Comments

CAN CIGARETTES BE MERCHANTABLE, THOUGH THEY CAUSE CANCER?

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It is a widely accepted thesis that smoking cigarettes can cause lung cancer. Numerous recent medical investigations, the most prominent of which is by the Surgeon General of the United States, assert that cigarettes do, indeed, drastically increase the chances of contracting cancer in the lungs.[1] Since the landmark case of *Pritchard v. Liggett & Myers Tobacco Co.*,[2] causation of lung cancer by smoking has been held susceptible of legal proof on a theory of implied warranty. The principal inquiry then becomes, "Granted a jury finding in a particular case that prolonged cigarette smoking was a proximate cause of lung cancer, can an aggrieved smoker, or his estate,[3] recover against the manufacturer[4] of the cigarette for breach of an implied

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[1] U. S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, SMOKING AND HEALTH: A REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964).

[2] 134 F. Supp. 829 (W.D. Pa. 1955), *rev'd*, 295 F.2d 292 (3d Cir. 1961). The court said that jury questions were presented on the issues of negligence, express warranty, and implied warranty.

[3] In addition to the surviving cause of action on behalf of the deceased, recovery for death resulting from smoking might be grounded in an action based on a wrongful death statute for the benefit of persons named by the statute. See, *e.g.*, ARIZ. REV. STAT. ANN § 12-611-613 (1956).

[4] Since the historic holding in MacPherson v. Buick Motor Co., 217 N.Y. 382, 11 N.E. 1050 (1916), the requisite of privity in suits against manufacturers for personal injury resulting from the use of their products has been steadily eroding. See generally Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1959). This is particularly true in regard to food products manufactured or processed for human consumption. See RESTATEMENT (SECOND), TORTS (Tent. Draft No. 7, 1962), listing 19 jurisdictions as supporting the rule of strict liability for food and drink; and RESTATEMENT (SECOND), TORTS § 402A (1962), which embraces the further concept that products intended for intimate bodily use (this would include cigarettes, cosmetics, shampoos) be treated the same as food products in abrogating the necessity for privity. In Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P.2d 1094 (1957), the Arizona court states adherence to the general rule requiring privity and embraces the above exception by holding that, as a general rule, no implied warranty inures in absence of privity of contract, but in cases involving the use of food, beverages and drugs, an implied warranty from the manufacturer inures to the benefit of the consumer, even in the absence of privity. The general rule stated in the Arizona case denying recovery in non-human consumption cases in the absence of privity has been subject to a mammoth onslaught in the past few years, triggered by Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960). In *Henningsen*, the court said it could see no basis for differentiating between a fly in a bottle and a defective automobile. Similar cases are quickening the pace of the latest assault upon the citadel. B. F. Goodrich Co. v. Hammond, 269 F.2d 501 (10th Cir. 1959) (automobile tires); Greenman v. Yuba Power Tools Prods.,

warranty of merchantable quality?"[5]

In two recent cases in the Fifth Circuit plaintiffs failed in their quest to hold cigarette manufacturers liable when the court applied a standard of foreseeability of harm much akin to the standard applied to negligence cases. It was held in *Green v. American Tobacco Co.*[6] that the scope of an implied warranty of merchantability does not extend to dangers that could not have been discovered by the reasonable application of human skill and foresight. It was then concluded that since the defendant tobacco company could not, by the reasonable application of human skill and foresight on or prior to February 1, 1956, when the decedent contracted cancer, have known that users of its cigarettes would be endangered,[7] it could not be held liable on an implied warranty theory. This holding was echoed in *Lartigue v. R. J. Reynolds Tobacco Co.*,[8] which held that under Louisiana law an implied warranty of wholesomeness[9] does not extend

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27 Cal. Rprt. 697, 377 P.2d 897 (1963) (power tools); Connally v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (1963) (automobile gears); Spence v. Three Rivers Builders & Masonry Supply Co., 353 Mich. 120, 90 N.W.2d 873 (1958) (cinder building blocks). See Annot., 75 A.L.R.2d 39 (1961).

[5] An implied warranty of merchantable quality existed both at common law (Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963), recognizing that in Florida the Uniform Sales Act has not been adopted), and under the Uniform Sales Act. Section 15(2) of the Uniform Sales Act provides: "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." Section 2-314 of the Uniform Commercial Code contains a similar provision, except that a sale by description is not required. Prosser, in discussing the implied warranty (Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN L. REV. 117, 122-124 (1943)), cites three theories as the basis for implied warranty: tort theory, based on strict liability for misrepresentation of fact; contract theory, the warranty having been agreed upon by the parties, either expressly or tacitly; and warranty imposed by law, whether or not so intended by the parties, on the basis of policy. Dean Prosser complains that as the occasion arises, courts jump from one theory to another depending on the facts. The implied warranty theory is preferable to plaintiffs because, being implied in law, it is easier of proof than negligence, express warranty, or misrepresentation.

[6] 304 F.2d 70 (5th Cir. 1962).

[7] An interrogatory submitted to the jury was as follows: "Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known that users of Lucky Strike cigarettes, such as the decedent Green would be endangered, by the inhalation of the main stream of smoke of Lucky Strike cigarettes, of contracting cancer of the lung?" The jury answered, "No," after having answered affirmatively that the smoking of Lucky Strike cigarettes was a proximate cause of decedent's cancer. Green v. American Tobacco Co., 304 F.2d 70, 71-72 (5th Cir. 1962).

[8] 317 F.2d 19 (5th Cir. 1963).

[9] Louisiana, lacking the Uniform Sales Act and the Uniform Commercial Code, finds a common-law warranty that products intended for human consumption are reasonably safe for such purposes. Lartigue v. R. J. Reynolds Tobacco Co., *supra* note 8, at 32-35. The warranty was held to be implied in law, in addition to the statutory warranty against redhibitory vices in Louisiana, and limited in its scope to those cases in which the harm involved was a foreseeable consequence

to risks, the harmful consequences of which, based on the present state of human knowledge, are unforeseeable.[10]

The limitations imposed upon a plaintiff by a standard which embraces foreseeability were lessened by a subsequent opinion in the *Green* case rendered by the Supreme Court of Florida.[11] In answer to a question certified to it by the Fifth Circuit[12] under a Florida statute,[13] the court said that the law of Florida imposes on a manufacturer of cigarettes absolute liability, as for breach of warranty, even though the manufacturer could not have known, at the time the decedent contracted cancer, that users of its cigarettes would be endangered.[14] With the scope of the warranty under Florida law thus enlarged, the Fifth Circuit was again called upon to render an opinion,

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of a defective condition.

[10] The foreseeability standard in *Lartigue*, which has been criticized as being nothing more than a negligence standard (1 FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 16.03(4) (Supp. 1963)), is characterized by the court as follows (at 24):

> The liability on warranty that a consumer invokes against a manufacturer, with whom he has no contract of sale, is delictual, a liability in tort; in Louisiana in the case of food products and other articles intended for human consumption, it is strict liability regardless of fault. This is a heavy burden on the manufacturer, but it is a liability only for a defective condition not contemplated by the consumer, the harmful consequences of which, based on the state of human knowledge, are foreseeable. "The foreseeability here involved is different from that required in negligence cases. It is not the foreseeability of unreasonable risks but rather the foreseeability of the kinds of risks the enterprise is likely to create." James, *Strict Liability of Manufacturers*, 24 TENN. L. REV. 923, 925 (1957).

[11] 154 So. 2d 169 (Fla. 1963).

[12] The Fifth Circuit, 304 F.2d 85 (1962), granted plaintiff's petition for rehearing and certified the following question to the Supreme Court of Florida:

> Does the law of Florida impose upon a manufacturer and distributor of cigarettes absolute liability, as for breach of an implied warranty, for death caused by using such cigarettes from 1924 or 1925 until February 1, 1956, the cancer having developed prior to February 1, 1956, and the death occurring February 25, 1958, when the defendant manufacturer and distributor could not on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered by the inhalation of the main stream of smoke of such cigarettes, of contracting cancer of the lung? 304 F.2d 85, 86.

[13] FLA. STAT. ANN. 25.031 (1961) provides for certification of questions to the Supreme Court of Florida for interpretations of Florida law.

[14] The court, in 154 So. 2d 169, 170-174, said:

> Our decisions conclusively establish the principle that a manufacturer's or seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty. . . . No reasonable distinction can, in our opinion, be made between the physical or practical impossibility of obtaining knowledge of a dangerous condition, and scientific inability resulting from a current lack of human knowledge and skill. . . . We think that, whatever may be the scope of an implied warranty in a given case, the basis of such liability is the undertaking or agreement, attributed to law, to be responsible in the event the thing sold is not in fact merchantable or fit for its ordinary use or purposes. . . . To the extent that our cases

this time in light of the Florida decision.[15] The court declined to treat the Florida opinion as tantamount to making the manufacturer an insurer against personal injury caused by smoking cigarettes. It held that, while under Florida law the implied warranty of merchantability extends beyond those dangers reasonably foreseen by the manufacturer, such dangers subject the manufacturer to liability not merely by causing harm, but only if the dangers cause the product to lack merchantable quality.[16] The court remanded the case for determination of that question by a jury. A vigorous dissent insisted that the certification to the Florida Supreme Court was meant as the final disposition of the case.[17]

The fallacy in the reasoning of those who conclude that an extension of the warranty to unknowable risks necessarily results in a finding of liability lies in a misunderstanding of the nature of the warranty. The warranty is one of reasonable fitness for the general purposes for which the product is intended.[18] The warranty is not a guarantee against personal injury. Extension of the scope of the warranty to include unknowable risks does not alter the nature of the

take note of a defendant's opportunity for knowledge, it is merely in recognition of a defendant's superior position, relative to the purchasing public, as a factor affecting policy considerations rather than determining the limits of implied warranty in a particular consideration. . . . The contention that the wholesomeness of a product should be determined on any standard other than its actual safety for human consumption, when supplied for that purpose, is a novel proposition in our law, and one which we are persuaded has no foundation in the decided cases.

[15] 325 F.2d 673 (5th Cir. 1963).

[16] *Id.* at 675, the court said that the question presented did not present
. . . the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of law unmerchantable in Florida under the stated conditions, nor does it request a statement of the scope of warranty implied in the circumstances of this case.

[17] *Id.* at 679, Circuit Judge Cameron insisted that the majority borrowed the notion of reasonable suitability from its reasoning in the *Lartigue* case, where the scope of the warranty was limited to knowable risks. He suggests that the intent of the parties, counsel, and the court was that only the scope of the warranty was presented to the Supreme Court of Florida for determination, and that liability hinged on the Florida decision on this point.

[18] In a general sense, "merchantable quality" means that the substance sold is reasonably suitable for the ordinary purposes it was manufactured to meet. Moore v. Hubbard & Johnson Lumber Co., 149 Cal. App. 2d 236, 308 P.2d 794 (1957); Simmons v. Rhodes & Jamieson, Ltd., 146 Cal. App. 2d 190, 293 P.2d 26 (1956). Merchantable quality refers to goods that are reasonably suitable for the ordinary purposes of goods of the general type described by the terms of the sale and that are capable of passing in the market under the name or description by which they are sold. Carney v. Sears, Roebuck & Co., 309 F.2d 300 (4th Cir. 1962); Burr v. Sherwin-Williams Co., 42 Cal. App. 2d 682, 268 P.2d 1041 (1954); Wallace v. L. D. Clark & Son, 74 Okla. 208, 174 Pac. 557, 21 A.L.R. 361 (1918). Reasonable suitability is also the criterion in Giant Mfg. Co. v. Yates Am. Mach. Co., 111 F.2d 360 (8th Cir. 1940); Crotty v. Shartenberg's-New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960); Vitro Corp. of America v. Texas Vitrified Supply Co., 71 N.M. 95, 376 P.2d 41 (1962); Dalton v. Pioneer Sand & Gravel Co., 37 Wash. 2d 946, 227 P.2d 173 (1951).

warranty. As the Fifth Circuit concluded, the unknowable risk is embraced within the scope of the warranty, but the warranty remains one of reasonable suitability.[19] The court allowed that a jury may apply a very strict standard of reasonableness to a manufacturer of cigarettes, in determining whether the cigarettes lived up to the warranty. Certainly the fact that the cigarettes caused harm is a factor to be weighed in determining their suitability.[20]

While harm is thus a factor, the conclusion that liability should follow from the mere occasion of injury is a dangerous one.[21] Even where a standard such as the one in the *Green* case is applied, which abandons foreseeability, a standard which imposed liability predicated merely on injury would be unsatisfactory for a product such as a cigarette. For example, although unwholesome food is not fit for any purpose as food, an unwholesome cigarette is fit for smoking. Indeed, cigarette sales remain lucrative despite the recent government report authoritatively linking their use with lung cancer. A jury question as to reasonableness thus remains.

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[19] The district court charged the jury as follows: "The manufacturer of products which are offered for sale to the public in their original package for original consumption or use impliedly warrants that its products are reasonably wholesome or fit for the purpose for which they are sold. . . ." There was an objection to the remainder of the instruction relative to foreseeability, and the reversal granted in the case was based upon sustaining that objection. However, the quoted language remains as the law of the case, and therefore the extension of liability to include unknowable risks does not alter the burden upon the manufacturer. He must still show only that the product was reasonably fit.

[20] The notion that a product merchantable in the commercial sense might fail to live up to the implied warranty of merchantability despite its commercial suitability was alluded to in Pritchard v. Liggett & Myers Tobacco Co., 134 F. Supp. 829 (W.D. Pa. 1955). In that case, there was no argument that the cigarettes did not meet the standard attained by other cigarettes, yet the court found that a cause of action had been stated on a theory of breach of implied warranty. This notion is something more than the merchantability spoken of in 77 C.J.S. *Sales* § 327 (1952). There, and in cases cited, merchantability is defined in terms of merchantability according to name and kind, Singleton v. Dunn, 71 Ariz. 150, 224 P.2d 643 (1950), and merchantability under the name by which the product is described, Poulos v. Coca-Cola Bottling Co., 322 Mass. 386, 77 N.E.2d 405 (1948). In line with the modern view adhered to in *Pritchard* is the recent holding of Twombley v. Fuller Brush Co., 221 Md. 476, 158 A.2d 110 (1960), which held that the warranty of merchantability could be found to be breached if spot remover, although suitable for removing spots, caused hepatitis.

[21] See note 18 *supra*, as to definition of "merchantability" in terms of reasonableness, and Comment, 42 N.C.L. REV. 468 (1964), to effect that the warranty cannot be one of perfection. Eisenbiess v. Payne, 42 Ariz. 262, 25 P.2d 162 (1933), suggests that the warrantor warrants that the product is harmless, but it is suggested by this writer that this defines the nature of the warranty, and that Arizona would limit the scope of the warranty to the foreseeability standard suggested by reasoning of the *Lartigue* case or adhere to the general rule rejecting the warranty as one of perfection, adhered to even in the *Green* case, where the foreseeability standard had been abandoned. A warranty of perfection would subject manufacturers of products which contain a high cholesterol count, which had not until recently been thought harmful, to liability for injuries to persons using such products. Will processors of dairy products be held liable for damage from cholesterol content in milk and eggs?

As a result of the *Green* holding, a plaintiff has crossed another plateau in a long struggle approaching the finding of a liability where fault is nonexistent.[22] The broadening base of implied warranty liability centers attention on the unmistakable trend toward a liability without fault imposed as a risk of any manufacturer's enterprise. Such a liability would be imposed without regard to such notions as foreseeability,[23] reasonable suitability,[24] or commercial merchantability.[25] Liability would be imposed based on the mere occasion of injury. Until recently, even strict liability has been based upon the maintenance of some dangerous condition[26] or embarking upon an enterprise fraught with danger.[27] All such liability is based in part upon a weighing of the respective positions of the parties, which leads the law to conclude that the liability is best fixed upon the manufacturer, in light of some potential danger to the public. But in all cases, liability is arrested somewhere short of the point where it would be basically unfair to a manufacturer to hold him liable. The proponents of a system of enterprise liability are not interested in the role of the manufacturer, but seek only to protect the consumer. In the case of cigarettes, such a system would protect a man from the harmful fruits of his own desires. A man smokes a cigarette because it gives him a certain pleasure he desires. Compensation for harm caused by activities which are lawful should have no part in law, whether or not a defendant is economically capable of carrying the burden thus imposed upon him. A "social fault" should not be a "legal fault." While manufacturers should be made to bear the risks of their enterprise, this maxim should extend only to those risks which can be properly attributed to some conduct on the part of the manufacturer which renders the imposition of such liability just.[28] This is the criterion of law. It should not be lost sight of for the sake of the convenience of awarding judgment to an injured person against a legally innocent defendant.

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[22] All but disappeared is the traditional notion of caveat emptor. See Hamilton, *Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931).

[23] The *Lartigue* case does not limit implied warranty liability to the foreseeability applied in negligence cases, but does limit such liability to types of harm from which, granted the harm existing in the product, harm would be expected to flow, based on the current state of human knowledge.

[24] See note 18 *supra.*

[25] See Singleton v. Dunn, 71 Ariz. 50, 224 P.2d 643 (1950), and note 20 *supra.*

[26] The landmark case is Rylands v. Fletcher [1868], L.R. 3 H.L. 330.

[27] *E.g.*, dynamiting. See RESTATEMENT (SECOND), TORTS, ch. 21 (1962). The extension to food and other products intended for human consumption is now practically accomplished. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER (1951).

[28] See EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951), which discusses compensation for harm caused by lawful activities, and the trend toward an enterprise liability for insurable loss, especially at 3-8, 14-33, and in Introduction.

The genesis of legal reasoning which seeks to base legal liability on social policy rather than on traditional notions of fault is found in Judge Traynor's now-famous dissent in *Escola v. Coca-Cola Bottling Co.*[29] Professor Vold[30] points out that the broad tendency of this position is to eliminate dangerous articles from the market. In the case of cigarettes, there exists no incentive apart from ruination through lawsuits for a manufacturer to eliminate his product from the market. The tremendous demand for the products discourages any such thought. While the cigarette is a product which is capable of causing harm, it is a product which the public does not wish to have removed from the market. While it is clear that cigarette advertising through mass media presents a misleading picture of the joys of cigarette smoking, it is reasoned that finding implied warranty liability is an inappropriate approach to a problem more suited for other legal controls.[31]

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[29] Escola v. Coca-Cola Bottling Co. (24 Cal. App. 2d 453, 150 P.2d 436 (1944), at 440-441:

> Even if there is no negligence, however, public policy demands that responsibility be fixed where it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unable and unprepared to meet its consequences. The cost of an injury and the loss of time and health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of his product, is responsible for its reaching the market. However intermittently such injuries may occur, and however haphazardly they may strike, the risk of their occurrence is a constant one, and a general one. Against such a risk there should be general and constant protection, and the manufacturer is best situated to afford such protection.

[30] VOLD, THE LAW OF SALES 443 (2d ed. 1959), is speaking of food products, but the extension to other products has been proceeding. He says: "It is a question, once more, not of who is at fault between the immediate buyer and his seller. Both may be equally blameless. It is a question of *who ought* in this deal *as a matter of social advantage, to carry the risk that is actually involved.*" (Emphasis added.)

[31] It is suggested that enforcement of legislation governing advertising, and enforcement of new legislation to curb advertisers' zealousness, is a more sensible solution. The court in the Florida decision in the *Green* case, 154 So. 2d 169, 173 (Fla. 1963), demands a finding of liability without necessity of submitting the question to a trier of fact, reasoning that those who bombard the air waves of communications with glowing words about their products ought to be in no position to defend those products as reasonably fit when injury is caused to a member of a captivated public. For cases discussing advertising as affecting warranty liability, see Burr v. Sherwin-Williams Co., 42 Cal. 2d 682, 268 P.2d 1041 (1954); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958); PROSSER, THE LAW OF TORTS 506 (2d ed. 1960); 1 WILLISTON, THE LAW OF SALES 648-50 (rev. ed. 1948).

However, the notion of shifting the burden of loss from products injuries progresses rapidly.[32] The day is fast approaching when the impact of such cases as *Green* will bring the status of a warrantor to that of an insurer.[33] In the case of a product like a cigarette, the possibility of a manufacturer bearing the burden of liability as an insurable loss which he might charge off as a cost would result in a prohibitive insurance premium and a resultant increase in the cost of the product. It seems more likely that the smoker would care to afford the risk of his vice than to pay a premium to embrace its hazards.

The compulsion to avoid liability for injuries caused by unknowable defects is in some cases demanded by public necessity for the product, despite possible hazards. A hospital should not be held accountable for a defect in blood plasma which no developed scientific skill could detect, because the plasma has potential benefits which outweigh the prospect of avoiding its use until it can be proved foolproof.[34] Although the cigarette has no visible social utility which makes it rewarding to mankind when viewed by objective analysis, it has a social utility created by the smoking public. *What should be* does not always coincide with man's desires. The public *wants* the cigarette.

The attitude of the user of the cigarette is one of the significant

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[32] James, *Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957). Reasoning that implied warranties of quality are imposed for reasons of social policy to begin with, Professor James espouses a philosophy that would shift the burden of loss to a larger segment of society, in this case the manufacturer, who is deemed capable of paying for the loss as a cost of the enterprise. In James, *Products Liability*, 34 TEXAS L. REV. 44, 192 (1955), Professor James asks that if implied warranties are based on reasons of social policy, as stated above, then why be concerned about possibilities of knowledge or advertising or a seller's supposed superior vantage point. The position advanced is one of merely *finding liability*. See also EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951).

[33] See discussion of trends, 1 FRUMER AND FREIDMAN, PRODUCTS LIABILITY 16.03(4)(a) (Supp. 1963).

[34] In dictum, the court in Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792 (1954), at 795, stated that if in this case the court had found the supplying of plasma to constitute a sale, it would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not reasonably be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of the bad blood. This is severely criticized in 1 FRUMER AND FREIDMAN, PRODUCTS LIABILITY 16.03(4)(a) (Supp. 1963), which states, in part:

> The argument can be made, as suggested above, that, if the product, while known to possess an element of danger, cannot be made free of the defects under the present state of scientific knowledge, regardless of how much money is spent by the manufacturer or how much care is exercised by him, and if the product nevertheless should be produced and sold as a matter of social good and public policy, the manufacturer should not be strictly liable.

In another hospital case cited by the authors, this idea is echoed. Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085 (1961).

factors which will continue to make plaintiffs' recoveries against cigarette manufacturers difficult. The plaintiff's conduct is so interwoven in cigarette-cancer suits that a jury re-trying the *Pritchard*[35] case found assumption of risk even though the case originally was tried without regard to whether the manufacturer could have known of the existence of harmful elements in cigarettes.[36] When the Florida decision in the *Green* case was published, a leading newspaper, in an editorial entitled "Nonsense in Florida,"[37] condemned the action of the court in extending liability to *unknowable* risks on the similar ground that the plaintiff has sufficient knowledge of the hazards of cigarettes to defeat his demands for relief. It is not the logic of such actions that is worth noting, but the disposition of the public to deny relief to smokers. Limitation to foreseeable risks accomplishes this denial without the necessity of abandoning logic. In the application of the foreseeability standard, a manufacturer is held liable, for example, in the case of a fly in a bottle of soda, because the fly represents a type of harm from which injury can be expected to flow. In the case of cigarettes, liability would be imposed only if a jury found that because of knowledge that could properly be imputed to the manufacturer, the manufacturer should have expected harm to flow from the caricogenic elements in the cigarette smoke. When knowledge is imputed to the manufacturer, then a defense of assumption of risk is properly available, and a jury might find that a plaintiff was likewise possessed of knowledge of possible harm. The *Green* holding has created a problem of reasoning for juries and courts who would deny liability. The resistance to finding a liability which is deemed basically unfair will, however, continue to give rise to judgments denying liability, utilizing reasoning which lies waiting in the minds of those who will deny such liability.

Although there is a trend toward liability, it still walks a path replete with obstacles. Privity requirements which remain in many places,[38] foreseeability standards applied in many states,[39] and the

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[35] PERSONAL INJURY NEWSLETTER 146 (1962).

[36] In Pritchard v. Liggett & Myers Tobacco Co., 134 F Supp. 829 (W.D. Pa. 1955), *rev'd*, 295 F.2d 292 (3d Cir. 1961), and in the *Lartigue* and *Green* cases, it was generally acknowledged that the harmful elements in cigarettes were not within the knowledge of the manufacturer at the time of plaintiff's injury. Yet a jury has now found that the plaintiff had an appreciation of that risk.

[37] New York Herald Tribune, June 7, 1963.

[38] The breakdown of privity requirements in cases of products used for human consumption is proceeding rapidly, but is not yet complete. North Carolina, for example, still requires privity between the seller and the user. Wyatt v. North Carolina Equip. Co., 253 N.C. 355, 117 S.E.2d 21 (1960). See Annot. 75 A.L.R.2d 39 (1961).

[39] The *Lartigue* case and first *Green* case are reflective of the general rule limiting implied warranty liability to knowable risks.

hazards of jury trial[40] constitute some of the obstacles which still beset plaintiffs in their quest to hold cigarette manufacturers liable for the ills of the smoking habit. The plain fact that the cigarettes are merchantable in a commercial sense, that is that they are suitable for smoking,[41] is a factor which will continue to make courts and juries reluctant to approach liability. While it has been seen that fitness for one purpose does not necessarily foreclose liability where injury is caused in another manner,[42] the collateral injury must result from a condition which renders the product unmerchantable.[43] Until a jury makes such a finding, there will be no liability, even in Florida.

In addition, it would seem clear that only those plaintiffs who can show that their cancer occurred before 1964, or that the injury was caused before 1964 and they have not by their conduct since 1964 worsened the condition, are eligible plaintiffs, in light of the recent government report.[44] The widespread publicity, coupled with authoritative information which has occupied the minds of the public through the first half of 1964, seems to make it clear that the defense of assumption of risk against a smoker who acquires the habit in the future is a strong defense indeed. Whatever knowledge of the ills of smoking is now available is available to the smoker as well as to the manufacturer. While, then, the potential number of plaintiffs is great, the cause of action in the cigarette-lung cancer cases[45] is one which will eventually lose much of its current impact.

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[40] Such as the assumption of risk found in the Pritchard case; see note 35 *supra.*

[41] The argument that the cigarettes complained of are different from the other cigarettes which pass in the market and are commonly sold is not advanced against cigarette manufacturers in suits for injuries caused by the caricogenic elements in the smoke. See note 20 *supra.*

[42] Twombley v. Fuller Brush Co., 221 Md. 476, 158 A.2d 110 (1960).

[43] The *Green* case illustrates this.

[44] See note 1 *supra.*

[45] Cooper v. R. J. Reynolds Tobacco Co., 158 F. Supp. 22 (D.C. Mass. 1957), *aff'd,* 256 F.2d 464 (1st Cir. 1957), *cert. denied,* 358 U.S. 875 (1958), denied recovery on the ground that the plaintiff was not in privity with the defendant. Ross v. Phillip Morris Co., 164 F. Supp. 683 (W.D. Mo. 1958), denied recovery on grounds of lack of privity on a decision that the Supreme Court of Missouri would require privity, then modified its decision in light of a holding by the Missouri Supreme Court that such privity was not required. Ross v. Phillip Morris Co. (Civil No. 9494, W.D. Mo. 1959). Mitchell v. American Tobacco Co., 183 F. Supp. 406 (M.D. Pa. 1960), stated that the time for accrual of the action was when the plaintiff knew or should have known that he had lung cancer. Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961), found improper a pretrial exclusion order removing all basis for proof on plaintiff's claim of breach of warranty. The remaining cases, *Pritchard* (see note 2 *supra*), *Lartigue* (see note 8 *supra*), and *Green* (see notes 6, 11, 12, 14, 15, 16, 17 *supra*) are discussed at length herein. Recent notes on cigarettes and cancer are found in: 30 BROOKLYN L. REV. 194 (1963); 52 GEO. L.J. 200 (1963); 42 N.C.L. REV. 468 (1964); 39 N.D.L. REV. 471 (1963), 38 TUL L. REV. 194 (1963).