not only be liable for negligence in manufacture but will be liable for failure to make a reasonable inspection for defects after manufacture, where the injury-causing defect was discoverable in the exercise of reasonable care. Because we have concluded that the vendor is also under a reasonable-care duty of inspection, it should not be assumed that the duties of the two functionaries are coincident. The criterion of reasonable care is constant, but the application of that criterion to each person will result in duties of different content. This is because their functions and positions in the marketing process differ widely. The manufacturer, being in the business of making such products, will be held at least to the standard of the industry and will be required to keep pace with new developments and increasing knowledge of his processes. The expertise which long experience in manufacturing these items ought to have developed should put him in an excellent position to know what to look for and what tests to make. In addition, it is usually most economical for the manufacturer, rather than the retailer or distributor, to make such tests. He is concerned with large quantities of such products over a long period of time and the initial cost of installing machinery for testing for defects will be spread over many, many items. If the product is to be sold in a sealed container, tests may be made before packaging. It is therefore clear that the manufacturer is in a very strategic position to make such extensive tests of his products. The application of the reasonable care standard to a person in such a position may even require the use of modern testing devices, such as electronic equipment. But when one compares the position of the retailer whose stock in any one item is limited, and who cannot unseal packages without ruining his chances of reselling them, it is obvious that reasonable care as applied to him will place far less onerous inspection demands on him.

Take, for example, the MacPherson case.247 There the defendants were held liable for failure to make an adequate inspection or test of a wheel bought from another and incorporated into a car made by them and ultimately sold to the plaintiff. The degree of inspection

and testing required of an automobile manufacturer was discussed by the Appellate Division:

If the defendant had purchased its wheels unpainted, a wood expert would have been a great assistance in determining the quality of the wood used. If it purchased the wheel painted, some of the paint could have been removed, the wheel could have been weighed, and an expert could have formed some judgment as to the quality of the wood used. There is some evidence of other tests, and it must be there is some way of determining the quality of the wood in such a wheel; if not, it must be negligence to purchase a wheel in such a forward state of construction that it is impossible to determine what it is made of."248

It will be seen that the tests required were quite stringent, and liability was imposed for failure to make such tests. This does not mean that a vendor who failed to undertake such tests would be held liable to the injured consumer. This is made clear in the case of Shroder v. Barron-Dady Motor Co.,249 where the court, despite the fact that it accepted the view that a vendor is under a duty to inspect for defects,250 refused to hold a motor car dealer liable for a defect which was more readily detectable than the defect in the MacPherson case: "We therefore hold that the evidence fails to show any facts out of which there could arise a duty of such unusual inspection as taking off the wheels of this car to determine the kind of grease used on the wheel bearings; that reasonable care under the circumstances shown did not require it; and that plaintiff has failed to show any actionable negligence on the part of the defendant."251

The present point is neatly illustrated in two cases where action was brought against both vendor and manufacturer, in each instance for failure to inspect for defects. In that these cases concede the existence of a duty of inspection in both vendor and manufacturer, yet hold only the manufacturer for breach of such duty, they clearly show that the inspection-duties of each functionary are not identical. In Washburn Storage Co. v. General Motors Corp.,252 plaintiff had alleged that the proximate cause of his injuries was the failure of each defendant to make a reasonable inspection, since a reasonable inspection would have revealed to both the existence of a pitted groove across

248. 160 App. Div. 55, 59, 145 N.Y. Supp. 462 (1914); per Kellogg J.
249. 111 S.W.2d 66 (Mo. 1937).
250. Id. at 71: "It is true, of course, that defendant, receiving new cars from the manufacturer, had some duty of inspection before selling them, and it should be charged with knowledge of what such inspection, as due care required, would disclose."
251. Id. at 72.
the top of the axle, which caused the axle to break and led to plain-tiff's injuries. Dealing with the action against the dealer, the court was of opinion that the petition did not set forth a cause of action: "We are further of the opinion that in such a situation the law does not require a dealer to examine the vehicle to such an extent as to require the dealer to discover such a defect in the axle as the petition alleges." On the other hand the court found no difficulty in holding that a manufacturer is liable for an injury "caused by such a defect as is alleged in the instant petition." Again, in Zesch v. Abrasive Co. of Philadelphia, action was brought against both vendor and manufacturer for negligent failure to make proper tests to ascertain defects. Plaintiff was an employee who used an abrasive cutting off wheel bought by his employers from the second defendants and manufactured by the first defendants. A flaw in the wheel caused the plaintiff personal injuries. Once again, the court differentiated between the inspection-duties of vendor and manufacturer.

Defendant-respondent, Production Tool and Supply Company, a vendor, could not have discovered the flaw by an exterior inspection, or by a test by sounding, and there was nothing shown in the evidence which should have caused a vendor to have realized that the wheel was unsafe for use. Defendant-respondent had no duty, under the facts, to subject the wheel to a rigid inspection or test for a latent flaw. Shroder v. Barron-Dady Motor Co., supra; Vol. II, Restatement of the Law of Torts, Comment a, sec. 402.

Compare the holding in relation to the manufacturer:

... given an article which may contain a latent imperfection making the article reasonably certain to be a thing of danger (though it is carefully manufactured), where it is shown that the imperfection could be disclosed by a test, it would seem reasonable that the manufacturer in the exercise of ordinary care would be under a duty to make the test.

We cannot follow the argument of the defendant-appellant that the plaintiff-respondent's case must fail because there was no evidence that defendant-appellant, or other manufacturers of abrasive wheels, possessed the necessary equipment to perform the test. The necessary equipment for such a test would require no more that the installation of an instrumentality which would operate the wheel at the necessary high rate of speed.

253. Id. at 385. (Emphasis supplied.)
254. Id. at 386.
255. 353 Mo. 558, 183 S.W.2d 140 (1944).
256. Id. at 564.
257. Id. at 567.
Thus the suggestion that the vendor will be liable for breach of a reasonable-care duty of inspection should cause no alarm, for it would not require him to install the expensive testing devices which reasonable care may call for in the case of the manufacturer.

Characteristics affecting duty of inspection.

There has been little sustained treatment of the vendor's inspection-duty. Occasionally, however, the courts have made observations which provide clues as to what facts will determine the existence and extent of this duty. It is submitted that the following will predispose a court to find that a duty exists or that the duty has not been fulfilled:

1. special danger involved;
2. ease of detection;
3. "assumption" of duty, inferred from the maintenance of sales and service departments;
4. the position of the vendor in the marketing structure of such products. This includes: (a) a de facto inquiry into what is normal in such trade, and will be affected by the degree of compilation of the product in question, and the likelihood that a defect may have supervened during shipment from manufacturer and will therefore require attention before it is sold;
   (b) the special competence of the vendor derived from his experience, or
   (c) his special opportunities to detect defects which put him in a position superior to that of the customer in respect of the particular kind of defect being complained of.

Special danger involved.

Professor Fleming James, Jr. has suggested a public policy justification for imposing a duty of inspection in a passage in which he answers Professor Eldredge's objection that such a duty would impose an unreasonable burden on vendors. The retailer, he observes, can generally pass the burden of liability back to his supplier. Moreover he is better situated than the consumer to do this. And if these considerations are sufficient to justify the burden of strict liability within the magically capricious circle of privity, they certainly are enough to call for a high standard of care towards plaintiffs who are outside privity but well within the class of people likely to be hurt by the enterprise by the retailer and maker. In his fear of pinning blame on those who have done nothing morally wrong, Eldredge fails to see the real incidence of
liability in modern setting and that the problem is increasingly one of fair and efficient administration of inevitable losses, rather than moral shortcoming of a nominal defendant.\textsuperscript{258}

Many important doctrines of the law had their genesis in public policy considerations\textsuperscript{259} and it seems fairly clear that such considerations have played their part in creating pressures to impose a duty of inspection on the vendor of defective goods. If this is true, then one should not be surprised to find the duty imposed most readily in situations where defective products constitute an extreme danger. There is perhaps an analogy in the food cases in the warranty field. And, indeed, one does not have to look far in cases which have imposed liability for passages which stress the danger of the defective product, implying that their decision, by reinforcing other legal sanctions, will encourage precautions and conduce to greater safety.

In the important \textit{Ebbert} decision, the court did not hesitate to articulate these views:

The public safety and security against the fatal or injurious consequences of negligence in demonstrating and testing mechanical devices for common public use and in which lurk obvious possibilities of danger is a consideration to which courts cannot be indifferent. An imperative social duty requires the imposition of an inspection-duty.\textsuperscript{260}

These words were quoted in the \textit{Witt} case, which imposes liability on the vendor of second hand articles for failure to detect reasonably discernible defects, at least where the article is represented as being a new one.\textsuperscript{261}

When we turn to the main English case on the subject,\textsuperscript{262} we find a similar emphasis: "Having regard to the extreme peril involved in allowing an old car with a defective mechanism to be used on the road, I have no hesitation in holding that the defendant in the circumstances was guilty of negligence in failing to make the necessary examination, or at least in failing to warn the plaintiff that no such examination had been carried out."\textsuperscript{263}

\textsuperscript{259.} Cf. Part I, 6 Vill. L. Rev. 36-37 (1960).
\textsuperscript{260.} 330 Pa. 257, 198 Atl. 323 (1938).
\textsuperscript{261.} \textit{Supra} notes 219-220.
\textsuperscript{262.} Andrews v. Hopkinson, [1957] 1 Q.B. 229; \textit{supra} notes 221-223.
\textsuperscript{263.} Id. at 237.
Ease of detection.

In the Ebbert case reliance was also placed upon the fact that the defect could easily have been detected. As the court put it, "An imperative social duty requires a vendor of a mechanical device to take at least such easily available precautions as are reasonably likely to prevent serious injury to those who by using such a device may be exposed to dangers arising from its defective construction." 264

Similarly, Judge McNair stressed detection in deciding for the plaintiff in the Andrews case: "On the evidence given before me I am satisfied . . . (4) that this defective condition could have been discovered by any competent mechanic (though probably not by an ordinary owner-driver) without stripping down the steering mechanism, by the simple and recognized method of manually pulling upon the ball pin after jacking up the car for examination." 265

Compare his later words: "There was before me abundant evidence that in the case of an old car such as this the danger spot is the steering mechanism and that this particular defect could have been discovered by a competent mechanic if the car had been jacked up." 266

Assumption of duty.

There is another factor which the court emphasizes in the Ebbert case which may prove useful in imposing liability on vendors whose function is not that of a mere conduit in the marketing chain, but who do in fact exercise and are paid for exercising a function of servicing and inspection. The factor stressed was the assumption of duty which could be spelled out from all the facts of the case.

[The defendant] took upon itself the duty of subjecting the wringer to "inspection and tests" before selling. It is a legitimate inference that the cost of such inspection and test was added to the price of the equipment. Defendant's director of appliance sales testified: "We have service men to take care of appliances, something over 100 of them, but they take care of all appliances, refrigerators, washers and all." We must assume that the work of these service men, i.e. testing and demonstrating appliances is essential work, that their salaries and wages are absorbed in the purchase price and that therefore a purchaser having paid the vendor for these tests and demonstrations, has a right to recover from the vendor for injuries resulting from inadequately tested machines the latter sold. To the question propounded: "Had defendant a duty to inspect the article for

266. Id. at 236-37.
defects?” the answer is: “The defendant assumed this duty and was paid for discharging it. 267

There seems to be involved here some idea of quid pro quo, as well as a notion of reasonable business expectations derived from normal practices. The obverse side of this notion would be represented by such cases as Outwater v. Miller, 268 where it was said that one does not reasonably expect a wholesaler to unpack every package passing through his hands and examine it. And when the court in Ebbert came to discuss the sealed package cases, it observed significantly: “The purchaser in such cases does not expect any such precaution to be taken and relies wholly upon the integrity, good faith and care of the person who put the food in the cans.” 269

Position of retailer — normal practice and nature of article.

This factor is related to the last. Retailers of automobiles, refrigerators, washing machines and other complicated mechanical devices generally maintain service and repair departments to correct defects which may have occurred in transit, and to make realignments and adjustments before the product is finally sent out to be used by the consumer. Under the “assumption” doctrine of the Ebbert case he will in such cases be liable for failure to detect reasonably discernible defects. Perhaps the likelihood of a defect supervening after the product has left the manufacturer is so high even the retailer who did not maintain a servicing and inspection department for such products would be held to be negligent. His function is quite different from the retailer of food and sealed packages. Unlike the latter, he is in many respects in a more strategic position to make checks and adjustments than the manufacturer, since his is the last stage before use. The result then is as it should be. He may find the maintenance of a servicing and inspection department uneconomical, but most manufacturers would refuse to deal with a retailer who refused to establish such a department where complicated products are concerned. And when he complies with the pressure of the manufacturer and normal usage, he will be liable under the Ebbert doctrine for failure to detect reasonably discernible defects. He will probably have an action over against his supplier, who in any case will normally stand behind him for sound business reasons.

In this connection, the federal court's attitude to the dealer who failed to inspect in the *Williams* case should be recalled. The product the court was concerned with in that case was a stove. As the court said:

The defendant did not know whether the stove was in a safe condition for use when it was delivered to Redick because notwithstanding it had been transported in some manner from somewhere to Hot Springs, the defendant did not even casually inspect it to ascertain whether the stove would leak fuel or whether it was in proper alignment or do anything that an ordinarily prudent dealer would have done.

*Position of retailer — special competence and opportunity to discover defects.*

It was pointed out earlier that one of the limiting factors of the vendor's duty is the purchaser's duty to look out for himself; this was one of the points at issue between Professors Farage and Eldredge, the latter maintaining that if the defect was obvious enough for the vendor to have been in a position to detect it, then the purchaser should also have seen it.

Professor Farage's answer, that the duties of the vendor and purchaser to inspect may not be identical, leads us to consider why the duty of the vendor should be more stringent than that of the purchaser. What is there in the situation of sale which justifies holding the vendor liable for failing to detect a defect which the purchaser failed to detect for himself? The 1934 Restatement of Torts provided the answer that the dealer has both superior experience and superior opportunity to enable him to detect defects:

[The vendor] may, however, as dealer, have a special opportunity to know of circumstances, which to his experience as a dealer, would indicate that the goods are likely to have deteriorated, as when he knows that goods, subject to deterioration by lapse of time, have been long kept in stock. If such is the case, he is subject to the same liability as though he knew of their defective character if he does not exercise reasonable care to inform the purchaser of the chance that the goods may have deteriorated. A retail or wholesale vendor may, in the cursory inspection which he gives to the goods while handling them for the purpose of receiving and selling them, or during the periodical taking of stock, have an opportunity to observe indications

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270. *Supra* notes 229-230.
272. See text accompanying notes 232-33 *supra*.
273. See references, note 209 *supra*.
which as a competent dealer in such commodities should cause him to realize that the goods are or are likely to be in a condition dangerous for use. These indications may be so slight that the vendor is not entitled to expect that they will be observed by any inspection which customers make or should make before buying and using goods. Even if the indications are plainly observable by the customer they may be such that, although enough to cause a competent dealer to realize that they make or are likely to make the goods unsafe, they may convey no such intimation to a customer having no special experience with such goods. The rule stated in this Section requires the retail or wholesale dealer to utilize not only the special opportunities which he has to observe the condition of the goods but also the special competence which, he, as a dealer in such goods, should have to realize the dangerous implication of conditions which though observable by the customer are not likely to be appreciated by him.\(^\text{274}\)

The rule which such considerations justified, imposing a limited duty of inspection where the vendor failed to utilize the peculiar opportunity and competence which as a dealer he should have had\(^\text{275}\) finds support in some of the cases. A general discussion is contained in the case of *Shroder v. Barron-Dady Motor Co.*\(^\text{276}\)

> It is true, of course, that defendant, receiving new cars from the manufacturer, has some duty of inspection before selling them, and it should be charged with knowledge of what such inspection, as due care required, would disclose. Defendant, as a dealer in motor cars, and its employees, were familiar with the construction and operation of the cars made by the manufacturer whose products it sold. Its duty as to inspection . . . would no doubt be greater than that of an ordinary retail merchant in the examination of less complicated articles of merchandise. This duty would undoubtedly require them to observe the cars as they received and operated them to see if they did operate properly, to investigate the cause of any unusual condition apparent to them, and also to investigate the condition of and check the operation of parts or appliances, which they might reasonably expect (as a result of their experience and knowledge of these cars) would need attention before being delivered to purchasers.\(^\text{277}\)

\(^{274}\) *Restatement, Torts* § 402, comment (1934).

\(^{275}\) Cf. 65 C.J.S. NEGLIGENCE § 100 c.(2) (b) n.51.

\(^{276}\) 111 S.W.2d 66 (Mo. 1937).

\(^{277}\) *Id.* at 71.
Section 15 of the Uniform Sales Act reads as follows:

Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or sale, except as follows:

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

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

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

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

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

(6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.278

In that Williston's draft represents an almost verbatim transcription of Chalmer's 1893 drafting of the English Sale of Goods Act provision, which in turn represents Chalmer's sedulous endeavour to enshrine the common law position which had developed during the preceding century, there is special justification for undertaking an historical survey.

278. Uniform Sales Act § 15.
History.

(a) early history.

More than 40 years ago, Judge Augustus Hand suggested that consumer protection could more efficiently be achieved by means of administrative control than by private action:

My own feeling is that protection to the public lies not so much in extending the absolute liability of individuals, as in regulating lines of business in which the public has a particular interest in such a way as reasonably to insure its safety. In other words, pure food laws, and rigorous inspection of meats, canning factories, and other sources of food supply, would seem to me a much more effective way of protecting the public than by the imposition of the liability of an insurer upon those who furnish food. The former method corrects the evil at its source. The latter method only imposes an obligation in cases which ex hypothesi cannot be guarded against by the individual by the exercise of due care. It shifts the loss from the person immediately suffering the injury to a person who has neglected no precaution in supplying the food. This certainly is not in accord with the general tendencies of the common law. I am inclined to think that the imposition of such an obligation would tend to lead in the long run to the prosecution of unfounded claims, rather than to the protection of individuals or the public. 279

In saying this, Judge Hand foreshadowed the modern development of many administrative regulations affecting food, drugs and other commodities, but the striking thing about this "modern" development is that it really represents a retrogression to the Middle Ages. Hamilton has shown 280 that the modern paternalist philosophy is not new, but existed in the Middle Ages of England in the form of guilds and other state supervision. In that authoritarian era, merchants were punished for selling sub-standard goods. Various assizes, going back as far as 1256, 281 were policed by "overseers" employed to visit shops and markets to inspect for breaches of regulations. These regulations were preventive rather than remedial and did not inure for the benefit of the individual consumer. Hamilton describes the early position in order to develop his thesis, reflected in the ironic title of the article, that doctrines of caveat emptor were judicial innovations in the nineteenth century.

281. Id. at 1142, n. 34.
In section III of this article the idea was developed that legal doctrines are reflections of the prevailing ideological climate. An excellent example of the close relationship of these phenomena is provided by the development of the law of warranties. When the philosophical climate changed during the eighteenth century to that of laissez faire, the courts were equal to the challenge. But the ethos of the legal profession required that an appearance of continuity be preserved. As Hamilton well puts it: "[The common law] has usually been administered as if it were exclusive, and as if its current interpretation had always prevailed. It has, accordingly, rested its decrees upon reason, natural justice, and enlightened public policy, and has claimed for even its novelties the authority of established precedent."283

As with all sociological developments, the evidence is not all one way and matters are not so clear-cut as some pursuing an academic inquiry would wish. Some judges are in advance of their time, others are conservative and seek to resist current forces. The frontier spirit of the United States tends to preserve individualism and retard more recent developments so that English and American developments cannot always be summed up in one comprehensive statement. Nevertheless the general outlines are clear.

Adam Smith's nascent laissez faire philosophy saw its counterpart in the law in a slowly developing "creed of judicial laissez faire."284 According to this creed, the buyer was a fool if he didn't extract from the vendor an express warranty;285 the requirement of intention to warrant was emphasized; courts were reluctant to read anything into the parties' agreement which had not been expressly stated; and a "sporting view" was taken of dealings — if the seller was sharp enough to induce a sale by vague suggestions, good luck to him.

During the early nineteenth century in England, and the latter part of the nineteenth century in the United States, the philosophical climate began to undergo a gradual change in emphasis which was to culminate in today's paternalist philosophy. This presented a challenge to the judicial technique — the preceding era, in a desire to clothe

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283. Hamilton, supra note 280 at 1163-64.
284. Id. at 1181.
the *caveat emptor* philosophy with the respectability of antiquity, had "protested too much," and frequent assertions that the law had "always been" as stated were somewhat embarrassing for those who would now change it. The way in which nineteenth century judges met this challenge, while it represents commendable technique, was to leave some unfortunate legacies for the present century.

Their method involved a resort to the parties' intentions. They were, they asserted, merely spelling out the parties' intentions, simply articulating what the parties would have said if they had been asked at the time of contracting. They took the entirely defensible semantic position that words have no inherent meaning, but take their meaning from ordinary usage and acceptation. In commercial dealings this meant that a description of goods was to be given content by examining the meaning ordinarily accepted in the trade. Such usage was part of the understanding of the parties.

An important case in early nineteenth century England was *Gardiner v. Gray*, which concerned an executory contract for the sale of "waste silk" to be imported from the continent. The silk actually delivered was found to be much inferior to that in samples previously shown the purchaser. In that there had been no mention of the samples in the sale note, the court was not prepared to treat the transaction as a sale by sample, but this was not the purchaser's only hope. According to the court,

> [T]he purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the *intention of both parties must be taken to be*, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill.287

Some sixty years later one judge was still insisting that all courts were doing in imposing implied warranties of quality was filling out the agreement of the parties. As Justice Brett put it in *Randall v. Newson*,

> In all [cases] it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the *article offered or delivered shall answer the description of it contained in the*

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287. Id. at 145, 171 Eng. Rep. 47. (Emphasis added.)
That rule comprises all the others. . . . The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out.

The consensual theory, however, was proving to be just the thin edge of the wedge as courts began to implement the nascent policy of protecting consumers by pouring new content in to the words “merchantable quality.” Despite the early insistence in *Gardiner v. Gray*, that the purchaser “cannot without a warranty insist that the [article] shall be of any particular quality or fineness,” the warranty of merchantable quality was beginning to import some concept of a minimum objective standard. Originally thought of simply as a standard of customary usage, the warranty of merchantable quality came to require successively that the goods should be of such a quality as to pass without objection in the trade under the description used in the contract, that they should be suitable for the primary purposes for which such goods are used, and that they should be free from defects.

Another landmark case, decided in 1829, is *Jones v. Bright*. In that case the defendants, who manufactured copper, agreed to supply the plaintiff with copper for the purpose of sheathing his ship. When the copper supplied corroded after an unusually short time, the plaintiff sued his supplier for breach of implied warranty. The development of the law in the fourteen years which had elapsed since *Gardiner v. Gray* is reflected in the statement of the court: “The law, then, resolves itself into this; — that if a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose.”

It is important to note that the decision for the plaintiff was influenced in some measure by the prevailing commercial milieu in which the manufacturer was frequently also vendor. In such a case it was easier to import a requirement of compliance with some minimum standard, since it was felt that the vendor was probably at fault in his capacity of manufacturer in having let the defect into the goods.

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288. These are the court’s italics.
289. [1877] 2 Q.B.D. 102, 109. (Emphasis added.)
291. Prosser has discussed at length the various meanings of the phrase “merchantable quality” in his article, *The Implied Warranty of Merchantable Quality*, 27 Minn. L. Rev. 117 (1943); the Uniform Commercial Code spells these out in section 2-314(2) (a)-(f).
292. 5 Bing. 533, 130 Eng. Rep. 1167 (C.P. 1829).
293. 4 Camp. 144, 171 Eng. Rep. 46 (K.B. 1815).
294. 5 Bing. 533, 546, 130 Eng. Rep. 1167, 1173 (C.P. 1829).
Express mention of this factor was made in Jones v. Bright: "[B]y providing proper materials, a merchant may guard against defects in manufactured articles; as he who manufactures copper may, by due care, prevent the introduction of too much oxygen." 295

It seems fair to say that the court felt easier about imposing liability on the vendor in that the vendor had probably been negligent in manufacture anyway. Many earlier American decisions refused to impose liability on sellers who were not also manufacturers. 298 Indeed it was felt necessary to remove any doubt that may have lingered even in 1907 by using express words in the Uniform Sales Act, viz., both warranties apply "whether [the seller] be the grower or manufacturer or not."

Operation of the warranty provisions today.

At the outset of this article 297 the relative merits of legislation and judicial development as methods of protecting injured consumers were discussed, and one of the reasons assigned for preferring the latter was the thought that legislation is relatively less flexible and less sensitive to the quickly changing social mores involved in this subject. It is submitted that the proof of the pudding is provided by the inadequacy of the Sale of Goods legislation in today's setting. Here we have an 1893 codification of 19th century sales law which was still, at that stage, in transition, designed to suit a different age, and a statement which has as its basic premise a proposition of caveat emptor, 298 being strained to suit an age which has a different commercial structure and different ideas as to the relative worth of security and freedom of enterprise. When it operates effectively, it does so only at the expense of normal and sensible canons of interpretations.

In the first place, it is clear that the earlier cases 299 were concerned with mercantile losses rather than the problem of accident compensation

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295. Id. at 544, 130 Eng. Rep. at 1172 (C.P. 1829); cf. Bierman v. City Mills Co., 151 N.Y. 482, 487, 45 N.E. 856, 857 (1897) (also action against a manufacturer-vendor; "[T]he defects resulted from improper processes of manufacture.").
296. 1 WILLOWTON, SALES § 233 (rev. ed. 1948); cf. Prosser, supra 291 at 146-47.
298. UNIFORM SALES ACT § 15: "Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows...".
for personal injuries; the rules they developed were appropriate for actions between dealers who were suing for the difference in value between the sub-standard goods which had actually been delivered and those which the contract, interpreted in the light of normal commercial usage, required. They are not appropriate for the modern problem which mass-production creates of compensating the consumer for injuries caused by some defect in the goods. No better example of this ineptness could be provided than the case of Henry v. Rudge & Guenzel Co., where plaintiff sought damages for severe personal injuries caused by a defective heel in shoes which she had purchased from the defendant. Unfortunately for the plaintiff, however, she had complained to the defendants and accepted a new pair of shoes. This the court regarded as effective rescission which, according to the court's construction of section 69(1) of the Uniform Sales Act as an exhaustive and mutually exclusive list of remedies, precluded a subsequent action for damages: "Having rescinded the contract, plaintiff has no right of action for damages for breach of the warranty. She cannot rescind and claim damages for breach of the warranty." Another example of this ineptness is provided by the practice of many large retailers of using a statement of minimal express warranties (usually repair and replacement of parts circumscribed by other requirements) and a statement that the written agreement is to constitute the sum total of the parties' understanding, in combination

sell "scarlet cuttings" evidence of mercantile usage, and accepted meaning of scarlet cuttings in the trade; the court also showed concern at the possible effect the result of the goods delivered would have on plaintiff-trader's commercial reputation. 300. Cf. Prosser, supra note 291 at 128, n.61; cf. also Comment, 32 Texas L. Rev. 557, 566 (1954); "Historically, implied warranties were dealer's remedies, and only later was protection extended to consumers"; the early meaning of merchantable quality as such as would pass in the trade under that description (see Prosser, supra note 291) shows that the courts were then more concerned with mercantile losses. Cf. A Note on the Civil Remedies of Injured Consumers, 1 Law & Contemp. Prob. 67, 70 (1933). 301. 118 Neb. 260, 224 N.W. 294 (1929). 302. Id. at 264, 224 N.W. at 296 (1929); section 69 (1) of the Uniform Sales Act reads: "(1) Where there is a breach of warranty by the seller, the buyer may, at his election:

(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;
(b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.
(c) Refuse to accept the goods, if the property has not passed, and maintain an action against the seller for damages for the breach of warranty;
(d) Rescind the contract to sell or the sale and refuse to receive the goods or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid."

In Russo v. Hochschild Kohn & Co., 184 Md. 462, 41 A.2d 600 (1945), the court reached the opposite result to that reached in the Henry case, by emphasizing section 70: "Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."
with the parol evidence rule, in order to withdraw from purchasers' rights which would otherwise exist, while at the same time creating an appearance of generosity. In fact, the whole of the Uniform Sales Act, with its talk of conformity to sample, passing of property, negotiable documents of title, instalment delivery, liens and rescission, and its "normal rule" for damages in Section 69(7), is geared to the problem of mercantile losses, with which the cases in the nineteenth century were mainly concerned. Professor James has said:

Where injuries are caused by dangerous products, the principal source of strict liability is the law of warranty, which did not develop primarily, if at all, as an attempt to solve the problem of accidental injuries. Rather, it grew as a branch of the law of commercial transactions and was primarily aimed at controlling the commercial aspects of these transactions. The shape it took and the limitations put on it were dictated mainly by considerations pertinent to the commercial relationship between buyer and seller, and are not necessarily rational attributes of the strict liability approach to the accident problem, to which the law of warranty was extended collaterally. 303

It was only in the third decade of this century when the accident problem began to loom large that courts were led to give an extended meaning to the phrase "merchantable quality," saying that it was not enough that goods would pass in the first instance on their appearance, with all defects concealed; they must be marketable with their true character known. "Merchantable does not mean that the thing is saleable in the market simply because it looks all right; it is not merchantable in that event if it has defects unfitting it for its only proper use but not apparent on ordinary examination." 304

We have already seen how in the early development of the law of implied warranties the judges justified their position by insisting that they were simply spelling out what the parties had actually agreed to, but had not bothered to write out in full. Later, during this


305. See text accompanying notes 284-289, and notes 287-289 supra; this technique was, of course, necessary to overcome earlier caveat emptor authority.
century, the courts were able to recognize "implied" warranties for what they were — obligations imposed upon vendors as a matter of public policy, independent of any intention to agree upon their terms as a matter of fact — but the damage had already been done. The consensual theory had dictated, as a logical corollary, the proposition that implied warranties could be contractually excluded by the parties.

The judges, insofar as it lies within their power, have given the provisions of the Uniform Sales Act an indulgent interpretation so as to adapt them to modern needs. They have readily inferred a communication of the buyer's purpose, taking the view that where a product causes injury because it is not fit for one of the ordinary purposes for which such goods are used, the buyer should not be required to show that he told the dealer of his purpose. They have with equal readiness inferred the buyer's reliance on the seller's skill or judgment, saying that such an inference can normally be shown from the fact that the buyer has chosen the seller's place of business in the confidence that the latter has selected his stock with skill and judgment. They have construed the words "by description" almost to the point of meaninglessness, holding that this requirement is even satisfied in the case of a sale from an automatic vending machine. They have poured new content into the words "merchantable..."
quality," and they have been liberal on the question of damages. They have given such an interpretation to the patent or trade name proviso that it can never cut down the warranty-creating provison on which it is supposed to operate. Finally they have leaned over backward to prevent disclaimer clauses from having the effect intended.

These decisions may be functionally commendable, but as an exercise in the literal interpretation of statutes they are absurd. They do nothing to foster public esteem for the law. Moreover they represent the absolute limits within which judges may operate in construing language. They still leave considerable gaps.

One such gap is the requirement of privity, which in this context produces great hardship. As Professor James has so well expressed it:

Perhaps such a limitation corresponds to the reasonable expectations of commercial buyers and sellers when they are concerned with trade losses. But where commodities are dangerous to life and health, society's interest transcends that of protecting reasonable business expectations. It extends to minimizing the danger to consumers and putting the burden of their losses on those who best can minimize the danger and distribute equitably the losses that do occur. And since the warranties involved in these cases do not represent the expressed or implied-in-fact intent of bargainers, but are warranties imposed by law as vehicles of social policy, the courts should extend them as far as the relevant social policy requires.

In similar vein Professor James has discussed the reliance requirement in today's setting:

An insistence on reliance is natural enough in shaping a remedy for trade losses in commercial transactions. A cardinal

311. See text accompanying notes 291, 304 supra.
313. Cf. Llewellyn, On Warranty of Quality, and Society, 37 Colum. L. Rev. 341, 363 (1937): "[Rabel] had thought we would not have section 15 (4) unless we had meant by it something which needed saying."; and cf. Hudson, Book Review, ATIVAR, SALE OF GOODS (1957), 22 Modern L. Rev. 109, 110 (1959): "[T]he interpretation placed on this provision in Baldry v. Marshall [1925] 1 K.B. 260 has in effect already reduced it to uselessness for, as explained by Bankes, L.J., at 266-67, it is only to operate when the buyer places no reliance on the skill and judgment of the seller by expressly requesting goods under a trade name — a case which would seem in any case not to fall within the main provisions of the subsection and to require no proviso."
314. The examples of this are legion. Perhaps the best is Bekkevold v. Potts, 173 Minn. 87, 216 N.W. 790 (1927), where the contract of sale contained a provision that "No warranties have been made in reference to the said motor vehicle by the seller to the buyer unless expressly written hereon," and no warranty had been written on the contract. The court nonetheless held that the implied warranty, being a "child of the law" was not excluded. The English courts have revealed a public policy rather than a consensual attitude to implied warranties in their construction of disclaimer clauses which mention "warranties" but fail to refer to "conditions"; see, e.g., Wallis v. Pratt, [1911] A.C. 394.
aim of contract and commercial law is to assure a man of the fulfillment of reasonable expectations induced by the apparently promissory conduct of another. In such a context, questions of reliance come very near to the heart of the matter. Expectations are born of reliance. Moreover, in an age of individualism it is natural that the buyer's opportunities for effective self-reliance might still defeat his recoveries against the seller.

In the field of physical injuries, on the other hand, strict liability is imposed upon an actor because his conduct involves the likelihood of physical harm and it is felt that requiring him to bear the cost of the casualties of his enterprise is just and expedient. In this context, reliance plays a much less significant role. Tort liability is imposed daily in a vast number of cases wherein reliance plays no part at all. The owner of a truck 'does not invite the public to use the roads in reliance on the care and skill of his' driver, yet he will be strictly accountable for his driver's defaults. Nor does a landowner invite people to acquire or retain land near his in reliance on his ability to confine dangerous substances or animals within his borders.

The rules of the Sales Act represent the law of an age which protected industry with doctrines such as that of common employment and lacked any scheme of compensation for injured workmen such as we have today. Such rules operate capriciously in the context of actions for compensation for personal injuries. It is difficult to avoid the conclusion that these rules are long overdue for an overhaul.

316. The quotation is from Baty, Vicarious Liability 11 (1916).
317. James, supra note 315 at 201-02.