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PRODUCT MISREPRESENTATION AND THE DOCTRINE OF CAUSATION

*Jerry J. Phillips**

A product claim based on breach of express warranty, tortious misrepresentation, or inadequate directions or warnings, requires the plaintiff to show not only that the product was defective and was the cause of his injury, but usually he must also show that he was aware of the defective representation. Proof of such awareness is not required when defects arise from the failure of a product to meet *ordinary* expectations, since these expectations are presumed.¹ Where the defect consists of a representation, however, *special* expectations are supposed to be involved, and the plaintiff, in order to recover, may therefore be required to show his awareness of the misrepresentation.

Proof of such awareness is thought necessary to establish cause-in-fact. Cause-in-fact, however, is not a fixed quantum in every case, but may vary according to the policy considerations involved in the particular circumstances of each case.² This article's thesis is that concern for proof of causation based on awareness should play a lesser role in representational defect cases than the courts usually accord the matter, because of countervailing policy considerations that minimize its importance. If the issue is considered at all, it should usually be a jury question rather than one of law for the court.

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1. The key provision of the merchantability warranty, § 2-314(2)(c) of the UNIFORM COMMERCIAL CODE (hereinafter referred to as the CODE), provides that goods to be merchantable must be "fit for the ordinary purposes for which such goods are used." Section 402A(1) of the RESTATEMENT (SECOND) OF TORTS provides that the seller is liable for physical harm to a consumer's person or property caused by the sale of a defective product that is "unreasonably" dangerous. These two leading bases for products liability thus adopt the ordinary expectations of the average consumer as the standard of defectiveness. See Dickerson, *Products Liability: How Good Does a Product Have To Be?* 42 IND. L. J. 301, 304-05 (1967). It has been held that proof of reliance is unnecessary in an action for breach of the implied warranty of merchantability. *Hinderer v. Ryan*, 499 P.2d 252 (Wash. App. 1972). Similarly, the clear implication of Comment c to § 402A is that reliance is assumed in an action brought under that section.

2. ". . . I find that even with reference to this issue of simple cause the mysterious relationship between policy and fact is likely to be in the foreground. In this Article it will be demonstrated that policy may often be a factor when the issue of cause-in-fact is presented sharply for decision, much as it is when questions of proximate cause are before the court." Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 61 (1956).

I. EXCESSIVE REPRESENTATIONS

A. *The Causal Relation*

A breach of express warranty or a tortious misrepresentation is normally characterized by excessive representations: the defendant represents that a product will do more than it will in fact do. The courts have therefore held that a plaintiff must show that he was aware of this special representation and relied on it to his injury. If he is unaware of it, he has only ordinary expectations, and his conduct and resultant injury are not caused by the "defective" representation.

This issue is illustrated by *Hochberg v. O'Donnell's Restaurant, Inc.*,³ in which the plaintiff sought damages for a tooth injury incurred when he chewed an unpitted olive served to him in a vodka martini by the defendant restaurant. He alleged that he "saw a hole cut in the end of the olive"⁴ before he put it into his mouth, and he therefore assumed the olive was pitted. He conceded that "if he had not seen the hole in the olive his case would be 'extremely tenuous.'"⁵ Based on these allegations, the court held the plaintiff stated a good cause of action.

Presumably, the reason why the plaintiff imbibers' case would have been "extremely tenuous" if he had not seen the hole is that the ordinary consumer does not expect to find pitted olives in his martinis. Now my martini-drinking friends tell me it is common practice to serve martinis with unpitted olives, but the defendant here, however, had in effect "represented" that his was a special, pitted olive. It is the same as if the defendant had sold plaintiff olives labeled "pitted." If the plaintiff had not seen the hole before chewing the olive, the defect would have been present but, arguably, would not have "caused" his injury. The cause might then be described as the plaintiff's own carelessness in chewing an olive without first ascertaining whether or not it was pitted.

Policy considerations, however, might dictate that the defendant could be held liable even though the plaintiff was unaware of the hole if, for example, it were decided that martinis should be served only with pitted olives in order to reduce the incidence of injuries such as those suffered by the plaintiff. In such a situation the *special* expectations of the plaintiff would in effect be

3. 272 A.2d 846 (D.C. App. 1971).

4. *Id.* at 847.

5. *Id.* at 849.

elevated to the status of *ordinary* expectations. It seems appropriate to submit the determination of this issue to the jury.⁶

Another policy basis to justify holding a defendant liable for breach of an express representation, even though the plaintiff is unaware of the representation at the time of injury, is that the plaintiff or some other purchaser has paid for the representation as part of the product's purchase price, and the user or consumer is therefore entitled to the benefit of the bargain. This proposition can be illustrated by *Randy Knitwear, Inc. v. American Cyanamid Co.*,⁷ where the plaintiff brought suit against the producers of a chemical resin sold to textile manufacturers to be used in processing fabrics to prevent shrinking. The plaintiff bought fabrics treated with this resin and they shrank and lost their shape after ordinary washing, causing the plaintiff to suffer damage. The defendant's product had been advertised in trade journals and by labels or garment tags representing that fabrics treated with the resin would not shrink or stretch out of fit.⁸ The plaintiff was permitted to recover because of breach of these representations.

Randy Knitwear held that the plaintiff relied on these representations in the purchase and use of the fabrics. What if he had not so relied? Should he not be permitted to recover anyway, since he probably paid a higher price to obtain a product that was supposedly shrink-proof?

It can, of course, be argued that if the plaintiff were unaware of the "defective" representations, they could not have caused the fabrics to be washed in an "ordinary" manner. In fact, however, it is unclear from the opinion that the persons who did the washing were actually aware of the representations. The allegations were that the plaintiff sold the fabrics to its customers, who apparently did the washing, and their claims against the plaintiff

6. In determining the duty of care to be imposed on a defendant, it is relevant for the jury to balance the likelihood and gravity of harm against the burden of precaution, *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 470, 467 P.2d 229, 232, 85 Cal. Rptr. 629, 632 (1970), and to weigh the magnitude of the foreseeable risk against the utility of the defendant's conduct, *Schemel v. General Motors Corp.*, 384 F.2d 802, 809 (7th Cir. 1967) (dissenting opinion). Usually, the jury should also be permitted to determine whether, as discussed hereafter, the plaintiff has received the benefit of the bargain, and whether the defendant's representations constitute waiver or estoppel.

7. 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962).

8. Disappointment of ordinary as well as "special" expectations may have been involved here, depending on the extent of shrinking or stretching. In any event, the seller may be under a duty to provide warnings or directions regarding the proper way to launder fabrics that are likely to shrink or stretch significantly under certain washing conditions.

produced the latter's damages. The customers probably bought the fabrics with knowledge of the representations, but such knowledge would not seem essential to the plaintiff's recovery. The plaintiff purchased the fabrics in reliance on the representations, and he should be entitled to the benefit of his bargain regardless of whether the actual users were aware of the representations when the injury occurred. One step further in this reasoning leads to the conclusion that either the customers or the plaintiff should have an action against the resin manufacturer regardless of whether any of them were aware of the representations so long as the representations constituted part of the consideration for which the parties bargained.

That a causal relation between the misrepresentation and the conduct leading to injury should not be required, can be further illustrated by two other leading cases: In *Baxter v. Ford Motor Co.*,⁹ the plaintiff bought an automobile in reliance on the defendant's representation that the windshield was made of shatterproof glass.¹⁰ He was permitted to recover for injuries sustained when the windshield, struck by a pebble, shattered. In *Bahlman v. Hudson Motor Car Co.*,¹¹ the plaintiff bought an automobile relying on the defendant's representation that it had a seamless steel roof. The roof was actually made of two separate parts, and the plaintiff was allowed to recover for injuries caused by a jagged roof seam when the car overturned as a result of his own negligent driving.

It can hardly be contended that the conduct of these plaintiffs, at the time their injuries were sustained, was more than remotely influenced by the defendants' representations. Arguably, the plaintiffs would not have driven their cars on the dates of their respective injuries had they known the representations were untrue, but such a conclusion is speculative at best. In any event, Baxter did not encounter the rock, and Bahlman did not overturn his car, each respectively relying on the fact that the windshield would not shatter or that the roof would not separate. Their actual conduct at the moment of injury need not have been influenced by these misrepresentations, any more than the con-

9. 168 Wash. 456, 12 P.2d 409 (1932).

10. Minimum glazing standards for motor vehicle windows are established by federal law. 37 Fed. Reg. 12237, June 21, 1972, as amended 37 Fed. Reg. 13097, July 1, 1972; 37 Fed. Reg. 24035, Nov. 11, 1972; 37 Fed. Reg. 24826, Nov. 22, 1972. Even without such standards, ordinary consumer expectations today probably include the expectation that shatterproof glass will be used for motor vehicle windows.

11. 290 Mich. 683, 288 N.W. 309 (1939).

duct of Randy Knitwear's customers in washing the fabrics in the "ordinary" way needed to be influenced by the defendants' representations in that case, for there to be recovery based on breach of representation.

B. Sales and Tort Law Aspects

These cases indicate that if a representation does not appreciably influence the plaintiff's actual use of a product at the time of injury, then it must at least influence the purchase of the product. There is support in sales law for the proposition that such influence not only may, but must occur at the time of purchase. Section 12 of the *Uniform Sales Act* provides that a seller's express warranty is created "if the buyer purchases the goods relying thereon." The courts have construed this provision literally to hold that no express warranty can be created after the sale is consummated.¹² The *Uniform Commercial Code*, successor to the *Sales Act*, conspicuously omits this time requirement in the express warranty provision, § 2-313;¹³ Comment 7 to this section states that the "precise time" when an express warranty is made "is not material" and that it may be made "after the closing of the deal."¹⁴ The closely related warranty of fitness for a particular purpose retains the requirement that the warranty arise "at the time of contracting."¹⁵ It is clear, however, that a cause of action

12. S. WILLISTON, *THE LAW OF SALES* § 211 (rev. ed. 1948).

13. § 2-313(1) of the CODE provides:

(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

14. § 2-209(1) of the CODE provides that an agreement modifying a sales contract "needs no consideration to be binding."

Courts have not been ready to forsake the date-of-sale requirement, however, even in actions for breach of express warranty brought under the CODE. *See, e.g., Stang v. Hertz Corp.*, 83 N.M. 217, 490 P.2d 475 (N.M. App. 1971), *rev'd on other grounds* 497 P.2d 732 (N.M. 1972).

15. § 2-315 of the CODE provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Both this warranty and the express warranty involve special expectations of the buyer.

for tortious misrepresentation will lie without regard to whether the misrepresentation is made before or after the date of sale.¹⁶

Another feature of the express warranty provision in the *Uniform Commercial Code* is that the requirement of "reliance" has been omitted, and the term "basis of the bargain" substituted in its place. The buyer need no longer prove that he relied on the seller's express warranty in purchasing or using the goods, provided he can show that the warranty was "part of the basis of the bargain." This term is not defined in the *Code*, and the Comments to § 2-313 are not particularly helpful on this point. Comment 3 states that "no particular reliance" need be shown, thus suggesting that at least some reliance is required. It further states that "any fact" which is to take express warranties out of the agreement "requires clear affirmative proof," thereby implying that the burden of proving lack of reliance is on the seller.

A fair construction of the *Code* seems to be that the actual plaintiff who is injured need not have relied on an express warranty in order to recover thereon, so long as the warranty has become "part of the basis of the bargain" somewhere in the chain of distribution. Section 2-318, for example, provides that a seller's warranty "whether express or implied" extends to various persons, depending on which alternative of the section is adopted, and there is no indication that such persons must prove their own reliance on or awareness of the seller's warranty before they can recover. This construction is in accord with the law of tortious misrepresentation.¹⁷ So, for example, in the *Randy Knitwear* case the ultimate customers would presumably be able to recover from the manufacturers who expressly warranted to the intermediate purchaser that their resin rendered the fabrics shrink-proof, even

The question of whether one or the other warranty has been created depends on whether the seller impliedly or expressly assents to such expectations.

16. "The false representations must have played a material and substantial part in leading the plaintiff to adopt his particular course. . . ." W. PROSSER, *THE LAW OF TORTS* § 108 (4th ed. 1971). Comment *j* to RESTATEMENT (SECOND) OF TORTS § 402B states that the rule of that section applies where an innocent public misrepresentation of a seller influences "the purchase or subsequent conduct" of a consumer.

17. Comment *j* to RESTATEMENT (SECOND) OF TORTS § 402B, which provides liability for a seller's tortious public misrepresentation, states:

The reliance need not necessarily be that of the consumer who is injured. It may be that of the ultimate purchaser of the chattel, who because of such reliance passes it on to the consumer who is in fact injured, but is ignorant of the misrepresentation. Thus a husband who buys an automobile in justifiable reliance upon statements concerning its brakes, and permits his wife to drive the car, supplies the element of reliance, even though the wife in fact never learns of the statements.

if these customers could not show that they knew of the warranty prior to washing the fabrics. The element of causation through reliance, in such a situation, appears very attenuated. It seems just as reasonable to conclude that an express warranty is "part of the basis of the bargain" merely because it is made by the seller; it might be deemed to "run with" the goods, as if it were part of the goods themselves.¹⁸

Professor Williston, in construing the reliance requirement for express warranties under the *Sales Act*, states that "as a general rule no evidence of reliance by the buyer is necessary other than the seller's statements were of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods."¹⁹ This language suggests that many express warranties are not very different from the implied warranty of merchantability, for which proof of reliance is normally not required.²⁰

Indeed, the overlap between the express warranty and the implied warranty of merchantability under the *Code* is apparent. Section 2-314(2)(f) provides that to be merchantable, goods must "conform to the promises or affirmations of fact made on the container or label if any"; such promises or affirmations should also constitute express warranties under § 2-313. Conversely, § 2-313(1)(b) provides that any "description of the goods" may constitute an express warranty, while the requirement that goods "pass without objection in the trade under the contract description" is also an essential element of the warranty of merchantability under § 2-314(2)(a).²¹

18. A similar approach was adopted in the breakdown of the privity requirement for implied warranties:

The recognition of an "implied" strict liability preceded the "express warranty" by some twenty years. . . . The movement ran considerably ahead of any legal justification to support it. For a time there was resort to various highly ingenious and patently fictitious devices, such as a postulated agency of the dealer to sell for the manufacturer . . . a third party beneficiary contract . . . a warranty running from the manufacturer to the consumer, by analogy to a covenant running with the land . . . [W. Prosser, *The Law of Torts* 653-54 (4th ed. 1971)].

19. S. WILLISTON, *THE LAW OF SALES* § 206 (rev. ed. 1948).

20. See note 1, *supra*. The sealed container doctrine, adopted in a minority of jurisdictions, is an aberration from this rule. See L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 19.03[4][c] (1972).

21. So in a hepatitis suit, where the plaintiff alleged that defendants "warranted and represented" that defective blood was merchantable, the court held that the allegation "asserts nothing more than the elements of implied warranties." *Shepard v. Alexian Brothers Hospital, Inc.*, 33 Cal. App. 3d 606, 109 Cal. Rptr. 132, 137 (1973).

The implied warranty of fitness for a particular purpose, which is very similar to the

Most laymen who purchase policies of accident or liability insurance probably do not study their policies in detail to determine the exact extent of their coverage. If an insured suffers a loss, however, and subsequently discovers that the loss is covered by his insurance, he would be entitled to payment in accordance with the terms of the policy. A beneficiary of an express warranty of goods may be analogized to the insured. If, for example, an automobile purchaser discovers after suffering loss that the manufacturer has given an express warranty covering such loss, he should be able to claim on the warranty even though he was unaware of its existence prior to the loss.

C. "Puffing" and Sales Talk

Where representations in the form of advertisement are involved, special problems concerning "puffing" and sales talk arise. Generally, a seller is permitted to "puff" his wares to a certain extent with impunity, and the ordinary buyer or user should be aware that the seller is merely engaging in sales talk.²² The clear trend of the cases, however, has been progressively to restrict the scope of permissible puffing.²³ Illustrating this trend

express warranty (note 15 *supra*), has likewise been treated as being of essentially the same scope as the warranty of merchantability. See *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E.2d 711 (1973). The historical reason for this overlap is probably owing to the strictures on recovery imposed through the "sale by description" requirement of the merchantability warranty under the UNIFORM SALES ACT, § 14. See *Kirk v. Stineway Drug Co.*, 38 Ill. App. 2d 415, 187 N.E.2d 307 (1963). If the goods were available for inspection at the time of contracting, the warranty of merchantability did not apply; in order to avoid leaving the plaintiff remediless in this situation, the courts treated the warranty of fitness for a particular purpose as being of equal scope with the merchantability warranty. Since the CODE does not retain the "sale by description" restriction on the warranty of merchantability this reason for overlapping the two warranties no longer exists, but the courts have shown no disposition to distinguish the warranties consistently under the CODE. It seems clear from Comment 2 to § 2-315 that the special expectations of the particular fitness warranty were not intended by the drafters of the CODE to overlap with the ordinary expectations of the warranty of merchantability.

22. "There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. . . . Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth." *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F.853, 856 (2d Cir. 1918) (Learned Hand, J.).

CODE § 2-313(2) provides that ". . . an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." Similarly, Comment *g* to RESTATEMENT (SECOND) OF TORTS § 402B states that the section "does not apply to the kind of loose general praise of wares sold which, on the part of the seller, is considered to be 'sales talk,' and is commonly called 'puffing'. . . ."

23. R. NORDSTROM, *THE LAW OF SALES* 217 (1970).

is a recent drug case, *Stevens v. Parke, Davis & Co.*,²⁴ which held that a manufacturer of the drug Chloromycetin could be found liable for injurious side effects to a plaintiff patient, where the prescribing doctor was induced by the manufacturer's overpromotion to use the drug unnecessarily. The doctor testified that "he could not remember specific instances" of such overpromotion, and that "he was cognizant of the dangers involved" in overuse of the drug.²⁵ The court nevertheless concluded that a jury could reasonably find the "watering-down" effect of the defendant's overpromotion nullified its warnings and overcame the doctor's own knowledge of the danger, since the promotion "consciously or subconsciously influenced" the doctor's conduct in prescribing the drug through "both direct and subliminal advertising."²⁶

Express warranties and advertising have played an important role in the breakdown of the privity requirement.²⁷ In some instances, the courts have been willing to permit a buyer to sue a remote seller for breach of express representations that constitute little more than warranties of merchantability, although such a suit would not lie on an implied warranty theory alone.²⁸ This trend has added to the tendency to treat express and implied representations as essentially overlapping. Now that the citadel of privity has been substantially breached,²⁹ the express representation should not be converted into a restrictive instrument for barring claims on the ground of lack of reliance. Certainly proof of reliance should be unnecessary in any case where the represen-

24. 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).

25. 9 Cal. 3d at 67, 507 P.2d at 663, 107 Cal. Rptr. at 55.

26. 9 Cal. 3d at 68-69, 507 P.2d at 663-64, 107 Cal. Rptr. at 55-56.

See also *Berkebile v. Brantley Helicopter Corp.*, CCH PROD. LIAB. REP. 7034 (Pa. Super. 1973), where the court held that "puffing," although insufficient to create an independent cause of action, was nevertheless relevant in determining the adequacy of defendant's warnings regarding the dangers involved in implementing a helicopter autorotational system in the event of power failure.

27. The rationale of an early false labeling case, *Thomas v. Winchester*, 6 N.Y. 397 (1852), figures prominently in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), the landmark case dispensing with privity in negligence actions. For a discussion of cases dispensing with privity in strict liability actions involving express warranties and advertisements, see L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 10.04[4][a] (1972).

28. See note 27 *supra*. This willingness has been particularly evident in cases involving only economic loss. See *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) (express warranty), and *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966) (strict tort misrepresentation).

29. Cf. CCH PROD. LIAB. REP. 4050 (1971).

tation is of the sort which, as Professor Williston says, "naturally would induce the buyer to purchase the goods."³⁰

D. "Ordinary" vs. "Special" Representations

Moreover, it is questionable whether "special" and "ordinary" representations should be treated differently for purposes of establishing reliance or causation. If, for example, one buys and pays for a shrink-proof fabric, he should be entitled to the benefit of his bargain regardless of whether he knows exactly what he paid for, and regardless of whether the "package" purchased consists of "ordinary" or "special" attributes of the product. Perhaps the martini drinker does not pay any more for a pitted than for an unpitted olive, and both kinds may be equally merchantable. If the seller specially represents that his olives are pitted, however, there is a basis for holding him to his representation on principles similar to those of waiver or estoppel.

As indicated earlier, it may also be relevant to consider whether pitted olives in martinis are more socially desirable for purposes of reducing the incidence of teeth injuries. There may be some countervailing aesthetic desirability³¹ in chewing an unpitted olive, although this has never been indicated to me by my martini-drinking friends. Without regard to the social desirability of one type of product over another, however, it may be equitable to hold a seller to his representations, whether "special" or "ordinary," because that is what he has sold. Importing considerations of social desirability suggest that a product attribute is being converted from a "special" to an ordinarily expectable characteristic. This conversion need not be made in order to dispense with the plaintiff's knowledge of the representation as a condition to recovery. If only an ordinary product is sold, this sale defines the scope of the seller's liability; if he undertakes to sell more, he may thereby voluntarily increase his potential liability correspondingly.

II. INADEQUATE REPRESENTATIONS

A. *The Causation Issue*

The converse of excessive representations is inadequate rep-

30. S. WILLISTON, *THE LAW OF SALES* § 206 (rev. ed. 1948).

31. Aesthetic desirability has been used as a basis for denying liability for glass door injuries, *Metal Window Products Co. v. Magnusen*, 485 S.W.2d 355 (Tex. Civ. App. 1972), and for injuries resulting from the presence of a fishbone in fish chowder, *Webster v. Blue Ship Tea Room*, 347 Mass. 421, 198 N.E. 2d 309 (1964).

representations, which normally involve insufficient warnings or directions.³² Representations may be inadequate because of either partial insufficiency or total failure to warn or direct. Problems of causation arise here too, but in an even more attenuated form than with excessive representations. The most common problem arises when the plaintiff has failed to read the directions or warnings that are actually given. The defense in this situation is that the inadequate directions or warnings do not cause the plaintiff's injuries, since they do not influence his conduct. Stated another way, it would have made no difference if the defendant had given adequate directions or warnings since the plaintiff would not have read them anyway.

This defense is what Professor Green describes, in connection with tort cases generally, as the "take your eye off the ball" argument³³ and what Professor Thode describes as the misleading "hypothetical case."³⁴ They contend that it obscures the issue of causation to focus on a situation that did not in fact occur; the appropriate inquiry should be the scope of the defendant's duty, rather than causation which is in fact present. The causation issue is more difficult to analyze, however, in connection with inadequate representations than it is with reference to tort cases generally. It is one thing to conclude that an excessively speeding automobile in fact causes an accident, even though it may have occurred if the car had been travelling at a lawful rate of speed, but another to conclude that an inadequate representation in fact influences conduct when the actor is unaware of the inadequacy.³⁵

32. "Directions and warnings serve different purposes. Directions are required to assure *effective* use, warning to assure *safe* use." (Emphasis by the editors.) L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 8.05[1] (1973). The two may overlap, however, since a statement directing that something not be done is at least in part cautionary in nature, although it may be inadequate because of insufficient specificity or intensity.

33. Green, *Duties, Risks, Causation Doctrines*, 41 TEXAS L. REV. 42, 68 (1962).

34. Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause In Fact*, 46 TEXAS L. REV. 423-35 (1968).

35. It is easy enough to see that a negligently speeding train causes an intersectional accident, even though the accident may have occurred had the train been travelling at a lawful rate of speed. Professor Thode (*supra* note 34) criticizes *Texas & Pacific Ry. v. McCleery*, 418 S.W.2d 494 (Tex. 1967), which denies liability in such a situation owing to the asserted absence of cause in fact. It is considerably more difficult, however, to see how a hotel's negligent failure to furnish fire escapes causes a guest's injury, when the guest is unaware of this failure and does not even look for a fire escape. See *Thode, supra* note 34 at 433-34. Recovery in this situation may be based on the supposition that, had there been fire escapes, there would also have been fire escape signs which might have attracted plaintiff's attention; or plaintiff's selection of the hotel might have been influenced by its general reputation for quality including safety. Similar suppositions regarding the effect

B. *Hypothesizing the Adequate Warning or Direction*

For the purpose of determining causation, it seems appropriate to approach the unread warning or direction situation by asking what a reasonable user or consumer in the plaintiff's position would likely have done had there been an adequate representation. This approach is illustrated by *Comstock v. General Motors Corp.*³⁶ The plaintiff alleged that the defendant negligently manufactured "O" ring sealers in the hydraulic brake master cylinders of 1953 Buicks, and negligently failed to warn purchasers of the defect after it was discovered. When the brakes of a purchaser's car gave way because of the defect, the purchaser took the car for repair to the local Buick dealer, where the plaintiff worked. A co-employee of the plaintiff forgot that the car was without brakes, and drove it into him crushing his right leg against the bumper of another car on which he was working.

The court rejected the defendant's argument that a prompt warning would have made no difference because the accident probably would have occurred anyway. The defendant apparently assumed that the warning might not have reached the car owner until after the defect resulted in loss of brakes, or that the owner would not have sought repair before that time. Neither of those assumptions was valid, however, since the owner "took good care of his automobile" and "[p]rompt warning to him would in all likelihood have meant repair before any brake failure occurred."³⁷

Similarly, in *Charles Pfizer and Co. v. Branch*³⁸ the court concluded that the plaintiff could recover damages for the death of calves as a result of the injection of medicine manufactured by the defendant, where the defendant negligently failed to warn adequately of the necessity for prompt administration of a known antidote in the event of a severe reaction to the medicine. The defendant contended that the inadequate warning was not a proximate cause of the damages, since the plaintiff admitted he had not read the label on the medicine. The court rejected this argument, since the plaintiff "testified that he had been using this medicine for about eight years" and, therefore, the trial court could reasonably have concluded that during this period of time

of postulated adequate representations are also made in suits based on inadequate representation.

36. 358 Mich. 163, 99 N.W.2d 627 (1959).

37. *Id.* at 178, 99 N.W.2d at 635.

38. 365 S.W.2d 832 (Tex. Civ. App. 1963).

the plaintiff would have become aware of an adequate warning had one been given.³⁹

Where the alleged defense is based on insufficient clarity or intensity of a direction or warning, the above approach seems particularly appropriate. In *Spruill v. Boyle-Midway, Inc.*,⁴⁰ it was held that the estate of a deceased child could recover against the manufacturer of a toxic furniture polish ingested by the child, since the label on the polish insufficiently warned of its toxicity. The label warned in bold letters that the polish was combustible and, in smaller letters under the section entitled "Directions," there was a statement that the product contained "refined petroleum distillates" and might be "harmful if swallowed, especially by children."⁴¹ The defendant contended that it should not be held liable because the child's mother admitted she never read the label. The court rejected this argument, stating that "had the warning been in a form calculated . . . to convey a conception of the true nature of the danger, this mother might not have left the product in the presence of her child. Indeed," said the court, "she might not have purchased the product at all" had she known the full extent of the danger.⁴²

In other cases it is more difficult to determine what effect an adequate warning might have had on a plaintiff's conduct. In *Davis v. Wyeth Laboratories, Inc.*,⁴³ for example, it was held that the manufacturer of Sabin polio vaccine might be held liable for its failure to warn of the danger of contracting polio from the vaccine, where the plaintiff contracted the disease from such an inoculation. The facts indicated that the risk of plaintiff's contracting the disease from the vaccine was statistically about the same as the risk of contracting the disease from other sources if the vaccine were not administered. In view of this close balance of probabilities, it is difficult to conclude what a reasonable person in plaintiff's position would have done had he known the actual risks involved.⁴⁴ Nevertheless, the court found that "a true

39. *Id.* at 834-35.

40. 308 F.2d 79 (4th Cir. 1962).

41. *Id.* at 82.

42. *Id.* at 87.

43. 399 F.2d 121 (9th Cir. 1968).

44. Plaintiff was vaccinated as part of a mass-immunization campaign, and he testified that he "was convinced by the campaign's advertising that it was his civic duty to participate." 399 F.2d at 125. He may have felt this "civic duty" even if he had known the actual risks involved, although defendant's advertising efforts in this respect might raise additional issues of overpromotion.

choice judgment” was involved, and that the plaintiff was entitled to make a “voluntary and informed choice” which could not be made absent knowledge of the attendant risks.⁴⁵

It may be argued that the approach of these cases involves the same kind of speculative inquiry that has been disapproved by torts scholars in connection with the so-called “hypothetical case”. Here, however, there is no other feasible approach because of the nature of the issues involved. A charge of inadequate warning or directions necessarily entails inquiry into what would have been adequate, since inadequacy can be determined only by comparison with a standard of adequacy. Error may arise, however, in focusing on a particular plaintiff’s actual conduct with regard to an inadequate direction or warning, when trying to determine what that conduct would have been had the representation been adequate. So, in the *Comstock* case, for example, it should have made no difference whether the actual owner of the car with the defective brakes took good care of his vehicle, so long as the reasonably prudent person would have done this and would also have responded promptly to a timely warning of the defect. Inquiry into a particular individual’s conduct for purposes of determining the casual effect of inadequate representations may divert one from the standards of ordinary conduct which should be applicable in such situations.

C. *The Role of Contributory Negligence*

If, on the other hand, contributory negligence is deemed a defense to an action for damages resulting from inadequate directions or warnings, it may be considered appropriate to focus on the plaintiff’s actual conduct to determine whether he was guilty of such conduct. Dillard and Hart contend that contributory negligence should not be a defense to such misrepresentation cases, since “the plaintiff cannot be said . . . to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed.”⁴⁶ This may be an overstatement, however, in cases where the directions or warnings, even though inadequate, may nevertheless have been sufficient to alert a prudent user had they been read. The mother in the *Spruill* case, for example, may have exercised greater caution had she read the labeling statement that the furniture polish contained refined

45. 399 F.2d at 129-30.

46. Dillard and Hart, *Product Liability: Directions For Use And The Duty to Warn*, 41 Va. L. Rev. 145, 163 (1955).

petroleum distillates and might be harmful if swallowed, especially by children.⁴⁷ In any event, a number of cases consider contributory negligence as a defense to a charge of inadequate warning, as Dillard and Hart acknowledge.⁴⁸

The appropriateness of treating contributory negligence as a defense in warnings and directions cases may depend on how the courts view the role of strict liability in such cases. The general rule is that contributory negligence, while a defense to an action in negligence, is no bar to a strict liability action.⁴⁹ One court has held that only a standard of due care may be imposed in inadequate warning cases, since a seller must only "exercise reasonable care and foresight to discover a danger in his product and to warn users and consumers of that danger."⁵⁰ This position seems questionable because, for the purpose of determining the standard of duty to be imposed on the defendant, there appears to be no good reason for distinguishing between defects arising from inadequate warnings, and defects in design or composition.

D. Law vs. Fact Issues

If the plaintiff's failure to read inadequate directions or warnings is considered contributory negligence, the issue should normally be one of fact for the jury. If it is treated as a question of causation, however, the courts are probably more likely to consider it as a question of law. So, for example, in *Parzini v. Center Chemical Co.*,⁵¹ the Georgia Court of Appeals ruled as a matter of law that the plaintiff could not recover (on a charge of inadequate labeling) for injuries received when a drain solvent containing sulfuric acid splashed on him as he attempted to open the bottle, since he had not read the label "and therefore any

47. The mother's contributory negligence in *Spruill* barred her own claim, but it did not bar the claims of the estate's other beneficiaries, 308 F.2d at 87.

A third party's actual knowledge of a product's dangerousness may constitute a superseding cause barring the plaintiff's recovery as a matter of law, *Steagall v. Dot Mfg. Corp.*, 223 Tenn. 428, 446 S.W.2d 515 (1969), but the better reasoned cases do not so hold. See, e.g., *Yale & Towne, Inc. v. Sharpe*, 118 Ga. App. 480, 164 S.E.2d 318 (1968). An adequate warning furnished to a third person may bar the plaintiff's recovery; but if the risk of danger is great, and there is a reasonably simple method of warning the plaintiff himself, such a warning may be required. See *West v. Broderick & Bascom Rope Co.*, 197 N.W.2d 202 (Iowa 1972).

48. See L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 8.06 (1973).

49. Noel, *Defective Products: Abnormal Use, Contributory Negligence, And Assumption of Risk*, 25 VAND. L. REV. 93, 106-08 (1972).

50. *Borel v. Fibreboard Paper Products Corp.*, CCH PROD. LIAB. REP. ¶ 7017, at pp. 12,213-14 (U.S. App. 5th Cir. 1972).

51. CCH PROD. LIAB. REP. ¶ 7024 (Ga. App. 1973).

inadequacy with regard to such warning would not be the proximate cause of his injuries.”⁵² The court held, however, that the plaintiff stated a cause of action regarding the container’s defectiveness since he “contended that the bottle was [so] flimsy . . . that when the plaintiff attempted by force to open the bottle . . . it caused the sulfuric acid to squirt out on him.”⁵³

This case should be contrasted with the same court’s decision in *Evershine Products, Inc. v. Schmitt*,⁵⁴ where it was held that the plaintiff stated a cause of action for failure to warn of the dangers in using a cleaning fluid in its undiluted form, even though the plaintiff failed to follow directions on the container regarding appropriate dilutions to be made for the varying uses of the product. It is unclear from the opinion whether the plaintiff had read the directions, but presumably she had for if she had not there would be an absence of “causation” under the *Parzini* rule. Since she apparently read, but failed to follow the directions, her conduct constituted only contributory negligence. It would seem, however, that the difference in degree of negligence of each of these two plaintiffs would be insufficient to justify a different outcome on the law-fact issue.⁵⁵

Professor Page Keeton⁵⁶ points out that there are three possible approaches to the issue of failure to read in warning or directions cases. One is to treat such failure as a legal bar to recovery, as was done in the *Parzini* case. Another is to hold the failure legally irrelevant to the right of recovery. The *Spruill* case, discussed above, apparently supports this position.⁵⁷ The third approach is to hold that the issue is one of fact for the jury, this last

52. *Id.* at p. 12,254.

53. *Id.*

54. CCH PROD. LIAB. REP. ¶ 7033 (Ga. App. 1973).

55. See also *D’Arienzo v. Clairol, Inc.*, CCH PROD. LIAB. REP. ¶ 7038 (N.J. Super. 1973), an allergy case in which the court denied defendant’s motion for a summary judgment based on plaintiff’s alleged negligence in failing to follow directions to perform a patch test before each application of defendant’s product, since a jury could reasonably find that there was inadequate warning of the dangers involved in failing to follow these directions. Plaintiff read the directions and performed the test before using the product for the first time, but she never performed it prior to re-applications. The court distinguished the dismissal of the suit in *Shaw v. Calgon, Inc.*, 35 N.J. Super. 319, 114 A.2d 278 (App. Div. 1955), another inadequate warning case, since there the “plaintiff completely failed to read the directions and warnings.” *Id.* at 12,305.

56. P. Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 Sw. L. J. 26, 33-34 (1965).

57. But see *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972), where it is stated that “[t]he holding was only that the causation issue presented a fact question, and the court in *Spruill* upheld the jury verdict.”

position being illustrated by *Technical Chemical Co. v. Jacobs*.⁵⁸

The intermediate appellate decision in the *Jacobs* case⁵⁹ probably presents the most thoroughly reasoned decision supporting the proposition that failure to read should be irrelevant in an inadequate warning or directions case. The plaintiff was injured by the explosion of a can of refrigerant, freon, as he was attaching it to his car's air conditioning unit. He alleged that the defendant manufacturer failed to warn of the danger of explosion if the can of freon were attached to the "high" instead of the "low" side of the car's air conditioner. The evidence indicated that the plaintiff had not read the labeling on the can. The defendant contended there was no proof of causation since the jury, although it returned a verdict for the plaintiff, found by special issue that the failure to warn was not a producing cause of the plaintiff's injuries.

The Texas Court of Civil Appeals was primarily influenced by two considerations in holding that the failure to read was legally irrelevant. One is the occasional impossibility of a plaintiff's carrying his burden of proof if, for example, he dies before trial or is blind or illiterate. Another is the likelihood of "pure speculation" by the jury with regard to whether the seller's failure to warn was the cause of the accident. The Texas Supreme Court reversed, holding that a jury issue was presented, but remanded the case for disposition in accordance with the Court of Appeal's alternative holding that the jury finding on the issue of causation "was against the great weight and preponderance of the evidence."⁶⁰

The Texas Supreme Court noted that "[i]t has been suggested that the law should supply the presumption that an adequate warning would have been read."⁶¹ This presumption would be rebuttable, however,⁶² and although it would aid the plaintiff in cases of absence of proof, it would be of no benefit to him where it could be affirmatively shown that a warning or direction had not been read.

58. 480 S.W.2d 602 (Tex. 1972).

59. *Jacobs v. Technical Chemical Co.*, 472 S.W.2d 191 (Tex. Civ. App. 1971).

60. 480 S.W.2d at 606.

61. *Id.* Compare the discussion in the text accompanying notes 16-18 regarding the possibility that the "basis of the bargain" requirement of express warranties under the UNIFORM COMMERCIAL CODE, § 2-313, may have the effect of shifting the burden of proving non-reliance to the seller.

62. If the presumption were irrebuttable, the defendant would be unable to contest it and any evidence on the issue would be irrelevant. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 804 (2d ed. 1972).

Where there is affirmative proof that the plaintiff did not read inadequate directions or warnings, jury "speculation"⁶³ may be justified on the issue of contributory negligence, if this is considered a defense to a warning action, and if there is some evidence that a warning or direction, had it been read, might have alerted a prudent user to the dangers involved. Where warnings or directions are devoid of such alerting characteristics, jury consideration of the issue is inappropriate. Similarly, the jury should be permitted to assume what an adequate warning would be, based on what the reasonably prudent person would have done had such a warning been given. As in the case of express warranties, questions of social desirability and benefit of the bargain, discussed hereafter, may also be pertinent jury considerations in determining the adequacy of warnings or directions.

E. Misleading Representations

If the plaintiff claims that the labeling or directions on a product lulled him into a false sense of security, it may be necessary to show that he was aware of the representation in order to establish causation. A leading case illustrating this proposition is *Maize v. Atlantic Refining Co.*,⁶⁴ where the plaintiff's wife died from inhaling the poisonous fumes of a cleaning fluid manufactured by the defendant. The label on the container cautioned against inhaling the fumes and directed that the cleaner be used only in a well-ventilated place. The court found that these directions and warnings, which were in relatively small letters, were effectively diluted by the much larger words "Safety-Kleen" on the container:⁶⁵

The word "safety" was so conspicuously displayed on all four sides of this can of dangerous fluid as to make the word "Caution" and the admonition against inhaling fumes and as to use only in a well ventilated place seem of comparatively minor import. . . . the word "Safety" was so prominently featured as to exclude from her mind that "provident fear" which has been characterized as "the mother of safety."

63. Compare note 34 *supra*, and the succeeding textual discussion with regard to whether a hypothetically better warning would be adequate to alert the average user or consumer. Juries are allowed to "speculate" in other situations, as for example in apportioning "second-collision" damages, where such speculation is justified by the necessities of the case. See *Larsen v. General Motors Corp.*, 391 F.2d 495, 503-04 (8th Cir. 1968).

64. 352 Pa. 51, 41 A.2d 850 (1945).

65. *Id.* at 55-56, 41 A.2d at 852.

It is arguable that misleading as well as inadequate language should be actionable regardless of whether the plaintiff has read it, just as it may be maintained that misrepresentations consisting of express warranties or advertisements should be actionable without proof of the plaintiff's awareness of them. This position is especially tenable if the prophylactic effect of recovery is emphasized: holding the defendant liable will presumably encourage him to provide better directions and warnings in the future so that others will not be misled.⁶⁶ Admittedly, substantial cause-in-fact problems are present since it is difficult to see how labeling can mislead the unaware plaintiff if it does not lead him at all. Benefit-of-the-bargain analysis may be tenuous in the case of misleading as well as inadequate labeling, which may cost about as much as adequate labeling, and the misleading or inadequate aspect may not carry any implication that the product is any better than what is ordinarily expected. Such labeling is usually designed to induce purchase and use of the product, however, and this persuasive factor may be deemed sufficient to justify treating the representation as "part of the basis of the bargain" by analogy to the approach suggested with regard to express warranties. In the case of either misleading or inadequate labeling, the plaintiff has received less than he reasonably expects in the product.

CONCLUSION

In actions based on breach of express warranty, the courts have frequently focused too much attention on whether the plaintiff was aware of the warranty, and not enough attention on policy issues favoring liability without regard to whether such awareness is established. Certainly there seems to be no reason for requiring that the awareness occur prior to the date of sale, since the law of tortious misrepresentation makes no such distinction and the Comments to the *Code* indicate that the distinction is not intended. The plaintiff himself need not be aware of the warranty if another in the chain of distribution has purchased or passed on the product in reliance thereon. Arguably, no one in the chain of distribution need be specifically aware, particularly where the warranty is one which may naturally be expected to accompany

66. Compare the approach of the United States Supreme Court in excluding illegally seized evidence without regard to whether it reliably establishes the defendants' guilt, since the prophylactic effect of the exclusionary rule outweighs the merits of the evidence in a particular case. See *Mapp v. Ohio*, 367 U.S. 643, 658-60 (1961). Similarly, the advantages of encouraging adequate warnings by holding the defendant liable may outweigh the issue of the plaintiff's lack of awareness in a particular case.

the product, or where the value of the warranty is a substantial factor in the product's cost.

Where inadequate warnings or directions are involved, the issue of awareness should not be whether the plaintiff's conduct was prompted by such representations—except perhaps where there is a charge that they were positively misleading, as well as negatively inadequate. The inadequacy cases should rather focus on whether the ordinary user's conduct would have been any different had the warnings or directions been adequate. The plaintiff's conduct in failing to read inadequate warnings or directions may be relevant on the factual issue of contributory negligence, if this is considered a defense in these cases. Even when it is a defense, however, such conduct should not be relevant if the warnings or directions are so inadequate that they could not reasonably be expected to alert the ordinary user to the risks involved.