

# Sales - Manufacturers' Liability and the Necessity for Privity of Contract - Illinois History

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SALES—MANUFACTURERS' LIABILITY AND THE  
NECESSITY FOR PRIVACY OF CONTRACT—  
ILLINOIS HISTORY

Ex contractu—ex delicto . . . These were the two divisions of the law as it came down from the ancient writ system in England. A peculiar combination of these two divisions in the field of manufacturers' liability arose out of the dictum in the 19th century English case of *Winterbottom v. Wright*.<sup>1</sup> The dictum in that case, that in an action of negligence in the field of manufacturers' liability, there must be a showing of privity of contract in order for the plaintiff to recover, was quickly adopted by the American courts as the "general rule."

In addition to liability for negligence,<sup>2</sup> the manufacturer may be liable in an action for breach of express<sup>3</sup> and/or implied warranty.<sup>4</sup> Often, any number of these grounds of manufacturers' liability have been pleaded in a single suit. Generally the warranty actions have retained their character as an action ex contractu, so that privity is required.

Because privity is so important in the field of manufacturers' liability, a large part of the subsequent discussion is devoted to that topic. However, consideration is also given to the other relevant areas in this field, such as the Uniform Sales Act, the Uniform Commercial Code, the acceptance theory and caveat emptor.

EARLY DEVELOPMENT OF MANUFACTURERS'  
LIABILITY IN ILLINOIS

In the early history of Illinois, the simple economic structure involved almost exclusively direct sales by the manufacturer to the ultimate consumer. It was in this setting, where the Illinois courts followed the rule of caveat emptor,<sup>5</sup> that the law of manufacturers' liability grew. However, when the manufacturer sold directly to the consumer, a warranty implied in law that the goods were of fair, average quality became part of the contract of sale.<sup>6</sup> Today this warranty is termed a warranty of merchantability.<sup>7</sup> If the buyer relied on the skill and judgment of the manufacturer,

<sup>1</sup> 10 Mees & W 109, 152 Eng. Rep. 402 (Ex. 1842).

<sup>2</sup> *Chapman v. Deep Rock Oil Corp.*, 333 Ill. App. 529, 77 N.E. 2d 883 (1948).

<sup>3</sup> *Lindroth v. Walgreen*, 329 Ill. App. 105, 67 N.E. 2d 595 (1946); *but see Lindroth v. Walgreen*, 338 Ill. App. 364, 87 N.E. 2d 307 (1949), *affd*, 407 Ill. 121, 94 N.E. 2d 847 (1950).

<sup>4</sup> *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N.E. 2d 739 (1943).

<sup>5</sup> *Archdale v. Moore*, 19 Ill. 565 (1858).

<sup>6</sup> *Misner v. Granger*, 9 Ill. 69 (4 Gilm.) (1847).

<sup>7</sup> ILL. REV. STAT. ch. 121½, § 15(1) (1961); *Appleman v. Fabert Motors Inc.*, 30 Ill. App. 2d 424, 174 N.E. 2d 892 (1961).

then the law implied a warranty that the goods were reasonably fit for the use for which they were intended.<sup>8</sup> This warranty is termed, today, a warranty of fitness for purpose.<sup>9</sup> In the second half of the 19th century the Illinois courts recognized that under certain circumstances these warranties extended to persons other than the purchaser, under the third party beneficiary theory.<sup>10</sup> However, one of the earliest Illinois cases that attached liability to a manufacturer solely for negligence was *Brady v. Empire Machinery Co.*,<sup>11</sup> in which the question of privity with third persons was expressly avoided.<sup>12</sup> The first important Illinois case adopting the theory of *Winterbottom v. Wright* was *Field v. French*,<sup>13</sup> in which plaintiff, a customer of Marshall Field & Co., sued the elevator contractor when the elevator in which he was riding collapsed. Plaintiff was denied recovery because

[there was] no fact alleged showing privity between appellee and the Elevator Company without which there can be no liability in this case to appellee for alleged negligent construction of the elevator. The duty of the Elevator Company was to Field, not to the appellee, so far as concerns negligent construction.<sup>14</sup>

The privity requirement thus stated has continuously been upheld by the Illinois courts.<sup>15</sup> However, to temper the harshness of the "general rule" requiring privity, many exceptions have been adopted by the courts.

#### INHERENTLY DANGEROUS EXCEPTION

The first exception is the inherently dangerous product exception as formulated in *Thomas v. Winchester*,<sup>16</sup> an early New York case. While the privity requirement was adopted because it would be unjust to make the manufacturer owe a duty to the public at large, it was held not to be

<sup>8</sup> *Hallock v. Cutler*, 71 Ill. App. 471 (1897); *Kohl v. Lindley*, 39 Ill. 195 (1866); *Archdale v. Moore*, 19 Ill. 565 (1858); *Beers v. Williams*, 16 Ill. 69 (1854).

<sup>9</sup> ILL. REV. STAT. ch. 121½, § 15(1) (1961); *Paul Harris Furniture Co. v. Morse*, 10 Ill. 2d 28, 139 N.E. 2d 275 (1956).

<sup>10</sup> *Dallum v. Birdsall*, 66 Ill. 378 (1872) (third party beneficiary physically present when warranties made); *Union Hide & Leather Co. v. Ressig*, 48 Ill. 75 (1868) (contract made for the benefit of defendant, therefore the seller's warranties extended to him).

<sup>11</sup> 60 Ill. App. 379 (1896).

<sup>12</sup> 10 Mees & W 109, 152 Eng. Rep. 402 (Ex. 1842).

<sup>13</sup> 80 Ill. App. 78 (1899).

<sup>14</sup> *Id.* at 88.

<sup>15</sup> *Day v. Barber-Colman Co.*, 10 Ill. App. 2d 494, 135 N.E. 2d 231 (1956); *Nat'l. Iron & Steel Co. v. Hunt*, 312 Ill. 245, 143 N.E. 833 (1924); *Standard Oil Co. v. Murray*, 119 Fed. 572 (7th Cir. 1902).

<sup>16</sup> 6 N.Y. 397 (1852). Defendant held liable for mislabeling a jar of poison to a person with whom he was not in privity because the product involved a risk of harm to users no matter how much care was used in its preparation.

unjust to hold a manufacturer of an inherently dangerous product to such a duty.<sup>17</sup> In Illinois, "inherently dangerous" has been defined as "dangerous in its normal or nondefective state, as for example, explosives and poisons."<sup>18</sup> Thus, lubricating oil,<sup>19</sup> tractors,<sup>20</sup> and a glass door,<sup>21</sup> were held not to be inherently dangerous. While, on the other hand, a shoe dye containing substances poisonous to certain allergic individuals was held to be inherently dangerous, because it involved a risk of harm to a portion of the population, no matter how much care was used in its manufacture.<sup>22</sup>

Further, the manufacturer of an inherently dangerous product owes a non-delegable duty to the public. In *Hulk v. International Mfg. Co.*,<sup>23</sup> the manufacturer of a space heater was held liable for the plaintiff's injuries, even though the negligence causing the injuries was that of a distributor and not the manufacturer. Because the manufacturer was negligent in failing to inspect the space heater, constructive knowledge of its defects was imputed to him. And marketing of a product with constructive knowledge of its defects constitutes fraud by the manufacturer even though the product is sold through a distributor selected and trained by him. The hiring of a distributor to sell the product is not such an intervening cause as will relieve the manufacturer of liability for his negligence because the duty owed third persons is non-delegable.

#### IMMINENTLY DANGEROUS EXCEPTION

Closely allied with the inherently dangerous product exception to the privity rule is the imminently dangerous product exception. These exceptions differ in that an inherently dangerous product involves a risk of harm to persons and property in its natural, common nondefective state; on the other hand, an imminently dangerous product involves such a risk of harm only if improperly made, constructed, or repaired. The rule is stated in the Restatement of Torts, Section 395, as follows:

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it

<sup>17</sup> *Reddick v. General Chemical Co.*, 124 Ill. App. 31 (1905).

<sup>18</sup> *Watts v. Bacon & Van Buskirk Glass Co., Inc.*, 20 Ill. App. 2d 164, 155 N.E. 2d 333 (1959).

<sup>19</sup> *Standard Oil Co. v. Murray*, 119 Fed. 572 (7th Cir. 1902).

<sup>20</sup> *Kuhn v. Goedde*, 26 Ill. App. 2d 123, 167 N.E. 2d 805 (1960).

<sup>21</sup> *Watts v. Bacon & Van Buskirk Glass Co., Inc.*, 20 Ill. App. 2d 164, 155 N.E. 2d 333 (1959).

<sup>22</sup> *Steber v. Kohn*, 149 F. 2d 4 (7th Cir. 1945).

<sup>23</sup> 14 Ill. App. 2d 5, 142 N.E. 2d 717 (1957); *but see Black v. Texas Co.*, 247 Ill. App. 301 (1928).

for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.<sup>24</sup>

This Restatement rule, which is the law in Illinois today was gradually developed by a large body of case law. The early cases recognizing the imminently dangerous exception to the privity requirement allowed recovery on a theory somewhat akin to fraud. For example, in *Standard Oil Co. v. Parrish*,<sup>25</sup> the manufacturer was liable for the explosion of adulterated illuminating oil on the theory that "one must not knowingly send out an instrumentality which is imminently dangerous without notice of its nature and qualities."<sup>26</sup> The most important early case, which laid the foundation for the present-day rule in Illinois, is *Davidson v. Montgomery Ward & Co.*<sup>27</sup> Here plaintiff recovered for injuries sustained from the explosion of a defective grinding wheel supplied by the defendant which held itself out as a manufacturer. The court, although recognizing the rule requiring privity, laid down three exceptions to that rule, in the following language:

- 1) Where the act of negligence of a manufacturer or a vendor is with reference with some article imminently dangerous to the life or health of mankind. . . .
- 2) Where an owner's act of negligence causes an injury to one invited upon the owner's premises . . . [This deals with invitees, trespassers, etc., and is not in the scope of this article.]
- 3) Where one, without giving notice of its qualities, sells or delivers an article which he knows to be imminently dangerous to life and limb, in which case he becomes liable to any person who suffers an injury therefrom, which might have been reasonably anticipated, regardless of any contractual relations between the parties . . .<sup>28</sup>

The court further held that while the third exception was applicable to the instant case, the grinding wheel was not "imminently dangerous in itself [inherently dangerous]," but due to its defective condition, it was "imminently perilous [imminently dangerous]."

Until the *Davidson* case, the courts used the privity requirement as the basis for not extending the liability of a negligent manufacturer to persons other than immediate parties.<sup>29</sup> Even after the courts extended liabil-

<sup>24</sup> RESTATEMENT, TORTS § 395 (1934).

<sup>25</sup> 145 Fed. 829 (7th Cir. 1906).

<sup>26</sup> *Id.* at 830; accord, *Standard Oil Co. v. Murray*, 119 Fed. 572 (7th Cir. 1902).

<sup>27</sup> 171 Ill. App. 355 (1912). These three exceptions were stated without change in substance in two recent Illinois cases: *Dittmar v. Ahern*, 37 Ill. App. 2d 167, 185 N.E. 2d 264 (1962); *Beadles v. Servel, Inc.*, 344 Ill. App. 133, 100 N.E. 2d 405 (1951).

<sup>28</sup> *Id.* at 364.

<sup>29</sup> *Standard Oil Co. v. Murray*, 119 Fed. 572 (7th Cir. 1902).

ity to the user of an imminently dangerous product,<sup>30</sup> they still refused to extend liability to the public at large. Thus, in *Shepard v. Kensington Steel Co.*,<sup>31</sup> when a wheel came off a truck and hit plaintiff, a pedestrian, recovery was denied as against the negligent dealer. However, the rule advocated in the dissenting opinion that the seller of an imminently dangerous article owes a duty to the public at large later became the law in Illinois. Today, a manufacturer or other seller of an article, not inherently dangerous, but which may become so when put to its intended use, owes the public a duty of care, skill and diligence in its manufacture.<sup>32</sup>

The rationale the courts used in ultimately extending the liability of the negligent manufacturer to parties not in privity was grounded in the tort doctrine of foreseeability. In the early case of *Standard Oil Co. v. Parrish*,<sup>33</sup> the defendant, a manufacturer of illuminating oil, was deemed to have "contemplated" that its product would be used in the households of purchasers; so that the negligent manufacturer was liable to purchaser's daughter. And in *Colbert v. Holland Furnace Co.*,<sup>34</sup> the liability was extended to include all those whom the manufacturer could foresee would use it "properly for the purpose for which it is supplied."<sup>35</sup> The evolution of the imminently dangerous rule has ultimately made the negligent manufacturer liable to the public at large.<sup>36</sup> This liability is based upon the premise that "limiting recovery to those in contractual privity with the manufacturer becomes inadequate and unjust under our specialized economic system where many middlemen intervene between the producer and the ultimate consumer."<sup>37</sup>

<sup>30</sup> *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355 (1912).

<sup>31</sup> 262 Ill. App. 117 (1931).

<sup>32</sup> *Morgan v. Mixon Motor Co.*, 10 Ill. App. 2d 323, 137 N.E. 2d 504 (1956); see *Beadles v. Servel, Inc.*, 344 Ill. App. 133, 100 N.E. 2d 405 (1951); *Kreger v. Diener*, 321 Ill. App. 302, 53 N.E. 2d 26 (1944); accord, *Day v. Barber-Colman Co.*, 10 Ill. App. 2d 494, 135 N.E. 2d 271 (1956) (recognizing rule but denying recovery to assembler of finished product).

<sup>33</sup> 145 Fed. 829 (7th Cir. 1906).

<sup>34</sup> 333 Ill. 78, 164 N.E. 162 (1928).

<sup>35</sup> *Id.* at 81, 164 N.E. at 164; accord, *Biller v. Allis Chalmers Mfg. Co.*, 34 Ill. App. 2d 47, 180 N.E. 2d 46 (1962) (employee of purchaser); *Lill v. Murphy Door Bed Co.*, 290 Ill. App. 328, 8 N.E. 2d 714 (1937) (tenant injured by negligently constructed bed purchased from defendant by landlord); *Roche v. Buick Motor Co.*, 358 Ill. 507, 193 N.E. 529 (1934) (recognizing foreseeability as basis for liability).

<sup>36</sup> *Morgan v. Mixon Motor Co.*, 10 Ill. App. 2d 323, 137 N.E. 2d 504 (1956). Plaintiff recovered for injuries sustained when his auto collided with an auto negligently repaired by defendant. *Beadles v. Servel, Inc.*, 344 Ill. App. 133, 145, 100 N.E. 2d 405, 411 (1956) ("manufacturer . . . liable for bodily harm . . . to those whom he should expect to use the chattel or to be in the vicinity of probable use"); *Wintersteen v. Nat'l. Cooperage Co.*, 361 Ill. 95, 197 N.E. 578 (1935).

<sup>37</sup> *Beadles v. Servel, Inc.*, 344 Ill. App. 133, 140, 100 N.E. 2d 405, 409 (1951) (liability for negligent manufacture extended to second-hand purchaser).

The liberalness of the rules regarding the imminently dangerous exception, nevertheless, has its limitations. For example, the manufacturer is not held liable for an extraordinary use of his product which he could not foresee.<sup>38</sup> Moreover, it has also been held that not every defect in a product renders it imminently dangerous; rather, "[t]he test is,—how dangerous is this product with the particular defect, if any, it is alleged and proven to have in a particular case,—is the product as defectively made . . . inherently dangerous when put to its intended use?"<sup>39</sup> Another way the manufacturer can limit his liability is to warn of the defect.<sup>40</sup> It has also been recognized that it is not necessary for the manufacturer to adopt every new design or safety device, and to use a device which is reasonably safe and in customary use in the industry is not negligence.<sup>41</sup> Further, the Illinois Appellate Court has held that one who manufactures an essential part of an imminently dangerous product does not incur the same liability as the manufacturer of the finished product.<sup>42</sup>

The law in Illinois, with respect to the imminently dangerous rule, is as applicable to suits involving property damage as it is to those involving personal injury.<sup>43</sup> Thus, by gradual case development, the Illinois courts have adopted in principle the law as stated in the Restatement of Torts<sup>44</sup> by holding that the manufacturer or supplier of a defective chattel which involves an unreasonable risk of causing substantial harm to persons or property, is liable to all persons who can foreseeably be damaged by the chattel in its ordinary use.

FRAUD

"Another exception has also been said to be where the manufacturer's negligence consists of a fraudulent or deceitful statement or misrepresent-

<sup>38</sup> *Miller v. Sears, Roebuck & Co.*, 250 Ill. App. 340 (1928); *Healy v. Heidel*, 210 Ill. App. 387 (1918). No liability for breaking of window sash when used in extraordinary manner in washing windows.

<sup>39</sup> *Day v. Barber-Colman Co.*, 10 Ill. App. 2d 494, 504, 135 N.E. 2d 231, 236 (1956).

<sup>40</sup> *Trust Co. v. Lewis Auto Sales, Inc.*, 306 Ill. App. 132, 28 N.E. 2d 300 (1940). Automobile dealer who warned purchaser of defect in brakes held not liable. For the application of the rule to a negligent manufacturer who did not warn of defects, see *Billcr v. Allis Chalmers Mfg. Co.*, 34 Ill. App. 2d 47, 180 N.E. 2d 46 (1962); *Calhoun v. Central Illinois Light Co.*, 205 Ill. App. 185 (1917).

<sup>41</sup> *Day v. Barber-Colman Co.*, 10 Ill. App. 2d 494, 135 N.E. 2d 231 (1956).

<sup>42</sup> *Alschuler v. Rockford Bolt & Steel Co.*, 318 Ill. App. 564, 48 N.E. 2d 435 (1943). Manufacturer of scaffold hooks held not liable when scaffold collapsed. *Contra*, *Carson v. Weston Hotel Corp.*, 342 Ill. App. 602, 97 N.E. 2d 620 (1951). Manufacturer of elevator cable held liable when elevator fell.

<sup>43</sup> *Dittmar v. Ahern*, 37 Ill. App. 2d 167, 185 N.E. 2d 264 (1962); *Paul Harris Furniture Co. v. Morse*, 10 Ill. 2d 28, 139 N.E. 2d 275 (1956); *Laclede Steel Co. v. Silas Mason Co.*, 67 F. Supp. 751 (W.D. La. 1946) (Applying Illinois law).

<sup>44</sup> *Billcr v. Allis Chalmers Mfg. Co.*, 34 Ill. App. 2d 47, 180 N.E. 2d 46 (1962).

tation."<sup>45</sup> It was early held that a manufacturer who knowingly sends out a product with a defect that renders it imminently dangerous is liable to all persons whom he can reasonably foresee will use that product. Thus, before Illinois recognized the imminently dangerous exception, the courts allowed recovery against a negligent manufacturer for acts of omission on the basis of fraud. In these cases knowledge of a defect was imputed to the manufacturer.<sup>46</sup> An example of this reasoning may be found in *Empire Machinery Co. v. Brady*,<sup>47</sup> where a pulley belt from a negligently made washing machine killed an employee of the purchaser. Here the court imputed constructive knowledge of the defect to the manufacturer because he failed to inspect the pulleys and belts attached to the machine before placing it on the market. The sale of the washing machine by the manufacturer with constructive knowledge of its defects constitutes fraud. The courts have also applied the fraud principle to acts of commission.<sup>48</sup> This principle was illustrated in *Laclede Steel Co. v. Silas Mason Co.*,<sup>49</sup> where the defendant was held liable for damage to plaintiff's open hearth furnace caused by concealment of non-ferrous metals in a shipment of scrap iron. However, a manufacturer can relieve himself of liability for his negligent act by a full disclosure of the defects to the purchaser.<sup>50</sup>

#### THE FOOD CASES

One of the first areas in the field of manufacturers' liability in which the courts applied liberal principles with consistency was in the food products cases. At first there was no warranty, even as to the retailer, and to recover, the injured party had to prove negligence by the retailer.<sup>51</sup> Slightly before the turn of the century, in the leading case of *Wiedeman v. Keller*,<sup>52</sup> the broad principle was recognized that, "in all sales of meats or provisions for immediate domestic use by a retail dealer there is an implied warranty of fitness and wholesomeness for consumption."<sup>53</sup> This warranty was later held to extend to the members of the purchaser's fam-

<sup>45</sup> *Day v. Barber-Colman Co.*, 10 Ill. App. 2d 494, 503, 135 N.E. 2d 231, 236 (1956).

<sup>46</sup> *Standard Oil Co. v. Parrish*, 145 Fed. 829 (7th Cir. 1906).

<sup>47</sup> 164 Ill. 58, 45 N.E. 486 (1896).

<sup>48</sup> *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355 (1912). Manufacturer who concealed defects in negligently made grinding wheel held liable for injuries to employee of purchaser.

<sup>49</sup> 67 F. Supp. 751 (W.D. La. 1946).

<sup>50</sup> *Trust Co. v. Lewis*, 306 Ill. App. 132, 28 N.E. 2d 300 (1940).

<sup>51</sup> *Sheffer v. Willoughby*, 163 Ill. 518, 45 N.E. 253 (1896).

<sup>52</sup> *Wiedeman v. Keller*, 171 Ill. 93, 49 N.E. 210 (1897).

<sup>53</sup> *Id.* at 98, 49 N.E. at 211.

ily.<sup>54</sup> The ultimate extension of liability occurred in *Blarjeske v. Thompson's Restaurant Co.*<sup>55</sup> where recovery was allowed to a plaintiff who was neither a member of the family nor a household guest of the purchaser, but rather a co-worker who shared a sandwich with the purchaser at their place of employment.

Paralleling the liberal extension of liability from the *retailer* to the consumer was a body of law which extended the liability of the food *manufacturer* to the consumer. Thus the injured party could look beyond the immediate seller for relief. A vanguard case in this field is *Salmon v. Libby, McNeil & Libby*.<sup>56</sup> Here, in an action against an Illinois manufacturer under the Kansas wrongful death statute, the court required only a showing that negligence was the proximate cause of the death; thus plaintiff, whose intestate was not in privity, stated a good cause of action. Later, recovery was allowed against the manufacturer on the basis of breach of implied warranty of fitness and wholesomeness for consumption.<sup>57</sup> Further liberalization of the rule permitted the purchaser "a remedy either as against the person from whom the food was last purchased or against *any prior seller*, or the producer of the article."<sup>58</sup>

A key factor in the liberalization process was the change in packaging methods from unsealed to sealed containers. While the retailer was still held liable, even though the goods were in a sealed container,<sup>59</sup> the manufacturer was also held liable on a warranty running with the goods.<sup>60</sup> To illustrate, in *Poteraskie v. Illinois Meat Co.*,<sup>61</sup> where food in a vacuum sealed package contained glass, the court found a warranty running to the consumer from the packer or distributor. But where food is not sold in a sealed container, no warranty runs with the goods.<sup>62</sup> However, whether the goods are in a sealed container or in an unsealed container, the manufacturer may still be held liable on the basis of negligence.<sup>63</sup>

<sup>54</sup> *Haut v. Kleene*, 320 Ill. App. 273, 50 N.E. 2d 855 (1943).

<sup>55</sup> 325 Ill. App. 189, 59 N.E. 2d 320 (1945).

<sup>56</sup> 114 Ill. App. 258 (1904).

<sup>57</sup> *Paolinelli v. Dainty Foods Mfg., Inc.*, 322 Ill. App. 586, 54 N.E. 2d 759 (1944) (recognizing rule as applying to purchaser's family).

<sup>58</sup> *Heimsoth v. Falstaff Brewing Corp.*, 1 Ill. App. 2d 28, 30, 116 N.E. 2d 193, 194 (1954) (emphasis added). *Accord*, *Sharpe v. Danville Coca-Cola Bottling Co.*, 9 Ill. App. 2d 175, 132 N.E. 2d 442 (1956).

<sup>59</sup> *Chapman v. Roggenkamp*, 182 Ill. App. 117 (1913).

<sup>60</sup> *Potargias v. Coca-Cola Bottling Co.*, 332 Ill. App. 117, 74 N.E. 2d 162 (1947); *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N.E. 2d 739 (1943).

<sup>61</sup> 342 Ill. App. 555, 97 N.E. 2d 475 (1951).

<sup>62</sup> *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N.E. 2d 739 (1943).

<sup>63</sup> *Paolinelli v. Dainty Foods Mfg., Inc.*, 322 Ill. App. 586, 54 N.E. 2d 759 (1944).

The negligence relates, and the warranty applies as against the manufacturer, to the goods in the condition in which they left the factory.<sup>64</sup> In cases involving sealed containers, the doctrine of *res ipsa loquitur* applies,<sup>65</sup> provided the plaintiff can negative the existence of an intervening cause.<sup>66</sup>

Thus the general rule on food products liability in Illinois has been stated by the Appellate Court in the following words:

We are of the opinion that the duty of a manufacturer is to see to it that food products put out by him are wholesome, and the implied warranty that such products are fit for use runs with the sale, and to the public, for the benefit of the consumer, rather than to the wholesaler or retailer, and that the question of privity of contract in sales is not controlling, and does not apply in such a case.<sup>67</sup>

#### VIOLATION OF STATUTE

The violation of a statute in the manufacture of goods is not in and of itself negligence, but only evidence of negligence.<sup>68</sup> For example, in *Welter v. Bowman Dairy Co.*,<sup>69</sup> where the existence of white paint in a bottle of milk was in violation of the Illinois Pure Food statute,<sup>70</sup> plaintiff could not recover because of failure to prove defendant's negligence by a preponderance of the evidence.

#### THE ACCEPTANCE THEORY

At one time, the acceptance of an article by the vendee relieved the vendor of liability to third persons.<sup>71</sup> Even today, by the operation of this rule, the vendor of a patently defective article will, in the absence of spe-

<sup>64</sup> *Tiffin v. The Great A. & P. Tea Co.*, 18 Ill. 2d 48, 162 N.E. 2d 406 (1959); *Williams v. Paducah Coca-Cola Bottling Co.*, 343 Ill. App. 1, 98 N.E. 2d 164 (1950).

<sup>65</sup> *Paolinelli v. Dainty Foods Mfg., Inc.*, 322 Ill. App. 586, 54 N.E. 2d 759 (1944).

<sup>66</sup> *Harris v. Coca-Cola Bottling Co.*, 35 Ill. App. 2d 406, 183 N.E. 2d 56 (1962); *Tiffin v. The Great A. & P. Co.*, 18 Ill. 2d 48, 162 N.E. 2d 406 (1959); *Williams v. Paducah Coca-Cola Bottling Co.*, 343 Ill. App. 1, 98 N.E. 2d 164 (1950); *Bowman v. Woodway Stores*, 345 Ill. 110, 177 N.E. 727 (1931).

<sup>67</sup> *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 321, 47 N.E. 2d 739, 746 (1943); *accord*, *Haut v. Kleene*, 320 Ill. App. 273, 50 N.E. 2d 855 (1943) (extending warranty of fitness and wholesomeness for consumption to preparation); *but see* *Crandall v. Stop & Shop*, 288 Ill. App. 543, 6 N.E. 2d 685 (1937) (warranty inapplicable to container in which food is packaged).

<sup>68</sup> *Chapman v. Deep Rock Oil Corp.*, 333 Ill. App. 529, 77 N.E. 2d 883 (1948). Defendant liable for storing combustibles in Illinois in violation of ILL. REV. STAT. ch. 127½ § 153 et. seq. (1961). *Wintersteen v. Nat'l. Cooperage Co.*, 361 Ill. 95, 197 N.E. 578 (1935) (shipping of empty barrels in violation of Interstate Commerce Act).

<sup>69</sup> 318 Ill. App. 305, 47 N.E. 2d 739 (1943).

<sup>70</sup> ILL. REV. STAT. ch. 56½, § 16 (1961).

<sup>71</sup> *Standard Oil Co. v. Murray*, 119 Fed. 572 (7th Cir. 1902); *Field v. French*, 80 Ill. App. 78 (1899).

cial circumstances, be relieved of liability by the vendee's acceptance.<sup>72</sup> However, if the article has a latent defect, and if it is a defect that is likely to result in injury, the vendor is liable to injured third persons, regardless of acceptance.<sup>73</sup>

#### THE UNIFORM SALES ACT

The bulk of Illinois litigation in the field of manufacturers' liability has taken place since the adoption of the Uniform Sales Act in 1915.<sup>74</sup> The sections of the Act relevant to the field of manufacturers' liability appeared to be in conformity with case law prior to their adoption; and subsequent case law embodies the provisions of the Act. Section 12 states that:

Any affirmation of fact or any promise<sup>75</sup> by the seller<sup>76</sup> relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods<sup>77</sup> and if the buyer purchases the goods relying thereon.<sup>78</sup>

In addition to Section 12, Section 15, dealing with implied warranties of quality, is often pertinent to cases involving manufacturers' liability. Every contract, unless otherwise agreed, is held to embody not only trade

<sup>72</sup> Kordig v. Grovedale Oleander Homes, Inc., 18 Ill. App. 2d 48, 151 N.E. 2d 470 (1958).

<sup>73</sup> Watts v. Bacon & Van Buskirk Glass Co. Inc., 20 Ill. App. 2d 164, 155 N.E. 2d (1959); Dixon v. Montgomery Ward & Co. Inc., 351 Ill. App. 75, 114 N.E. 2d 44 (1953); Colbert v. Holland Furnace Co., 333 Ill. 78, 164 N.E. 2d 162 (1928) (stating rule).

<sup>74</sup> ILL. REV. STAT. ch. 121½ (1961).

<sup>75</sup> Hawkins v. Berry, 10 Ill. 36 (5 Gilm.) (1848).

<sup>76</sup> Albin v. Illinois Crop Improvement Ass'n., 30 Ill. App. 2d 283, 174 N.E. 2d 697 (1962). Defendant was not liable when manufacturer used its tag to certify quality of seed. Chanin v. Chevrolet Motor Co., 15 F. Supp. 57 (N.D. Ill. 1935). Manufacturer's advertising statements are not by a "seller"; therefore, injured party could not recover from the manufacturer with whom he was not in privity.

<sup>77</sup> Beckett v. F. W. Woolworth, 376 Ill. 470, 34 N.E. 2d 427 (1941) (statement *after* sale not an inducement); Air Conditioning Corp. v. Honaker, 296 Ill. App. 221, 16 N.E. 2d 153 (1938). The term "air conditioning" was vague; therefore, parol was admissible to define it. Dallum v. Birdsall, 66 Ill. 378 (1872) (third party beneficiary of seller's express warranty recovered from seller in absence of privity).

<sup>78</sup> Bender v. Cooper & Nephews Inc., 323 Ill. App. 96, 55 N.E. 2d 94 (1944) (label must be read as a whole to constitute a warranty); Gaw v. Lake Erie Chemical Co., 293 Ill. App. 123, 11 N.E. 2d 982 (1937). Since plaintiff did not read the pamphlet, he could not rely on the warranties it contained. Miller v. Sears, Roebuck & Co., 250 Ill. App. 340 (1928). Warranties do not apply when the product is used in an extraordinary manner. Present Illinois law requires that the instructions on the label be followed in order for the injured party to recover. See Dittmar v. Ahern, 37 Ill. App. 167, 185 N.E. 2d 264 (1962); *but see*, Malstedt v. Ideal Lighting Co. 271 Ill. 154, 110 N.E. 795 (1915).

custom and usage, but also the implied warranties of the Sales Act.<sup>79</sup> The most important of these, as concerning the liability of manufacturers, are the implied warranties of quality of Section 15, subsections (1) and (2), which state:

- (1) Where a 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, there is an implied warranty that the goods shall be fit for such purpose.
- (2) Where the goods are bought by description from a seller who deals in goods of that description, there is an implied warranty that the goods shall be of merchantable quality.

It was early held that a manufacturer impliedly warrants an article to be fit for its particular purpose,<sup>80</sup> as stated in subsection 1 of Section 15, and that vendors generally warrant that the goods are of fair, average quality,<sup>81</sup> i.e. merchantable. However, the Sales Act recognizes in subsection (3), where the buyer has examined the goods and reasonably should have discovered the defect, that the warranties of merchantability and fitness for a particular purpose are negated as to him. And in subsection (4), where the article is purchased under its patent or other trade name, there is no implied warranty of fitness for purpose although there still is an implied warranty of merchantability.<sup>82</sup>

Subsection (5) of the Sales Act codifies the principle that warranties "as to quality or fitness for a particular purpose may be annexed by the usage of trade."<sup>83</sup> However, if there is any agreement of the parties inconsistent with the implied warranties, the warranties will be negated, as provided in subsection (6).<sup>84</sup>

#### UNIFORM COMMERCIAL CODE

The warranty provisions of the Uniform Sales Act have, for the most part, been adopted by the Uniform Commercial Code,<sup>85</sup> with modifica-

<sup>79</sup> *Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co.*, 334 Ill. 287, 165 N.E. 793 (1929).

<sup>80</sup> *Hallock v. Cutler*, 71 Ill. App. 471 (1897); *Archdale v. Moore*, 19 Ill. 565 (1858).

<sup>81</sup> *Beers v. Williams*, 16 Ill. 69 (1854); *Misner v. Granger*, 9 Ill. 69 (4 Gilm.) (1847).

<sup>82</sup> *But see Appleman v. Fabert Motors Inc.*, 30 Ill. App. 2d 424, 174 N.E. 2d 892 (1961). Purchase of automobile by trade name will not negative implied warranties of quality. *Contra*, *Fuchs & Lang Mfg. Co. v. Kittredge & Co.*, 146 Ill. App. 350 (1909); *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N.E. 587 (1898).

<sup>83</sup> *Miszczak v. Maytag Chicago Co.*, 11 Ill. App. 2d 496, 138 N.E. 2d 52 (1956). Since washing machine was used for two years by another without trouble, plaintiff could not make out a case of negligence sufficient in law.

<sup>84</sup> See *Haas v. Buick Motor Division*, 20 Ill. App. 2d 448, 156 N.E. 2d 263 (1959).

<sup>85</sup> ILL. REV. STAT. ch. 26, § 2-314 to § 2-317 (1961).

tions only to bring the statutory law into conformity with the developing case law on the subject. The subject matter of Section 2-318, while not treated in the Sales Act, is a statutory recognition of the Illinois case law on the subject.<sup>86</sup> The pertinent portion of this section is as follows:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty.

The comments following this section specifically indicate that it is neutral as regards extension or restriction of "the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."<sup>87</sup>

#### CONCLUSION

In the early history of manufacturer's liability, where the manufacturer sold directly to the consumer, the Illinois courts developed a principle of law that the maker impliedly warranted the quality and workmanship of his product. Later, when merchandising methods became more complex through the growth of the wholesaling and retailing functions, the producer became isolated from the ultimate purchaser. Because of this remote relationship, the doctrine of privity in negligence actions against the manufacturer by the purchasing public evolved. It was soon recognized, however, that in many instances public policy demanded that the manufacturer should be answerable for his negligence even though he was not in privity of contract with the injured party. Thus, the "inherent" "imminent," and food products exceptions to the "general rule" developed. The legislature stepped into the field by enacting statutes which placed a duty of care on the manufacturer in such fields as: storage of petroleum, sale of combustibles and sale of foods and drugs. The violation of these statutes was merely evidence of negligence, not negligence *per se*.

Although the privity requirement is slowly being eroded away by a plethora of exceptions, the Illinois courts are still tenaciously clinging to it by an almost adamant refusal to allow recovery where the fact situa-

<sup>86</sup> Cf., *Blarjeske v. Thompson's Restaurant Co.*, 325 Ill. App. 189, 59 N.E. 2d 320 (1945) (seller's warranty extended to person who was not in the family or household of the buyer, nor a guest in the buyer's home). "To say that, in the case at bar there was an implied warranty to [the person] who purchased the rabbits for food but that it did not extend to his wife and children, in our opinion does not make sense." *Haut v. Kleene*, 320 Ill. App. 273, 280, 50 N.E. 2d 855, 857 (1943). And in *Standard Oil Co. v. Parrish*, 145 Fed. 829 (7th Cir. 1906), the court found for plaintiff on the ground that, "defendant was supplying oil for illumination and must have contemplated that it would be burned in the ordinary and usual lamps in the households of the purchasers."

<sup>87</sup> UNIFORM COMMERCIAL CODE § 2-318, comment 3 (1958).