

# RETAILER AND MANUFACTURER LIABILITY IN GERMANY AND THE UNITED STATES FOR PERSONAL INJURY FROM DEFECTIVE PRODUCTS

## HYPOTHETICAL CASE

Consumer *A* selected and bought at a retail store operated by Retailer *B* a wooden stepladder manufactured by Manufacturer *C*. When *A*, a man of 180 pounds, later mounted the ladder to hang a picture on the wall in his house, the ladder collapsed because of a defect in the wood which was not observable by mere visual inspection. *A* suffered grave bodily injuries amounting to \$1000 in medical costs alone. Disregarding other elements of damages, can *A* recover \$1000 from either *B* or *C*?

## LIABILITY UNDER GERMAN LAW\*

### CONSUMER V. RETAILER

1) (a) Consumer *A* and Retailer *B* concluded a contract for the sale of a stepladder. The buyer's relief will, therefore, primarily sound in contract. If the thing sold is defective, the seller is liable as against the buyer for breach of warranty regardless of fault on his part. Sections 459, 462, and 463 of the German Civil Code<sup>1</sup> afford the buyer three alternative remedies: (1) rescission of the contract; (2) diminution of the price; and (3) damages for breach of contract. None of these

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<sup>1</sup> GERMAN CIVIL CODE § 459 (Chung Hui Wang transl. 1907) [hereinafter G.C.C.]—"The seller of a thing warrants the purchaser that, at the time when the risk passes to the purchaser, it is free from defects which diminish or destroy its value or fitness for its ordinary use or the use presupposed in the contract. An insignificant diminution in value or fitness is not taken into consideration.

"The seller also warrants that, at the time the risk passes, the thing has the promised qualities."

G.C.C. § 462—"On account of a defect for which the seller is responsible under the provisions of 459, 460, the purchaser may demand annulment of the sale (i.e., cancellation), or reduction of the purchase price (i.e., reduction)."

G.C.C. § 463—"If a promised quality in the thing sold was absent at the time of the purchase, the purchaser may demand compensation for non-performance, instead of cancellation or reduction. The same rule applies if the seller has fraudulently concealed a defect."

remedies, however, gives the buyer more than compensation for the direct and immediate consequences of the non-performance of the contract; none of them provides for recovery of damages suffered indirectly due to the defects of the thing sold.<sup>2</sup> *A*'s remedies for breach of warranty against *B* would, therefore, entitle him to rescind the contract of sale and recover his purchase price, or to demand delivery of a new stepladder, or to keep the ladder and recover part of his purchase price. He would not be able to recover damages for his personal injuries, however.

(*b*) If the seller was negligent in selling the defective ladder, the consumer might have a further contractual claim against the retailer. Basically the German Civil Code has regulated the liability for non-performance of contracts under two headings only: impossibility and non-delivery. Both Sections 280, 286,<sup>3</sup> which apply to unilateral obligations, and Sections 325, 326,<sup>4</sup> applying to mutual obligations, afford

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<sup>2</sup> See the decision of the German Supreme Court of November 13, 1940, [1941] *Deutsches Recht* 637, 638.

<sup>3</sup> G.C.C. § 280—"Where the performance becomes impossible in consequence of a circumstance for which the debtor is responsible, the debtor shall compensate the creditor for any damage arising from the non-performance.

"In case of partial impossibility the creditor may, by declining the still possible part of the performance, demand compensation for non-performance of the entire obligation, if he has no interest in the partial performance. . . ."

G.C.C. § 286—"The debtor shall compensate the creditor for any damage arising from his default.

"If the creditor has no interest in the performance in consequence of the default, he may, by refusing the performance, demand compensation for non-performance. . . ."

<sup>4</sup> G.C.C. § 325—"If the performance due from one party under a mutual contract becomes impossible in consequence of a circumstance for which he is responsible, the other party may demand compensation for non-performance, or rescind the contract. In case of partial impossibility, if he has no interest in the partial performance of the contract, he is entitled, subject to the conditions specified in 280, par. 2, to demand compensation for non-performance of the entire obligation, or to rescind the entire contract. . . ."

"The same rule applies in the case provided for by 283, if the performance is not effected before the expiration of the period, or if at that time it is in part not effected."

G.C.C. § 326—"If, in the case of a mutual contract, one party is in default in respect of the performance due from him, the other party may allot him a fixed reasonable period for performing his part with a declaration that he will decline the performance after the expiration of the period. After the expiration of the period he is entitled to demand compensation for non-performance, or to rescind the contract, if the performance has not been effected in due time; the claim for performance is barred. If the performance is in part not effected before the expiration of the period, the provision of 325, par. 1, sentence 2, applies *mutatis mutandis*.

"If, in consequence of the default, the performance of the contract is of no use to

the party injured an action for damages in such cases. Relief here, however, is predicated upon some fault on the part of the non-performing party. The fault can be either intentional or negligent, a negligent person being defined by Section 276<sup>5</sup> as one "who does not exercise ordinary care." Under this theory, the damages recoverable cover not only losses incurred out of the transaction itself, but those arising indirectly.

The phrases "impossibility" and "non-delivery" fail to cover the innumerable fact situations in which the violation of contractual obligations through the fault of one party causes damage to the other party. In order to afford an equitable solution of the cases not specifically provided for in the Code, constant usage as evidenced by judicial decisions has created the so-called *positive violation of contract (culpa in contrahendo)* theory as a new ground for recovery of damages sounding in contract.<sup>6</sup> This doctrine, which applies wherever one party to a contract culpably has violated its contractual obligations other than by non-delivery or self-incurred impossibility of performance, is based on the general principle of liability for fault underlying German contract law and evidenced, for instance, by such provisions as Sections 280, 286, 325, and 326 of the Civil Code.<sup>7</sup>

The retailer's liability on this ground would be contingent upon his fault. Since *B* was unaware of the defect in the ladder, this fault cannot be intentional. Was *B*, then, negligent? As defined by Section 276<sup>8</sup> of the Civil Code, the standard of due care has to be determined from case to case in accordance with general custom as regards the type of transaction at hand. In the present case, the seller cannot reasonably be expected to subject all the ladders offered for sale by him to a thorough investigation for concealed flaws. Therefore, he did not act negligently. Consequently, as there was no fault on the part of the re-

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the other party, such other party has the rights specified in par. 1 without the fixing of a period being necessary."

<sup>5</sup> G.C.C. § 276—"A debtor is responsible, unless it is otherwise provided, for wilful default and negligence. A person who does not exercise ordinary care acts negligently. . . ."

"A debtor may not be released beforehand from responsibility for wilful default."

<sup>6</sup> See the following decisions of the German Supreme Court: 54 Entscheidungen des Reichsgerichts in Zivilsachen [hereinafter R.G.Z.] 98; 100-103 (1903); 106 R.G.Z. 22, 24-26 (1922); 149 R.G.Z. 401, 403-404 (1935); 11 Entscheidungen des Bundesgerichtshofes in Zivilsachen [hereinafter B.G.H.Z.] 80, 83-84 (1953).

<sup>7</sup> See *supra* notes 3 and 4. And see the judgment of the German Supreme Court of November 13, 1953, 11 B.G.H.Z. 80, 83.

<sup>8</sup> See *supra* note 5.

tailer, the consumer cannot recover damages from him on the basis of positive violation of contractual obligations.

2) While Consumer *A* is thus unable to recover damages sounding in contract for his bodily injuries, he might seek to recover damages sounding in tort. Section 823<sup>9</sup> of the Civil Code provides that one who intentionally or negligently and unlawfully injures the body or the health of another is liable to the person injured for the harm caused thereby. Since the general standard of due care, as defined by Section 276, applies to the whole law of obligations the retailer would only be liable under this section if he disregarded the degree of diligence customary in such cases. As has been discussed above, this is not the case. Therefore, Consumer *A* does not have a delictual claim against Retailer *B*.

#### CONSUMER V. MANUFACTURER

The question now arises whether the consumer can claim damages from the manufacturer of the ladder. German law generally predicates liability for non-performance of a contract—barring contracts for the benefit of third parties—upon the existence of a direct contractual relationship between the person responsible and the person injured.<sup>10</sup> However, if one party to a contract employs an agent in the fulfillment of his contractual obligations, he becomes liable for the fault of such agent.<sup>11</sup>

When the damages inflicted by such agents are incurred by third parties with respect to whom the principal is under no contractual obligation, the latter's liability for the fault of his agents is regulated by Section 831,<sup>12</sup> in accordance with which the principal is liable only if he has acted negligently in the selection and employment of such agents.

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<sup>9</sup> G.C.C. § 823—"A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or any other right of another is bound to compensate him for any damage arising therefrom.

"A person who infringes a statutory provision intended for the protection of others incurs the same obligation. If, according to the purview of the statute, infringement is possible even without any fault on the part of the wrong-doer, the duty to make compensation arises only if some fault can be imputed to him."

<sup>10</sup> See the decision of the German Supreme Court of May 9, 1939, 160 R.G.Z. 310, 314-315.

<sup>11</sup> G.C.C. § 278 provides: "A debtor is responsible for the fault of his statutory agent, and of persons whom he employs in fulfilling his obligation, to same extent as for his own fault. The provision of 276, par. 2, does not apply."

<sup>12</sup> G.C.C. § 831—"A person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of his work. The duty to compensate does not arise if the employer has exercised ordinary care in the selection of the employee, and, where he has to supply appliances or implements or to superintend the work, has also exercised ordinary care

1) While we may assume that the agent of Manufacturer *C* who was responsible for the construction of the ladder has acted negligently, Consumer *A* will most probably not be able to recover against *C* on the basis of Section 831,<sup>13</sup> since *C* undoubtedly will be able to show that he acted with due care and diligence in selecting his agent.

2) The absolute liability for the fault of agents, as stipulated by Section 278<sup>14</sup> does not apply as against *A*, since there is no contractual connection between *A* and *C*. Consequently, *A* will not be able to recover as against *C* under this Code provision.

3) There seem to be substantial grounds for criticism of such an outcome, based as it is on the strict letter of the law. The absence of a contractual nexus between producer and seller combines with the possibility of exculpation for acts of agents not engaged in the fulfillment of contractual obligations<sup>15</sup> to enable the manufacturer to escape liability. Some legal authors have shown an increasing tendency to assume a quasi-contractual tie between manufacturer and consumer which would exclude the possibility of exculpation, a result they consider socially unjustifiable. These authorities generally start with the assumption that the manufacturer owes a general quasi-contractual obligation to the public at large to furnish goods without "dangerous" defects, and postulate that the breach of such quasi-contractual obligation gives rise to a cause of action of the injured consumer against the manufacturer.<sup>16</sup>

Professor Such, for instance, submits that cases like the present, expressly mentioned by him, should be dealt with by assuming an actionable duty of the manufacturer in favor of the consumer to furnish goods without defects. Since modern industrial producers, in planning their manufacturing activities, generally also strive to predetermine the outlets and the means of distribution of their end products (*e.g.*, vertical price maintenance), there is, he urges, in reality a direct "chain of sale" between producer and consumer. He proposes to classify this chain of sale as a quasi-contractual nexus excluding the applicability of the exculpatory provision of Section 831.<sup>17</sup>

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as regards such supply or superintendence, or if the damage would have arisen, notwithstanding the exercise of such care.

"The same responsibility attaches to a person who, by contract with the employer, undertakes to take charge of any of the affairs specified in par. 1, sentence 2."

<sup>13</sup> See *supra* note 12.

<sup>14</sup> See *supra* note 11.

<sup>15</sup> See G.C.C. § 831, *supra* note 12.

<sup>16</sup> This line of thinking has been expressed with great lucidity by Heinz Such, *WIRTSCHAFTSPLANUNG UND SACHMÄNGELHAFTUNG* 103ff (1948).

<sup>17</sup> See *supra* note 12.

While Such's argument appears to be both cogent and impressive, it can hardly be overlooked that the virtual elimination of Section 831 proposed by him would run counter to the letter and spirit of the law currently in force. It may be that the future will bring a factual amendment of the Civil Code by judicial legislation along the course outlined by him or that Parliament will enact the occasionally-discussed amendment of Section 831. Until then, however, it is relatively safe to assume that he has merely made an eloquent plea for a change of the law, and not a statement of the *lex lata*.

#### CONSUMER V. MANUFACTURER VIA RETAILER

As between retailer and manufacturer, there originally must have been a contract for the sale of the ladder in question. Manufacturer *C* presumably employed one or more agents in the fulfillment of this contractual obligation, e.g., the fabrication of the ladder. As regards Retailer *B*, *C* is liable for all fault of his agents in the construction of the ladder, as due to the contractual relationship existing between *B* and *C*. *C*'s liability here is predicated upon Section 278<sup>18</sup> and not 831.<sup>19</sup> While the factual question whether an agent of *C* actually did act negligently in the construction of the ladder would yet have to be determined, it will be assumed for the purpose of this note that one of *C*'s agents was, in fact, negligent.

Retailer *B*, therefore, would be entitled to compensation from Manufacturer *C* for the damages suffered by him through the negligence of *C*'s agent. However, in this case, it was the consumer, not the seller, who suffered such damage. This is a fact situation falling within the so-called "shifting of damages" theory. The common characteristic of such cases is that the damage normally suffered by the person legally entitled to compensation is suffered by a third party who, on principle, is not so entitled. It would be most unjust if in such cases the person responsible—here the manufacturer—were to escape all liability, and if the person injured were to obtain no reparation. For this reason, legal authors, and, in principle, some courts have held that as an exception from the general rule that every person can recover damages only for such injuries as he himself has suffered, the uninjured party to the contract is entitled in such cases to demand from the negligent party

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<sup>18</sup> See *supra* note 11.

<sup>19</sup> See *supra* note 12.

indemnity for the injuries suffered by a third person who is not a party to the contract.<sup>20</sup>

This so-called liquidation of damages for the benefit of third parties can be effectuated either by Consumer *A* directly, in which case he will have to obtain an assignment of Retailer *B*'s claim against Manufacturer *C* prior to instituting action against the latter, or by *B* on behalf of *A*, in which case *B* will be liable to turn over the compensation recovered to *A*. Section 281<sup>21</sup> of the Civil Code affords *A* the possibility of compelling *B* to execute such an assignment if he does not choose to institute the action himself. Thus, *A* acquires either a direct, or through *B*, an indirect claim for damages as against *C* for positive violation of contract obligations. Compensation for damages is generally regulated by Section 249, following, of the Civil Code. In accordance with Section 249,<sup>22</sup> the person injured can demand reparation in the form of pecuniary damages instead of specific relief. Since liability for violation of contract obligations covers, as indicated above, all damage suffered by the other party, *C* will have to compensate *A* fully for his bodily injuries.

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<sup>20</sup> See generally LARENZ, *LEHRBUCH DES SCHULDRECHTS* 134-136 (2d ed. 1957); TÄGERT, *DIE GELTENDMACHUNG DES DRITTSCHADENS* 50-53 (1938); German Supreme Court, November 23, 1954, 15 B.G.H.Z. 224, 227-228; District Court (Landgericht) Lüneburg, February 24, 1955 [1955] *Monatsschrift für Deutsches Recht* 355. A case directly in point has apparently not been reported.

<sup>21</sup> G.C.C. § 281—"If, in consequence of the circumstance which makes the performance impossible, the debtor acquires a substitute or a claim for compensation for the object owed, the creditor may demand delivery of the substitute received or assignment of the claim for compensation.

"If the creditor has a claim for compensation on account of non-performance, the compensation to be made to him is diminished, if he exercises the right specified in par. 1, by value of the substitute received or of the claim for compensation."

<sup>22</sup> G.C.C. § 249—"A person who is bound to make compensation shall bring about the condition which would exist if the circumstance making him liable to compensate had not occurred. If compensation is required to be made for injury to a person or damage to a thing, the creditor may demand, instead of restitution in kind, the sum of money necessary to effect such restitution."

## LIABILITY IN THE UNITED STATES

## CONSUMER V. RETAILER

Under the facts supposed the consumer would probably fail were he to rely solely on negligence theories, which presuppose a duty to the person ultimately injured.<sup>1</sup> A retailer's duty is to act as a conduit of goods, and a claim that he was negligent ordinarily would be grounded on one of the following acts or omissions:<sup>2</sup> misrepresentation as to the quality of the goods; knowledge that they are dangerous, combined with a failure to disclose this information to the buyer; a failure to make a reasonable examination which would have disclosed obvious defects;<sup>3</sup> a failure to exert reasonable care in preparing the goods for sale; or a sale of the goods to one not competent to handle them. If the retailer can be proved negligent in one or more of these respects, of course the consumer can likely recover on that basis. There is, though, no indication in the hypothetical case that the retailer in any way failed to exercise the care of a reasonably prudent seller.

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<sup>1</sup> PROSSER, TORTS 166 (2d ed. 1955).

<sup>2</sup> 2 HARPER & JAMES, TORTS 1597-599 (1956); PROSSER, TORTS 491-93 (2d ed. 1955).

HARPER & JAMES, TORTS ch. 28, *Liability of Suppliers of Chattels*, 1534-606 (1956), was originally published as James, *Products Liability*, 34 TEXAS L. REV. 44-77, 192-228 (1955). To obviate the necessity of repeated parallel citations throughout this article, the writer has taken the liberty of referring only to the treatise of Professors Harper and James.

<sup>3</sup> Professor Eldredge has forcefully attacked the position that retailers have any duty to inspect, arguing that this places an unreasonable affirmative duty on dealers equal to the burden of inspection placed on manufacturers. See Eldredge, *Vendor's Tort Liability*, 89 U. PA. L. REV. 306 (1941); Eldredge, *Vendor's "Duty" To Inspect Chattels—A Reply*, 45 DICK. L. REV. 269 (1941), both of which are reprinted in ELDREDGE, MODERN TORT PROBLEMS 243 (1941). Most legal writers, however, have recognized that while the retailer is not required to make tests, open sealed containers, or take the goods apart, he must at least exercise the care of a reasonable dealer under the circumstances, *i.e.*, inspecting where it is reasonably practical to do so or where he has reason to believe the goods are defective. See 2 HARPER & JAMES, TORTS 1597 (1956); PROSSER, TORTS 492 (2d ed. 1955); Farage, *Must A Vendor Inspect Chattels Before Their Sale?—An Answer*, 45 DICK. L. REV. 159 (1941); Farage, *Vendor's Duty To Inspect Chattels—A Rejoinder*, 45 DICK. L. REV. 282 (1941), both written directly in answer to the Eldredge articles *supra*; Leidy, *Tort Liability of Suppliers of Defective Chattels*, 40 MICH. L. REV. 679 (1942). At any rate, the retailer in our hypothetical case would be under no affirmative duty to test each ladder for latent defects with a man weighing, say, 200 pounds or thereabout.

As regards the liability of retailers to consumers, however, negligence or fault of any kind is today but half the story. The consumer will, in addition, plead breach of implied warranty,<sup>4</sup> normally deemed a contract remedy<sup>5</sup> requiring no proof of negligence for recovery.<sup>6</sup> Fifty years ago the purchaser would also have had little chance of success under this theory since the courts were inclined to apply the harsh doctrine of *caveat emptor* to transactions involving mere dealers, at least where the goods were present and available for inspection and the defect was not known to the seller.<sup>7</sup> That this is not the law today reflects one of the more interesting developments in American jurisprudence<sup>8</sup> and is attributable to the courts' perceiving in the Uniform Sales Act<sup>9</sup> a verbal formula for a well-defined trend toward the opposite extreme of absolute liability on retail sellers.

Section 15(1)<sup>10</sup> of the Uniform Sales Act provides for an implied

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<sup>4</sup> As against retailers, breach of warranty actions have largely replaced those based on negligence. Nevertheless, the two theories have been allowed to exist simultaneously in plaintiff's complaint, and the action for negligence may become vitally important if for some reason the requirements of a warranty cannot be found. PROSSER, TORTS 491 (2d ed. 1955); cf. Ringstad v. I. Magnin & Co., 39 Wash.2d 923, 239 P.2d 848 (1952); Gilbert v. Louis Pizitz Dry Goods Co., 237 Ala. 249, 186 So. 179 (1939), wherein a complaint containing counts of negligence and warranty is set out.

<sup>5</sup> In its origin a warranty liability was grounded in tort, and the action was on the case. However, at least by 1778 the English Courts were allowing plaintiffs to proceed on the contract theory of *assumpsit*. This notion that breach of warranty is a contract action has apparently stuck; but noted authorities point out that in as much as the warranty is imposed on the seller under certain conditions, whether he affirmatively agrees to it or not, the liability cannot be based on a contract but remains a tort liability. 1 WILLISTON, SALES §§ 195-197 (rev. ed. 1948); PROSSER, TORTS 493-494 (2d ed. 1955); Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 126-127 (1958).

<sup>6</sup> 1 WILLISTON, SALES § 237 (rev. ed. 1948); PROSSER, TORTS 494 (2d ed. 1955).

<sup>7</sup> Barnard v. Kellogg, 77 U.S. 383, 388 (1870); White v. Oakes, 88 Me. 367, 34 Atl. 175 (1896).

<sup>8</sup> See generally 1 WILLISTON, SALES ch. IX (rev. ed. 1948).

<sup>9</sup> During the period 1907-1942, the UNIFORM SALES ACT was adopted in 33 states plus the jurisdictions of Alaska, District of Columbia, Hawaii and the Panama Canal Zone. Of these, Massachusetts (in 1957, effective October 1, 1958) and Kentucky (in 1958, to be effective July 1, 1960) have adopted the more modern UNIFORM COMMERCIAL CODE, first enacted by Pennsylvania in 1953. 1 UNIFORM LAWS ANN. (Supp. 1957, at 6-7); Ky. Acts 1958, Ch. 77. Fourteen states (Florida, Georgia, Kansas, Louisiana, Mississippi, Missouri, Montana, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Virginia, and West Virginia) have maintained the common law in this field.

<sup>10</sup> "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." 1 UNIFORM LAWS ANN. 7.

warranty of *fitness for a particular purpose* when such purpose is made known to the seller and the buyer apparently relies on the seller's judgment or skill to supply the item. Since the courts have construed the section so as not to require any special purpose,<sup>11</sup> apart from that to which the article is usually put, it has been held that the nature of the article itself may sufficiently indicate the use to which it is to be applied.<sup>12</sup>

The major difficulty in establishing liability under section 15(1) has been the requirement of the buyer's reliance on the judgment and skill of the retail seller. In this context, several problematical factors exist in the hypothetical case, for Consumer A selected the ladder himself and the defect was latent.<sup>13</sup> A split of authority in application of the reliance factor is illustrated in somewhat analogous cases involving pre-packaged food. It has been held that where the consumer selects food in a sealed container there can be no reliance on the dealer, for the dealer is in no better position than the purchaser to know of any latent defect in the article. To impose liability here places an unjust burden on the retailer, it is said, since the consumer, being aware of the dealer's inability to inspect the food, is actually relying, if at all,

<sup>11</sup> *Martin v. J. C. Penney Co.*, 313 P.2d 689 (Wash. 1957); *Stonebrink v. Highland Motors Inc.*, 171 Ore. 415, 137 P.2d 986 (1943); *Deere & Webber Co. v. Moch*, 71 N.D. 649, 3 N.W.2d 471 (1942); *Weiner v. A. D. Schulte, Inc.*, 275 Mass. 379, 176 N.E. 114 (1931); *Brandenberg v. Samuel Stores*, 211 Iowa 1321, 235 N.W. 741 (1931); *Minneapolis Steel & Machinery Co. v. Casey Land Agency*, 51 N.D. 832, 201 N.W. 172 (1924); *Flynn v. Bedell Co. of Massachusetts*, 242 Mass. 450, 136 N.E. 252 (1922). And see *Prosser, The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 133-34 (1943).

<sup>12</sup> Cases cited *supra* note 11 and *Ringstad v. I. Magnin & Co.*, 39 Wash.2d 923, 239 P.2d 848 (1952); *Vaccarino v. Cozzubo*, 181 Md. 614, 31 A.2d 316 (1943); *Rinaldi v. Mohican Co.*, 225 N.Y. 70, 121 N.E. 471 (1918). And see *Note*, 34 ORE. L. REV. 59, 61-62 (1954).

It should be noted that the buyer cannot recover for personal injuries unless he was harmed through a reasonable and normal use of the goods. *Ringstad v. I. Magnin & Co.*, *supra*; *Landers v. Safeway Stores Inc.*, 172 Ore. 116, 139 P.2d 788 (1943).

<sup>13</sup> UNIFORM SALES ACT § 15(3) provides: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed." 1 UNIFORM LAWS ANN. 7. This leaves the door open for cases where the buyer examines, but the defect is latent. Section 15(3) is also said to prevent the warranty if the buyer has an opportunity to inspect, but does not utilize it. 1 WILLISTON, SALES § 234 (rev. ed. 1948). But that statement conceals the inarticulate assumption that the buyer *ought* to have inspected, an assumption not always appropriate. At least one case has held that it may make a difference who is buying what; that where the buyer knows so little about the subject matter of the sale that he cannot determine whether there are any latent defects, the implied warranty exists even though he makes an examination. *Hydrotex Industries v. Floyd*, 209 Ark. 781, 192 S.W.2d 759 (1946) (involving liquid roofing materials).

on the producer.<sup>14</sup> Recent decisions, on the other hand, have tended to hold the retailer liable by finding "reliance" in the buyer's dependence on the retailer's selection of merchandise.<sup>15</sup> The latter view is ostensibly accepted today, even in cases not involving food,<sup>16</sup> although it rests on an unsound fiction. Its recognition, doubtless stems from a sound judicial preference for the social desirability of the strict liability which it produces.<sup>17</sup> A frank discussion on the merits of strict liability would probably do much to dispel the unrealistic mist which surrounds the fiction of "reliance" in many cases involving retail sales.

An additional opportunity to establish strict liability may be found in section 15(2)<sup>18</sup> of the Uniform Sales Act, which provides for an implied warranty of *merchantability* "where the goods are bought by description from a seller who deals in goods of that description." Although employed in the cases less frequently than the warranty of fitness for a particular purpose, the warranty of merchantability appears the more encompassing of the two.<sup>19</sup> The problem phrases here

<sup>14</sup> *Torpey v. Red Owl Stores, Inc.*, 129 F. Supp. 404 (D.C. Minn. 1955), *aff'd*, 228 F.2d 117 (8th Cir. 1955); *Wilkes v. Memphis Grocery Co.*, 23 Tenn. App. 550, 134 S.W.2d 929 (1939), rehearing denied 24 Tenn. App. 36, 139 S.W.2d 416 (1939); *McMurray v. Vaughn's Seed Store*, 117 Ohio St. 236, 157 N.E. 567 (1927); *Bell v. Bowers Stores, Inc.*, 3 Tenn. App. 590 (1926); *Crosby, J.*, dissenting in *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918); *Bigelow v. Maine Central R.R. Co.*, 110 Me. 105, 85 Atl. 396 (1912); *Waite, Retail Responsibility and Judicial Law Making*, 34 MICH. L. REV. 494 (1936).

<sup>15</sup> *Higbee v. Giant Food Shopping Center, Inc.*, 106 F. Supp. 586 (E.D. Va. 1952); *Martin v. Great Atlantic & Pacific Tea Co.*, 301 Ky. 429, 192 S.W.2d 201 (1946); *Bonenburger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942); *Kurriss v. Conrad & Co.*, 312 Mass. 670, 46 N.E.2d 12 (1942); *Swengel v. F. & E. Wholesale Grocery Co.*, 147 Kan. 555, 77 P.2d 930 (1938); *Giminez v. Great Atlantic & Pacific Tea Co.*, 264 N.Y. 390, 191 N.E. 27 (1934); *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932); *Griffin v. James Butler Grocery Co.*, 108 N.J.L. 92, 156 Atl. 636 (1931); *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918). And see 2 HARPER & JAMES, TORTS 1600 (1956); *VOLD, SALES* 454, 465-66 (1931); *Note*, 34 ORE. L. REV. 59, 62, 63 (1954).

<sup>16</sup> *Higbee v. Giant Food Shopping Center, Inc.*, *supra* note 15 (home permanent); *Tremeroli v. Austin Trailer Equipment Co.*, 102 Cal. App. 2d 464, 227 P.2d 923 (1951) (tractor wheel); *Libke v. Craig*, 35 Wash.2d 870, 216 P.2d 189 (1950) (hay); *Kurriss v. Conrad & Co.*, *supra* note 15 (dress).

<sup>17</sup> See cases and authorities cited note 15 *supra* and note 38 *infra*.

<sup>18</sup> "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." 1 UNIFORM LAWS ANN. 7.

<sup>19</sup> 2 HARPER & JAMES, TORTS 1582 (1956); *Prosser, The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 135 (1943). Professor Prosser also

are "by description" and "merchantable quality." Originally sales "by description" were limited to those involving distant goods or other goods which required description for identification.<sup>20</sup> Today, however, even where the goods are present, the buyer's mere designation of them by their generic name is probably enough to constitute a "description." (Example: "A loaf of bread, please.")<sup>21</sup> Furthermore, where the buyer picks out a specific chattel for himself it has been argued that by placing the item on sale the dealer has impliedly warranted that the article is what it appears to be and is reasonably fit for ordinary purposes.<sup>22</sup> To say that this is a "sale by description" is to employ yet another fiction, however socially desirable be the strict liability result.<sup>23</sup>

For goods to fall below the standard of "merchantable quality," they apparently need not be completely valueless, but merely below "fair average quality," unfit for their normal uses, or unsalable with their defects known.<sup>24</sup> At any rate, a court should have little difficulty finding that a ladder which does not support the normal man is not merchantable,<sup>25</sup> thus enabling recovery under section 15(2), wholly aside from section 15(1).

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notes that the implied warranties of fitness and merchantability may coexist in the same transaction, thus making the inquiry as to which section applies of little practical importance in many cases. *Id.* at 134.

<sup>20</sup> *Williams v. S.H. Kress & Co.*, 48 Wash.2d 88, 291 P.2d 662 (1955); *American Soda Fountain Co. v. Medford Grocery Co.*, 128 Ore. 83, 262 Pac. 939 (1928); 1 WILLISTON, SALES § 224 (rev. ed. 1948); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 139-40 (1943). It is possible that the draftsmen of the ENGLISH SALE OF GOODS ACT (1893), who first used the term "by description," were thinking of and codifying the rule of *Jones v. Just*, [1868] 3 Q.B. 197, the landmark case which involved Manila hemp on the high seas and which established retailers' implied warranty of merchantability.

<sup>21</sup> *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931). 2 HARPER & JAMES, TORTS 1582 (1956).

<sup>22</sup> *Kohn v. Ball*, 36 Tenn. App. 281, 254 S.W.2d 755 (1953); Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 143-45 (1943), and cases cited therein; Annot., 168 A.L.R. 389, 391, 398 (1947).

<sup>23</sup> "By description" is an instructive example of an awkward statutory term which might better be eliminated or ignored. English courts in recent years have virtually ignored this same technicality in the ENGLISH SALE OF GOODS ACT § 14(2), from which UNIFORM SALES ACT § 15(2) is copied. *Grant v. Australian Knitting Mills, Ltd.*, [1936] A.C. 85. The UNIFORM COMMERCIAL CODE has omitted the words "by description" from its provision on the warranty of merchantability. See note 36 *infra*.

<sup>24</sup> *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931); VOLD, SALES 456 (1931); 1 WILLISTON, SALES § 243 (rev. ed. 1948).

<sup>25</sup> One is reminded of Judge Cardozo's classic statement, or understatement, that "loaves baked with pins in them are not of merchantable quality." *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 394, 175 N.E. 105, 107 (1931).

Nothing in the pertinent sections of the Uniform Sales Act *compels* the results which the American courts have been reaching.<sup>26</sup> Indeed, if the Act, as is often stated, merely codifies the common law,<sup>27</sup> the consumer's claim would, at first glance, appear futile<sup>28</sup>—that is, if one overlooks the basic fact that it is the common law itself which is moving away from *caveat emptor*.<sup>29</sup> Rather the language of the Act has given judges an opportunity, by indulging in some fictions, to impose on retailers a warranty liability for latent defects even where there has been no *real* reliance.<sup>30</sup> It follows, then, that this liability does not necessarily arise by implication from the transaction, but is imposed by law and is in fact a tort liability without fault.<sup>31</sup> Thus, Retailer *B* may be liable for the personal injuries of Consumer *A* even though *B* exercised due care and the defect was created by the fault of another.

Even in those jurisdictions<sup>32</sup> which have not adopted the Uniform

<sup>26</sup> See *supra* notes 10 and 18. By the language of UNIFORM SALES ACT §§ 15(1) and 15(2), dealers are included, but there is nothing which requires the courts to find reliance by the buyer where goods are present, or in the latent defect situation where neither the buyer nor the retailer is aware, or can be aware, of any imperfection. Neither is there any language which demands that courts construe fitness for a "particular purpose" to mean an ordinary purpose, nor "by description" to apply to sales of present specific chattels where the buyer make his own selection.

<sup>27</sup> *Adams v. Peter Tramontin Motor Sales, Inc.*, 42 N.J. Super, 313, 126 A.2d 358 (1956); *Simon v. Graham Bakery*, 17 N.J. 525, 111 A.2d 884 (1955); *Childs Dining Hall Co. v. Swingler*, 173 Md. 490, 197 Atl. 105 (1938); *McNabb v. Central Kentucky Natural Gas Co.*, 272 Ky. 112, 113 S.W.2d 470 (1938); *Hoback v. Coca Cola Bottling Works of Nashville*, 20 Tenn. App. 280, 98 S.W.2d 113 (1936).

<sup>28</sup> See note 7 *supra*. Then there is the argument that the UNIFORM SALES ACT is copied from the ENGLISH SALE OF GOODS ACT which codified the common law as set forth in *Jones v. Bright*, 5 Bing. 533, 130 Eng. Rep. 1167 (C.P. 1829), which established fitness for purpose, but involved a manufacturer-seller rather than a mere dealer, and *Jones v. Just*, L.R. 3 Q.B. 197 (1868), establishing the merchantability warranty as to dealers, but involving distant goods. At least one state has held that the UNIFORM SALES ACT *changed* the common law. Compare *Scruggins v. Jones*, 207 Ky. 636, 269 S.W. 743 (1925) (decided under common law principles and holding retailer not liable in sealed container case) with *Martin v. Great Atlantic & Pacific Tea Co.*, 301 Ky. 429, 192 S.W.2d 201 (1946) (decided after UNIFORM SALES ACT enactment and reaching a directly opposite result).

<sup>29</sup> See note 33 *infra*.

<sup>30</sup> Waite, *supra* note 14, at 506-508 takes this approach although he reaches the conclusion that retailers should not be strictly liable.

<sup>31</sup> *Rogers v. Toni Home Permanent Co.*, 139 N.E.2d 871 (Ohio App. 1957); *Buchanan v. Dugan*, 82 A.2d 911 (D.C. Mun. App. 1951); *Allis-Chalmers Mfg. Co. v. Frank*, 57 N.D. 295, 221 N.W. 75 (1928); 2 HARPER & JAMES, TORTS 1571 (1956); PROSSER, TORTS 493 (2d ed. 1955); Brown, *The Liability of Retail Dealers for Defective Food Products*, 23 MINN. L. REV. 585 (1939).

<sup>32</sup> See note 9 *supra*.

Sales Act the courts have gradually relaxed the rigidity of common law principles to permit broader retailer liability.<sup>33</sup> Furthermore, the Uniform Commercial Code,<sup>34</sup> enacted so far in only three states,<sup>35</sup> goes beyond the Uniform Sales Act in expanding the situations in which an implied warranty by the dealer may be found.<sup>36</sup>

At first blush, absolute liability may appear unduly burdensome on dealers, but, if properly limited, it can be adequately justified under the American economic and judicial systems. It may be noted, first, that strict liability apparently has not hindered or impaired over-the-counter sales. Furthermore, the difficulty of proving negligence against a dealer, even where it exists, not to mention the dealer's lack of negligence in the usual case, would leave the consumer virtually remediless had he to rely on negligence alone; for the manufacturer, even though at fault, is often either legally or practically unreachable. On the other hand, the dealer is normally in privity with the consumer and can usually be served with judicial process.<sup>37</sup>

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<sup>33</sup> For instance, *compare* *Dickson, Mallory & Co. v. Jordan*, 33 N.C. (11 Ired. 166) 128, 53 Am. Dec. 403 (1850) (where buyer relied but no recovery because seller did not know of defect) and *Woodridge v. Brown*, 149 N.C. 219, 62 S.E. 1076 (1908) (again reliance, but no recovery because seller did not intend a warranty) *with* *Rabb v. Covington*, 215 N.C. 572, 2 S.E.2d 705 (1939) (buyer recovered consequential damages from dealer for teeth broken on metal in sausage since there is an implied warranty that food is merchantable and fit for consumption). See also *Ashford v. H.C. Shrader Co.*, 167 N.C. 45, 83 S.E. 29 (1914); *Lexington Grocery Co. v. Vernoy*, 167 N.C. 427, 83 S.E. 567 (1914); *Williams v. Elson*, 218 N.C. 157, 10 S.E.2d 668 (1940). *But see* *Driver v. Snow*, 245 N.C. 223, 95 S.E.2d 519 (1956).

Another example of a common law state which has almost caught up with those which have adopted the UNIFORM SALES ACT is Virginia. See *Higbee v. Giant Food Shopping Center, Inc.*, 106 F. Supp. 586 (E.D. Va. 1952); Note, *The Implied Warranty of Fitness in Virginia*, 43 VA. L. REV. 273 (1957).

<sup>34</sup> Prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, approved in 1952 and revised in 1957.

<sup>35</sup> See note 8 *supra*. It should be noted that due to the 1957 revision of the UNIFORM COMMERCIAL CODE, Massachusetts and Kentucky provisions differ in some minor respects from the Pennsylvania statute, which was taken from the 1952 draft.

<sup>36</sup> UNIFORM COMMERCIAL CODE § 2-314(1) eliminates the words "by description" and implies the warranty of merchantability so long as the seller is a "merchant" of the kind of goods involved. Sec. 2-314(2) attempts to set forth minimum standards for determining merchantability. Sec. 2-315 allows easier imputation of the purpose to the seller in the warranty of fitness. Sec. 2-318 sets forth a provision unknown to the UNIFORM SALES ACT in extending the warranty to the purchaser's family, members of his household or his guests who may reasonably be expected to "use, consume or be affected by the goods and who is injured in person by breach of the warranty." UNIFORM COMMERCIAL CODE (1957 ed.). This breaks down the doctrine of privity, a doomed but kicking doctrine, which is discussed in the text at notes 42-48, 67-77 *infra*.

<sup>37</sup> 2 HARPER & JAMES, TORTS 1600 (1956); *Brown, supra* note 31 at 596-601.

Basically the problem seems to be one of risk administration, about which the law has had to make a policy choice, especially where the retailer and consumer are equally faultless. The burden has been placed on him who can, if not "bear" it, at least "administer" the risk. Absolute liability may be denominated as merely part of the cost of doing business, a cost which in all probability eventually is passed back to the public through higher prices.<sup>38</sup> The dealer may, and often does, insure himself against such loss.<sup>39</sup> Moreover, when sued, the retailer may vouch in or implead the manufacturer<sup>40</sup> or subsequently recover indemnity from him either in a separate suit or by the more common means of negotiation.<sup>41</sup> In essence, it may be said that strict liability on retailers comports harmoniously with contemporary ideas of fairness and with what the buyer may reasonably expect from a modern and highly integrated commercial world.

#### CONSUMER V. MANUFACTURER

At the turn of the century a personally injured consumer could not have recovered from a manufacturer even on the basis of the latter's negligence, for there was no contract and, thus, not the required privity between the parties.<sup>42</sup> Gradually, however, the cases carved out exceptions to this devastating rule which had virtually insulated the manufacturer from liability.<sup>43</sup>

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<sup>38</sup> *Higbee v. Giant Food Shopping Center, Inc.*, 106 F. Supp. 586 (E.D.Va. 1952); *Griggs Canning Co. v. Josey*, 139 Tex. 623, 164 S.W.2d 835 (1942); *Rabb v. Covington*, 215 N.C. 572, 2 S.E.2d 705 (1939); *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 392, 175 N.E. 105, 106 (1931); *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 120 N.E. 225 (1918); 2 HARPER & JAMES, TORTS 1600 (1956); VOLD, SALES 465-66 (1931).

<sup>39</sup> 2 HARPER & JAMES, TORTS 1601 (1956).

<sup>40</sup> *Ryan v. Progressive Grocery Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931); *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951).

<sup>41</sup> 2 HARPER & JAMES, TORTS 1601 (1956); *Brown*, *supra* note 31 at 606.

Allowing the retailer to recover from the manufacturer creates a paradox: If the retailer is strictly liable to the consumer in non-food cases under a warranty, and may, in turn, recover from the manufacturer on the same warranty, then it would seem that a liability without fault is indirectly, at least, being placed on the manufacturer for articles for which he would not be liable to the consumer even for fault under the *MacPherson* doctrine, discussed in the text beginning at note 44 *infra*.

<sup>42</sup> *Winterbottom v. Wright*, 10 M. & W. 109, 11 L.J.Ex. 415 (1842).

<sup>43</sup> *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865 (8th Cir. 1903), summarized these exceptions. (a) Even lacking privity, the maker was held liable if he knowingly provided an "imminently dangerous" article "without notice of its qualities" and a third party was injured in a manner reasonably foreseeable. (b) If an owner's invitee suffered injuries through the use of the owner's defective article, then the owner was liable. (c) Most important, a manufacturer was held responsible

In 1916 the landmark case of *MacPherson v. Buick Motor Co.*<sup>44</sup> cut away the "exceptions," greatly extending manufacturer liability for negligence by announcing that ". . . if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."<sup>45</sup> [Emphasis added.] This rule was to be applied for the benefit of third parties where it was reasonably to be expected by the manufacturer that others than his immediate purchaser, i.e. the retailer, would use the product.<sup>46</sup> Although the *MacPherson* case limited liability to the ultimate purchaser, subsequent decisions have extended the responsibility to those who may reasonably be expected to be endangered by a defective product.<sup>47</sup> The *MacPherson* rule has been accepted almost universally,<sup>48</sup> and privity as a requirement for manufacturer liability on the basis of negligence has been effectively entombed.

There is still no clear identification of the types of products which fall within the *MacPherson* doctrine. Apparently the chattel involved must be of a kind that could reasonably be foreseen to cause more than trivial harm if defective. Yet in recent years the rule increasingly has been extended to items not usually considered "inherently dangerous."<sup>49</sup> The *MacPherson* case itself involved an automobile wheel, and liability has since been applied in connection with such articles as electric appliances,<sup>50</sup> cigarettes,<sup>51</sup> and even hair combs.<sup>52</sup> More significantly for

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to injured third parties for the negligent preparation of products "intended to preserve, destroy or affect human life." *Id.* at 870-871. For several years this somewhat vague classification was applied only to such items as food, beverages, poisons and explosives as the courts confined their view to the inherent nature of the product itself in evaluating its dangerous potentialities. PROSSER, TORTS 499 (2d ed. 1955); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957).

<sup>44</sup> 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>45</sup> *Id.* at 389, 111 N.E. at 1053.

<sup>46</sup> *Ibid.*

<sup>47</sup> PROSSER, TORTS 501 (2d ed. 1955); RESTATEMENT, TORTS § 395, comment b (1934).

<sup>48</sup> PROSSER, TORTS 500 (2d ed. 1955); Noel, *supra* note 43, at 965.

<sup>49</sup> 2 HARPER & JAMES, TORTS 1552-54 (1956); PROSSER, TORTS 500-501 (2d ed. 1955); Noel, *supra* note 43, at 967-68.

<sup>50</sup> *Rosebrock v. General Electric Co.*, 236 N.Y. 227, 140 N.E. 571 (1923).

<sup>51</sup> *De Lape v. Liggett & Myers Tobacco Co.*, 25 F.Supp. 1006 (D.C. Cal. 1939), *aff'd* 109 F.2d 598 (9th Cir. 1940); *Meditz v. Liggett & Myers Tobacco Co.*, 167 Misc. 176, 3 N.Y.S.2d 357 (1938).

<sup>52</sup> *Smith v. S.S. Kresge Co.*, 79 F.2d 361 (8th Cir. 1935).

our purposes, the rule also has been utilized in cases involving household furniture and ladders.<sup>53</sup>

Liability hinges on reasonable foreseeability; the court must be satisfied that a reasonably prudent manufacturer would have foreseen the unreasonable risk of harm lurking in a defective product.<sup>54</sup> Makers are not held liable if the defect or danger is obvious to the consumer, who is then apparently held to have assumed the risk,<sup>55</sup> nor if the consumer is hurt through an unnatural use of the product.<sup>56</sup> The same may be true where the user fails to follow instructions,<sup>57</sup> although there is some authority to the effect that a manufacturer has a duty to warn as to dangers that may result if instructions are not followed, unless such dangers are obvious in themselves.<sup>58</sup> On the other hand, negligence by an intervening handler may not insulate the manufacturer from liability. Again it is a question of foreseeability, and some juries have been permitted to find that negligence, such as the retailer's failure to inspect, is reasonably to be expected by the maker.<sup>59</sup> Affirmative negligence by an intermediary probably evokes a different rule.<sup>60</sup>

A negligence action involves difficult burdens of proof for the con-

<sup>53</sup> *Benedict v. Eppley Hotel Co.*, 159 Neb. 23, 65 N.W.2d 224 (1954) (folding chair); *Okker v. Chrome Furniture Mfg. Corp.*, 26 N.J. Super. 295, 97 A.2d 699 (1953) (bar stool); *Simmons Co. v. Hardin*, 75 Ga. App. 420, 43 S.E.2d 553 (1947) (bed); *Sheward v. Virtue*, 20 Cal.2d 410, 126 P.2d 345 (1942) (leather chair); *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481 (1934) (ladder).

<sup>54</sup> 2 HARPER & JAMES, TORTS 929, 1554 (1956); PROSSER, TORTS 500, 502 (2d ed. 1955).

<sup>55</sup> *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950); *Yaun v. Allis-Chalmers Mfg. Co.*, 253 Wis. 558, 34 N.W.2d 853 (1948); *Noel*, *supra* note 43, at 973. *But see* 2 HARPER & JAMES, TORTS 1543 (1956), which argues that the extent of the danger and the feasibility of the manufacturer installing safety devices should be factors considered by a jury in determining whether the maker was negligent even though the danger is obvious.

<sup>56</sup> PROSSER, TORTS 503 (2d ed. 1955).

<sup>57</sup> *Foster v. Ford Motor Co.*, 139 Wash. 341, 246 Pac. 945 (1926) (contrary to instructions, tractor was run at high speed causing it to tip over backwards on operator. *Held*, maker not liable).

<sup>58</sup> *McClanahan v. California Spray-Chemical Corp.*, 194 Va. 842, 75 S.E.2d 712 (1953). And see 2 HARPER & JAMES, TORTS 1548 (1956) which notes, "An assurance of safety, as well as a failure to warn of danger, may be negligence." It also points out that the manufacturer may be held liable if the warnings or instructions are not adequate under the circumstances. *Id.* at 1548, 1549.

<sup>59</sup> *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951), *cert. denied*, 342 U.S. 887 (1951); *Rosebrock v. General Electric Co.*, 236 N.Y. 227, 140 N.E. 571 (1923); PROSSER, TORTS 504 (2d ed. 1955); RESTATEMENT, TORTS § 447 (1934).

<sup>60</sup> *Rulane Gas Co. v. Montgomery Ward & Co.*, 231 N.C. 270, 56 S.E.2d 689 (1949); *Noel*, *supra* note 42, at 974, 975.

sumer who must establish that the injury occurred as a result of the defect, that the defective condition was an unreasonably dangerous one, that the defect is attributable to the maker's negligence, and that the imperfection existed when it left the manufacturer's custody.<sup>61</sup>

The nature of the required proof and the consumer's remoteness from and unfamiliarity with the manufacturer's production methods make it obvious that recovery will largely depend upon circumstantial evidence or the doctrine of *res ipsa loquitur*.<sup>62</sup> With increasing liberality the courts have applied this doctrine to cases involving manufacturers.<sup>63</sup> Under it the consumer must establish (1) that the accident was of a type that does not ordinarily occur unless there has been negligence, (2) that nothing the user did caused the accident, (3) that the product was in the maker's control when the defect arose, and, perhaps, (4) that the evidence is more readily accessible to the producer than to the plaintiff.<sup>64</sup> Since in the hypothetical case the defect is latent or inherent in the wood of the ladder, it may logically be inferred that the accident-causing imperfection arose during production, while the article was in the manufacturer's control, and without any negligence or tampering by the consumer.<sup>65</sup> Therefore, Consumer A can probably establish a case of circumstantial evidence strong enough for submission to a jury under

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<sup>61</sup> See 2 HARPER & JAMES, TORTS 1560-1569 (1956). The requirement of proving the condition was unreasonably dangerous stems from the *MacPherson* rule. See text at note 45, *supra*. Professors Harper and James point out that whether there is the requisite danger is usually a matter of evaluation for the court or jury. Evidence which may affect this evaluation is the experience of others or expert testimony. *Id.* at 1562, 1563.

<sup>62</sup> PROSSER, TORTS 505 (2d ed. 1955).

<sup>63</sup> See Noel, *supra* note 43, at 977-79. But see Condon, *Product Liability Cases—1956*, 12 FOOD DRUG COSM. L.J. 215, 218 (1957) which says that *res ipsa loquitur* as a basis for recovery in food, drug, and cosmetic cases is decreasing in favor of warranty actions.

<sup>64</sup> For a thorough discussion of the doctrine of *res ipsa loquitur* and its procedural effect, see PROSSER, TORTS 199-217 (2d ed. 1955). The determination of element (1), in the text above, depends largely on common knowledge, but where this is lacking as to the subject matter at hand, expert testimony may be introduced. *Id.* at 202. Professor Prosser does not approve element (4), in the text above, as a requirement although he admits it may have some relevance in persuading the court to apply the doctrine. *Id.* at 209. Of course, even if the plaintiff establishes all the elements, he has still not proved the defendant negligent. Rather he has raised an inference of negligence, which a jury may or may not accept even if defendant introduces no evidence. But a small minority of states hold that by meeting the requirements of *res ipsa loquitur* the plaintiff creates a presumption of negligence, thus, shifting the burden of introducing evidence to the defendant. *Id.* at 211-13.

<sup>65</sup> See Noel, *supra* note 43, at 977-78.

the *res ipsa loquitur* doctrine in which event he will likely recover damages for his injuries from Manufacturer C.

Before turning to the status of manufacturer liability under implied warranties, it should be noted that there exists a form of strict liability against producers where consumers are injured through defective products that violate the standards of certain statutes enacted for the safety of the public at large. This is so even where the pertinent statute offers no civil remedy, for the prevailing view is that the placing of certain substandard items on the market in violation of the statute is negligence per se.<sup>66</sup>

Once the requirement of privity was discarded in negligence actions, it was only natural that strong policy considerations should produce a demand that the privity rule be further abandoned to provide the strict liability features of implied warranties against the manufacturer as well as the dealer. Food cases have led the way in rejecting privity requirements and partially opening the door to strict liability through implied warranties.<sup>67</sup> A recent count as to food cases showed that 18 states still require privity, but that 12 have definitely abandoned it and 19 are at least uncertain.<sup>68</sup>

Liability without fault is just emerging in the area of general products, however.<sup>69</sup> Here many of the cases are ostensibly grounded on the finding of something approaching an express warranty, either in the product's label or in the manufacturer's advertising.<sup>70</sup> But there are

<sup>66</sup> See 2 HARPER & JAMES, TORTS 1590-92 (1956); Noel, *supra* note 43, at 979, 980.

<sup>67</sup> Jacob E. Decker & Sons, Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); Klein v. Duchess Sandwich Co., 14 Cal.2d 272, 93 P.2d 799 (1939); Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936); Ward Baking Co. v. Trizino, 27 Ohio App. 475, 161 N.E. 557 (1928); Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 382 (1920); Catani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915).

<sup>68</sup> DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 94 n. 2 (1951). This count includes the District of Columbia, which is one of the 18 jurisdictions requiring privity.

<sup>69</sup> The term "general products" is a frame of reference meant to encompass mechanical items, tools, furniture, and the like, and would certainly cover the stepladder in our hypothetical case. It is used to distinguish the above class of items from food and articles analogous to food in their intimate relationship to the body, such as soap, cosmetics, drugs, tobacco, etc.

<sup>70</sup> Rogers v. Toni Home Permanent Co., 147 N.E.2d 612 (Ohio 1958) (permanent wave); Simpson v. American Oil Co., 217 N.C. 542, 8 S.E.2d 813 (1940) (insecticide); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939) ("seamless" automobile-top); Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) ("shatterproof" windshield); and see 1 WILLISTON, SALES § 244(a) (rev. ed. 1948), approving a warranty liability arising from the expressions in labels and advertising.

a number of decisions which, citing the food cases as authority, have frankly abandoned the privity requirement as to non-food products where only an implied warranty can be found.<sup>71</sup> Admittedly, most of these cases have concerned articles such as soap, cosmetics and tobacco, which are somewhat analogous to food in their intimacy to the body. Yet there is some authority, though scant, to the effect that strict liability should be applied to mechanical and other general products as well.<sup>72</sup>

In breaking down the privity requirement, various courts have employed or suggested the following rationales, among others: (1) Public policy now demands that privity not bar manufacturer liability through implied warranties;<sup>73</sup> (2) The warranty from the maker to his buyer, the retailer, runs with the product to the consumer and others who foreseeably may be injured by a defective article;<sup>74</sup> (3) The consumer is a third party beneficiary of the contract between the manufacturer and the dealer;<sup>75</sup> (4) Under certain circumstances the dealer is really an agent either for the manufacturer or the consumer and, thus, there is privity between the parties.<sup>76</sup> Most likely, the cogent factor in all these

<sup>71</sup> *McAfee v. Cargill, Inc.*, 121 F. Supp. 5 (S.D. Cal. 1954) (dog food); *Raymond v. J. R. Watkins Co.*, 88 F. Supp. 932 (D.C. Minn. 1950) (dictum) (shampoo); *Nichols v. Nold*, 174 Kan. 613, 258 P.2d 317 (1953) (exploding bottle); *Krupar v. Procter & Gamble Co.*, 113 N.E.2d 605 (Ohio App. 1953), *rev'd. on other grounds*, 160 Ohio St. 489, 117 N.E.2d 7 (1954) (bar of soap); *Graham v. Bottenfield's Inc.*, 176 Kan. 68, 269 P.2d 413 (1954) (dictum) (hair dye); *Webb v. Brown & Williamson Tobacco Co.*, 121 W.Va. 115, 2 S.E.2d 898, 902 (1939) (concurring opinion, dictum) (dead worm or moth in chewing tobacco); *Dow Drug Co. v. Nieman*, 57 Ohio App. 190, 13 N.E.2d 130 (1936) (exploding cigar).

<sup>72</sup> *DiVello v. Gardner Machine Co.*, 102 N.E.2d 289 (Ohio C.P. 1951) (grinding wheel); *but see Wood v. General Electric Co.*, 159 Ohio St. 273, 112 N.E.2d 8 (1953). Professor Noel notes that even the *DiVello* case may be based on the idea of extending the warranty after sale to employees such as UNIFORM COMMERCIAL CODE § 2-318 does to members of purchaser's household. He also states that the *Wood* case, *supra*, seems to overrule *DiVello*, without mentioning it by name, as to relaxation of privity. See Noel, *supra* note 43, at 995, 996.

<sup>73</sup> *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942); *Klein v. Duchess Sandwich Co.*, 14 Cal.2d 272, 93 P.2d 799 (1939); *Madouros v. Kansas City Coca-Cola Bottling Co.*, 230 Mo. App. 275, 90 S.W.2d 445, 450 (1936) ("If privity of contract is required, then, under the situation and circumstance of modern merchandise in such matters, privity of contract exists in the consciousness and understanding of all right-thinking persons.").

<sup>74</sup> *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951); *Simpson v. American Oil Co.*, 217 N.C. 542, 8 S.E.2d 813 (1940); *Coca-Cola Bottling Works v. Lyons*, 145 Miss. 876, 111 So. 305 (1927).

<sup>75</sup> *Ward Baking Co. v. Trizzino*, 27 Ohio App. 475, 161 N.E. 557 (1928).

<sup>76</sup> *Timberland Lumber Co. v. Climax Mfg. Co.*, 61 F.2d 391 (3d Cir. 1932); *Wisdom v. Morris Hardware Co.*, 151 Wash. 86, 274 Pac. 1050 (1929).

For an exhaustive compilation of cases in which courts have mentioned various legal

cases is public policy, and the courts are utilizing various legal fictions in order to avoid irrevocably adopting a strict liability system in an area where its practical effects are still virtually untested.<sup>77</sup>

As in the case of retailers, there are good reasons for urging that strict liability be applied to manufacturers. It is argued that such a responsibility will tend to promote safer products; that the complexity of modern technology renders the proof of negligence unreasonably difficult, if not impossible, especially with regard to remote (out-of-state) producers; and that manufacturers are better able to administer the risk of such liability by controlling prices.<sup>78</sup> Furthermore, if the retailer is strictly liable and may subsequently recover from the manufacturer, the imposition of an identical liability on makers will avoid circuitry and multiplicity of suits and place no greater financial burden on manufacturers.<sup>79</sup> To be sure, certain of the arguments are untested in a practical sense, and there are those who disagree with one or more of them, or at least with certain applications of some of them.<sup>80</sup> Hence, there may be valid justifications for the courts to proceed cautiously in this field until the effects of strict liability can be adequately judged.

Nevertheless, at least one writer has pointed out that abandoning privity as to implied warranties would cause no greater practical change than did the *MacPherson* rule.<sup>81</sup> Moreover, if it is true that implied warranties are imposed by law rather than contract—that as applied to personal injuries they offer really a tort theory of recovery<sup>82</sup>—then, perhaps, on pure legal theory alone the change would not be great, but merely in line with the modern trend to extend the idea of strict liability in

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formulae to get around the privity problem, see Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1958).

<sup>77</sup> See Noel, *supra* note 43, at 988; Amram and Goodman, *Some Problems in the Law of Implied Warranty*, 3 SYRACUSE L. REV. 259, 268 (1952); Gillam, *supra* note 76, at 155.

<sup>78</sup> See generally 2 HARPER & JAMES, TORTS 1510-14, 1605 (1956); Noel, *supra* note 43, at 1009-10; Traynor, J., concurring in *Escola v. Coca-Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436 (1944); James, *General Products—Should Manufacturers Be Liable Without Negligence*, 24 TENN. L. REV. 923 (1957).

<sup>79</sup> Noel, *supra* note 43, at 1010. And would not this help eliminate the paradox mentioned at note 41 *supra*?

<sup>80</sup> See Green, *Should the Manufacturer of General Products Be Liable Without Negligence?*, 24 TENN. L. REV. 928, 930-34 (1957), which seemingly would not place strict liability on manufacturers in cases involving mechanical products; Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957).

<sup>81</sup> Noel, *supra* note 43, at 1015.

<sup>82</sup> See note 31 *supra*.

certain areas of tort law.<sup>83</sup> Finally, even under an implied warranty theory the manufacturer does not become a social insurer, for it is a liability limited by high degrees of proof as to defectiveness, causation and the injuries that are reasonably foreseeable from a normal use of a defective product.<sup>84</sup>

It cannot yet be said that liability without fault is the general rule as to producers, especially in a non-food case such as our hypothetical case. There are traces of a start in that direction, but as of today Consumer *A* might well be advised that there is a strong likelihood that he will fail in any attempt to recover from Manufacturer *C* on the basis of breach of warranty.

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<sup>83</sup> See James, *supra* note 78, at 924, 925; Noel, *supra* note 43, at 1014-15.

<sup>84</sup> 2 HARPER & JAMES, TORTS 1604-1605 (1956); Noel, *supra* note 43, at 1016-17.