VENDOR'S TORT LIABILITY

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The scope of this Article is an analysis of the nature and extent of the purely tort liability of a vendor of a chattel which is likely to cause harm unless the purchaser is aware of the danger lurking in it. This danger may be a normal attribute of the type of chattel involved or it may result from the fact that danger-creating defects exist in a type of chattel normally considered harmless. Liability based upon the breach of an express warranty, or of an implied warranty (or condition) under Sections 12 and 15 of the Uniform Sales Act, or under preexisting decisions, will receive only incidental consideration. Other writers have plowed that field of law, particularly with reference to the unwholesome food cases1 in which the question most frequently arises. In addition, although the action for breach of warranty originally developed as a tort action,2 today it has many attributes and limitations of an action for breach of contract and in more than a few jurisdictions the plaintiff must pursue the theory that he is suing on a contract, and seeking consequential damages for the personal injury or other harm he suffers.3

Although it has been suggested that liability for breach of warranty is in reality a liability based upon negligence,4 it seems clear that to the extent this liability can be considered a tort liability it is another example of an absolute liability which is imposed upon a vendor who neither knew, nor by the exercise of the most meticulous precautions could have known, of the danger hidden in the warranted chattel. That is particularly true of the vendor of canned foods which have been packed by a reputable packer, the true condition of which the vendor cannot know until he is told of the plaintiff’s illness caused by the unwholesome contents. The fact that such a vendor sold the war-

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1. Brown, The Liability of Retail Dealers for Defective Food Products (1939) 23 MINN. L. REV. 585; Perkins, Unwholesome Food as a Source of Liability (1919) 5 IOWA LAW BULL. 6, 86.

2. 4 WILLISTON, CONTRACTS (Rev. ed. 1936) 2689; Note (1929) 42 HARV. L. REV. 474.


ranted food in "the original package" does not help him escape liability, as it does where the vendor's negligence is in question. Perhaps the Achilles heel of a vendor who feels himself secure in the defense of a sale in "the original package", at least when attacked by a plaintiff who can wield the implied warranty spear, is the warranty, under Section 15 of the Uniform Sales Act and under Section 14 of the English Sale of Goods Act, of "merchantable quality".

By the word "vendor" is meant a person who sells a chattel but who did not manufacture, compound, pack, or otherwise create the finished product which is sold. Normally he is the retailer, though he may be a wholesaler. In discussing the liability for harm caused by dangerously defective chattels courts have frequently grouped together, manufacturers, contractors, and vendors as though they occupied the same role and their liability was governed by the same rules. This may have been well enough in the days when all three of them were almost equally free from liability to persons with whom they had no contractual relations. But it was never an accurate grouping, and since the modern development of a manufacturer's liability, particularly since Mac Pherson v. Buick Motor Co., it has been positively misleading. No single rule will explain the extent of a vendor's liability and in certain situations the manufacturer of a dangerously defective chattel may be liable for harm caused by it while the vendor who sells it is not.

Any reasonable man who manufactures an article which, if defectively made, is reasonably certain to be a thing of danger and to place life and limb in peril, can foresee that unless he acts with competence, skill, attention and care he is actively creating an unreasonable risk of harm to a determinable class of persons. In such a situation attention and care involve inspections in the course of manufacture to determine whether the materials used by the manufacturer are adequate for the use for which they are being prepared. In other words the manufacturer who carelessly and inattentively creates an automobile, for example, can foresee that he is engaging in an activity which is unreasonably dangerous to persons who will use the finished product and to travelers in its path, just as much as the person who carelessly and inattentively drives even a perfect automobile can foresee that he

6. West v. Emanuel, 198 Pa. 180, 47 Atl. 965 (1901); RESTATEMENT, Torts (1934) § 401, comment a.
7. See the devastating application of this to the vendor of sulphite impregnated underpants in Grant v. Australian Knitting Mills, [1936] A. C. 85, which, however, did not involve a sale in an original package. See Naumann v. Wehle Brewing Co., 15 A. (2d) 181 (Conn. 1940). See also 4 WILLISTON, CONTRACTS (Rev. ed. 1936) § 983 at 2709, § 987 at 2710.
is engaging in an *activity* which is unreasonably dangerous to himself, others in the car and travelers in its path. The fact that after the automobile was finished the defect was hidden and then undiscoverable by any practicable inspection by the manufacturer does not help him any more than the inattentive motorist's sudden attempt at the last moment to avert a collision helps him escape liability for his prior active misconduct. In both cases the antecedent active negligence is the basis of liability. In both cases the actor has knowledge which warns him of the unreasonable risk inherent in his active conduct.\(^{10}\)

On the other hand the competent, careful and attentive operator of a new automobile of a standard make who does not know that it contains a dangerous defect cannot foresee that his operation of it creates an unreasonable risk of harm to anybody. Aside from the mass of general information which every man is required to possess,\(^{11}\) in order to determine the risk inherent in his activity, the reasonableness of a particular activity is determined by the actor's actual knowledge at the time he acts.\(^{12}\) By the same token the vendor of that automobile, who is equally ignorant of its defect, cannot foresee that the sale and delivery of it to the operator is an act which is unreasonably dangerous to him or to anybody else. If liability is imposed on such a vendor or purchaser it cannot be (as in the case of the manufacturer) upon any theory of active negligence; the liability must be founded upon what the purchaser or vendor failed to do, upon the omission to inspect and discover the unknown danger. There is a real difference between the case of one who, on the facts known to him, acted in a manner foreseeably dangerous and of one whose activity appeared to be innocent and was made dangerous only by the existence of an unknown although discoverable fact. The extent to which a vendor is under an affirmative duty to discover unknown dangers in chattels he handles will be considered in succeeding pages.

The situation is entirely different when the vendor actually knows that the chattel he is selling contains a hidden defect which makes perilous its normal and foreseeable use. The "hidden defect" is stressed because generally the foreseeable peril results from the combination of the defect and the purchaser's ignorance of its existence. In many cases the purchaser's knowledge of the defect will remove the

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10. So, too, a contractor who builds something which unless carefully and competently made will become a trap, can foresee the unreasonable risk in his careless and inattentive activity and should be liable to any person likely to be and injured thereby. The lack of "privity" which allowed the creator of a death trap to escape liability in *Curtin v. Somerset*, 140 Pa. 70, 21 Atl. 244 (1891) was not persuasive in *Grodstein v. McGivern*, 303 Pa. 555, 154 Atl. 794 (1931). See also *Restatement, Torts* (1934) §404.
12. Id. §282, comment g.
danger in the use of the chattel. Even if it does not it would seem that so far as the purchaser, or any other person having knowledge of the defect, is concerned, the use of the known dangerous chattel would constitute a true voluntary assumption of risk, just as the use by even a business guest of premises on which there is a dangerous condition known to him constitutes a voluntary assumption of risk by him. It would be an unusual case in which it could be successfully argued that the vendor was absolutely prohibited from selling a dangerously defective chattel to one who knew the facts because of the risk that the purchaser would none the less use the chattel dangerously and injure a third person or turn the chattel over to the third person without warning of the defect. It seems likely that in any ordinary case such intervening negligence by the purchaser would be considered extraordinary and would operate as a superseding cause even if the vendor's sale could be considered an act of negligence with respect to the third person.

It seems safe to assume that ordinarily the vendor's duty does not go beyond exercising reasonable care to warn the purchaser of the defect.

If he does not, and the purchaser is ignorant of the defect and unlikely to discover it for himself, it is clear that the vendor's act of delivering the chattel is an act fraught with foreseeable peril, the extent of which varies with the amount of harm likely to result from the particular chattel in question. It is difficult to understand why a number of courts still cling to the so-called distinction between "inherently dangerous" articles and other articles in discussing the liability of both manufacturers and vendors. Professor Bohlen and Judge Cardozo long ago showed the fallacy of it and recently it has been pointed out again by Mr. Justice Maxey in the Supreme Court of Pennsylvania. There are few things more innocuous than a piece of rope; yet if it is defective and is sold for use in sustaining a high scaffold, far more danger inheres in it than in unwholesome food, which seldom causes more than a temporary illness. How can judges, who regularly dispose of three meals a day, and have, all their lives, without untoward effect, solemnly designate food as "inherently dangerous" and deny that designation to other articles normally equally harmless but far more lethal when defective than unwholesome food, particularly when the defect is hidden and the article is therefore a

13. See Eldredge, Landlord's Tort Liability for Disrepair (1936) 84 U. of Pa. L. Rev. 467, 469-70; Restatement, Torts (1934) § 340, comment e.
wolf in sheep's clothing? The Supreme Judicial Court of Massachusetts long ago decided that the caterer who served the bad deviled crab to the banquet guest was liable to him despite the absence of privity of contract.\textsuperscript{18} Yet twelve years after \textit{Mac Pherson v. Buick Motor Co.} this same court, apparently with its head in the ground but not with its feet on it, unanimously held that the defendant who sold machinery and prepared and furnished defective plans for a stone bin designed to hold 150 tons, and under which teams and trucks were to stop to be loaded, was not liable for the death of a teamster, crushed under 75 tons of stone when this man trap collapsed.\textsuperscript{19} In some parts of the United States the sunshine of Cardozo's wisdom still falls on stony ground, although its rays have brought forth fruit across the seas.\textsuperscript{20}

\textbf{CHATTELS KNOWN TO BE DANGEROUS}

\textit{Langridge v. Levy}\textsuperscript{21} appears to be the first case involving the liability of the vendor of a known defective chattel. The defendant sold a known cheap defective gun to plaintiff's father and actively represented it to be a high grade Nock gun. He knew it was purchased for the plaintiff, who used it, relying upon the representation, and was injured when the gun exploded. Baron Parke considered the case as one of deceit based upon the defendant's fraudulent representation and held the defendant liable.\textsuperscript{22} On the facts this is satisfactory but in many cases some of the essential elements of a deceit action are not present. This is true where the vendor does not say anything or actively conceal the defect and hence there is no representation, unless resort is had to the fiction that the delivery of the chattel in itself is an implied representation that it contains no known hidden defect. Also a deceit action would fail where the plaintiff did not rely upon the representation (as in the case of an innocent bystander injured by the chattel) or the vendor did not intend the plaintiff to rely upon it.\textsuperscript{23}

In view of the modern concept of what is active negligence there is no need to resort to any theory of fraud. So far as foreseeable peril is concerned there is not much difference between selling a perfect gun

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  \item \textsuperscript{18} Bishop v. Weber, 139 Mass. 411, 1 N. E. 154 (1885).
  \item \textsuperscript{19} Christensen v. Bremer, 263 Mass. 129, 160 N. E. 410 (1928) (It is difficult to understand the explanation for such a revolting decision).
  \item \textsuperscript{20} Donoghue v. Stevenson, [1932] A. C. 562 (P. C.); Grant v. Australian Knitting Mills, Ltd., [1936] A. C. 85 (men's "underpants" here involved and probably worn by many judges are not generally considered "inherently dangerous").
  \item \textsuperscript{21} (1837) 2 M. & W. 519, 150 Eng. Rep. R. 8631 (Ex.).
  \item \textsuperscript{22} The decision was affirmed upon this theory in the Exchequer chamber: (1838) 4 M. & W. 337, 150 Eng. Rep. R. 1458 (Ex.). That fraud was the basis of liability was emphasized by both Lord Buckmaster and Lord Atkin in Donoghue v. Stevenson, [1932] A. C. 562, 567, 588 (P. C.).
  \item \textsuperscript{23} \textit{Restatement, Torts} (1934) §§ 534, 537.
\end{itemize}
to a boy of tender years and a known defective gun to an adult. In both cases, on the facts known to the vendor, he did an act which foreseeably created an unreasonable risk of injury to a determinable class of people, and as to that class he was actively negligent. The same can be said of the sale of defective rope to support a scaffold. Indeed the sale of a normally innocuous chattel which contains a defect making it dangerous creates a greater risk of harm than selling a chattel which even when perfect is dangerous. The latter carries its own warning to handle it with great care, while the nature of the former lulls the user into a feeling of safety in using it and thereby increases the extent of the risk. Thus it is not surprising to find that in a later English case, in which there was knowledge of the defect but no active representation, the vendor's liability was based upon negligence and Langridge v. Levy was not mentioned. The American cases have proceeded upon the same theory.

In this type of case the fact that the defendant is a vendor is of no controlling significance. Liability is based upon the fact that he is a person who has acted negligently, and the same liability would be imposed upon a donor or a bailor.

The person who happens to be a vendor may be guilty of other types of negligent acts. He may carelessly hand out the wrong drug

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25. Clarke v. Army & Navy Co-operative Society, Ltd., [1903] 1 K. B. 155. The case involved the sale of a can of chlorinated lime. The only defect was in the container. When the top was pried off, lime flew up into plaintiff's eye. The vendor did not know of any defect in this particular can but did know that other purchasers of cans from the same lot had had a similar experience. The vendor's negligence was in delivering the can without warning the plaintiff of this risk so she could avoid it.
26. Lewis v. Terry, 111 Cal. 39, 43 Pac. 398 (1896) (injuries to tenant of purchaser of folding bed. Vendor did represent bed to be safe, but this factor is not an element of liability in the rule announced as applicable); Huset v. Case Threshing Machine Co., 120 Fed. 865 (C. C. A. 8th, 1903) (defendant was in fact the manufacturer); Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N. W. 48 (1913) (plaintiff was injured by dyed fur collar on coat purchased from defendant. Defendant did not know of any defect in the coat, but did know that 1% of purchasers would be injured by any dyed fur collar, and delivered the coat without warning of that effect); Karsteadt v. Gross Co., 179 Wis. 110, 190 N. W. 844 (1922) (defendant warned plaintiff only of some of the dangers to avoid in using the washing machine); Guinan v. Famous-Players Laskey Corp., 267 Mass. 501, 167 N. E. 235 (1929) (defendant was a donor rather than a vendor but the court discusses the case in terms of vendor, and classifies inflammable movie film as "inherently dangerous"); Farley v. E. E. Tower & Co., Inc., 271 Mass. 230, 171 N. E. 630 (1930) (inflammable comb classified as "inherently dangerous"); Siler v. Morgan Motor Co., 15 F. Supp. 468 (E. D. Ky. 1936) (automobile); Baker v. Sears, Roebuck & Co., 16 F. Supp. 925 (S. D. Cal. 1936) (stove); Restatement, Torts (1934) § 399. Cf. Wissman v. General Tire Co., 327 Pa. 215, 192 Atl. 633 (1937).
27. See Restatement, Torts (1934) § 388.
28. Where liability is based upon a theory of breach of warranty the defendant's status as a vendor is frequently of controlling importance.
prescriptions; 31 or carelessly deliver a poisonous article instead of a safe one; 32 or sprinkle rat poison in such proximity to a flour bin that it is likely to be carried into it by the rodents, 33 or he may actively install a perfect chattel in such an incompetent and careless manner as to create an unreasonable risk of harm. 34 In all of these cases liability is clear. Yet some courts, overlooking the fact that the case involves merely the application of familiar rules of negligence to a defendant who happens to be a vendor have erroneously denied liability upon the quite immaterial grounds that there was an absence of "privity of contract" and that the chattel itself (which was in no way defective) was not "inherently or imminently dangerous". 35

Although the presence of an active conscious misrepresentation is not essential to liability it is by no means an unimportant factor when present. An active misrepresentation may be by words or by actively concealing the defect. If this is coupled with a delivery of a chattel, known to be dangerous, under circumstances which make it substantially certain that harm will follow, the vendor may be considered guilty of an intentional tort. 36 Even where harm is not substantially certain the active misrepresentation increases the foreseeable risk of harm by deterring a possible investigation and thus bears not only upon the question of negligence 37 but also upon that of contributory negligence.

A good example is State to use of Hartlove v. Fox & Son. 38 The vendor of a horse, knowing it had glanders, a communicable

31. See Beckwith v. Oatman, 43 Hun 265 (N. Y. 1887) (on the facts this is really a case of defective compounding, similar to defective manufacturing).
32. Wright v. Howe, 46 Utah 585, 150 Pac. 956 (1915).
34. McGuire v. Dalton Co., 101 So. 158 (La. App. 1930) (gas range); Crandall v. Boutell, 95 Minn. 114, 103 N. W. 890 (1905) (stove); Jaeger v. Elizabethtown Consol. Gas Co., 124 N. J. L. 420, 11 A. (2d) 746 (1940) (gas range); Cox v. Mason, 89 App. Div. 219, 85 N. Y. Supp. 973 (2d Dept '03) (folding bed). Where the defendant assures the plaintiff, after the work is done, that the chattel may be safely used, as in the Jaeger case, liability may be based upon the additional rule that the negligent performance of work, even when gratuitously undertaken, is actionable as the creation of a trap when harm results. A familiar example is the case of a landlord's gratuitous repairs negligently carried out: Gill v. Middleton, 105 Mass. 477 (1870); RESTATEMENT, TORTS (1934) § 362.
36. RESTATEMENT, TORTS (1934) § 13, comment d, and § 310, comment a.
37. Id. at § 310.
38. 79 Md. 514 (1894). A recent interesting example of the same point is Pease v. Sinclair Refining Co., 104 F. (2d) 183 (C. C. A. 2d, 1939) in which the defendant sent free to the plaintiff (and other school teachers) a "Sinclair Exhibit" showing various forms of oil in labelled bottles. To prevent discolouration and to permit mailing the defendant had substituted water in the bottle labelled "Kerosene". The plaintiff, preparing for a classroom chemistry experiment, poured the "Kerosene" over a piece of Sodium. Sodium is preserved in kerosene but reacts violently with water and an explosion ensued injuring plaintiff, who was allowed to recover. The judgment for the defendant in Fedor v. Albert, 110 N. J. L. 493, 166 Atl. 191 (1933), can be justified only upon the plaintiff's failure to prove the falsity of
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disease dangerous to persons as well as animals, sold it with the representation that the horse "was suffering from nothing worse than a bad cold". The purchaser's brother cared for the horse, contracted glanders and died. The court recognized that this was active negligence by the vendor but held that the declaration was insufficient in its factual averments and sustained the defendant's demurrer, though with leave to amend the declaration.

CONSCIOUS MISREPRESENTATION OF SOURCE

A different type of conscious misrepresentation is a representation by the vendor that he is the manufacturer or packer of the article sold. This is generally accomplished by putting the vendor's name or trademark, or both, on the article without a clear designation that he is merely the vendor. In this situation the cases unanimously hold that the vendor assumes the manufacturer's liability and if, due to negligent manufacture, the article is dangerously defective, the vendor is liable for harm caused thereby, regardless of whether he knew, or could have known, of the defect. This is a quite recent development in the law and the rule is generally considered to have originated in *Thornhill v. Carpenter-Morton Co.* Actually the rule had been announced two years earlier by the New York Court of Appeals. In 1929 The American Law Institute used the *Thornhill* case as the basis of its Tentative Section 270. The only reason advanced in the *Thornhill* case to support the decision was that the defendant's representation that it was the manufacturer "must be taken as essentially true". The comment in the *Restatement* gives as a reason that "By putting a chattel out as his own product, he causes it to be used in reliance upon his care in making it." This does not appear to have been a factor in either of the cases extant when that statement was written. The *Restatement* comment also says, "The rule . . . applies only where the chattel is so put out as to lead those who use it to believe that it is the product of him who puts it out."
Subsequent cases are interesting as they seem to be expanding the application of the rule. In *Burkhardt v. Armour & Co.*,⁴⁴ the can was marked “Armour’s Veribest Products Corned Beef”, and in small type “Armour & Co. foreign distributors”. The court approved the Restatement rule and said “The principle of estoppel appears to afford the main basis and reason for the liability . . . but it seems that additional justification may be found in the consideration . . . that the ultimate purchaser has no available means of ascertaining the actual manufacturer or packer.”⁴⁵ The court needed the “additional justification” on the facts, which showed that the purchaser did not rely on defendant’s name or trademark but merely asked his grocer for a can of corned beef. In *Slavin v. Leggett & Co.*,⁴⁶ the can of peas bore the label “Francis H. Leggett & Co., Distributors” and its trade-mark “Premier”. The court referred to the earlier cases, and held it to be a jury question whether the label was misleading and affirmed the plaintiff’s judgment. The same year the Supreme Court of Mississippi held the vendor liable for harm resulting from packaged cheese in wrappers bearing the vendor’s name and trademark, following the Restatement and the above cases.⁴⁷ The latest case is *Armour & Co. v. Leasure*,⁴⁸ where the can, bought at a retail grocery store, was labeled with the Armour trademark, the words “Packed for Armour & Co., Chicago, Ill., U. S. A.” and the name of the Brazilian packer. These facts seem to take the case out of the scope of the Restatement rule, yet the court, without discussion, held it to be applicable and affirmed judgment for the plaintiff. Can it be said that a vendor puts a thing out “as his own product” when it is stated to be “packed for” him and the name of the packer is given? For the plaintiff it may be answered that purchasers seldom read labels but often do rely on a well known trademark, such as the nationally advertised Armour trademarks, and advertisers spend large sums to induce such reliance. Indeed, on the can involved in this case the label read “The name ‘Armour’s Star’ is your guarantee of purity and wholesomeness”. It does not shock the writer’s sense of justice to ask the vendor who

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⁴⁴. 115 Conn. 249, 161 Atl. 385 (1932).
⁴⁵. Id. at 265, 161 Atl. at 391. The unnamed packer was in Argentina.
⁴⁶. 114 N. J. L. 421, 177 Atl. 120 (1935).
⁴⁷. Here, as in most of these cases, the defendant was not the retailer, but a wholesale distributor.
⁴⁸. Swift & Co. v. Hawkins, 174 Miss. 253, 164 So. 231 (1935); accord, Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N. E. (2d) 130 (1936), in which defendant wholesaler sold cigars in box marked “Title and design owned by (defendant) Co.”. In *Cone v. Virginia-Carolina Chemical Corp.*, 178 Miss. 816, 174 So. 554 (1937), plaintiff was injured by fertilizer containing sulphuric acid. The defendant did not make the fertilizer but distributed it in the original sacks which were labelled “Sold by Virginia-Carolina Chemical Corp.”. In holding for the defendant no reference was made to the Restatement rule which the court had accepted two years earlier.
⁴⁹. 177 Md. 393, 9 A. (2d) 572 (1939).
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voluntarily, because he finds it beneficial to do so, affixes his name or trademark to a product, to stand back of it as his own and bear the burdens as well as enjoy the benefits which the conferring of one's name upon another, normally entails. In this type of misrepresentation there is no element of fraud nor can the representation be defined as a negligent act. It seems rather that the person who was happy to adopt the "child" should not attempt to disown him when he causes trouble.

RECKLESS MISREPRESENTATION OF CHATTEL’S SAFETY

Where a vendor represents a chattel to be safe and does not have actual knowledge that it is dangerously defective a slightly different problem is presented. So far as the law of deceit is concerned the vendor who represents a chattel to be safe when he knows that he does not know whether or not it is safe, and has no firm belief that it is, is guilty of a conscious misrepresentation. As to the law of negligence he can foresee that his assurance of safety is at least a deterrent to any investigation by the purchaser and that if the chattel should be dangerously defective the act of representing the contrary does create an unreasonable risk of harm. There is no social utility in reckless and untrue statements. Where the vendor does not have an actual belief that the chattel he represents as safe, or as free from hidden defects, is so, and knows that if defective it will be dangerous, particularly in the hands of a purchaser who has been lulled into a feeling of security by the vendor's positive statement, he is guilty of an act of negligence when he delivers the chattel with such a misrepresentation. A man who knows he does not know the facts, or who knows that his data are an insufficient basis for any reasonable belief as to what the facts are, can often foresee that his going ahead without further investigation may be fraught with peril. For example, assume that Rip Van Winkle was a reasonable man, prolong his sleep to 1940, and deposit him in Times Square, New York City. When he awoke he would be unaware of many of the normal perils of present life, yet he would realize that if he acted without some investigating first, he would be acting negligently. More familiar examples are the many cases involving persons who walk into unfamiliar dark places without ascertaining whether hidden dangers are present, and involving motorists who drive blindly into fog or darkness not pierced by the car's headlights. A vendor who sells rope for scaffolding and who pur-

50. Peek v. Derry, 14 App. Cas. 337 (1889); Restatement, Torts (1934) § 526, comment e.
51. Restatement, Torts (1934) § 289, comment j.
52. Many Pennsylvania cases are cited in Restatement, Torts, Penna. Annot. (1934) § 289, comment j.
chases a supply from an unknown, itinerant peddler is in the same position. He can foresee that his sale of the rope to a house painter, with the representation it is safe, may be very dangerous if the rope is defective; and he has no reasonable grounds to believe it is not. The representation that the rope is sound is a reckless statement and a dangerous act under the circumstances.

It is important that cases dealing with this type of act should not be misunderstood and used as authority to impose liability upon a vendor whose conduct falls into a different category. There are several of these cases. A striking example is a recent case in the Manchester Michaelmas Assizes in which the plaintiff, a customer of a hairdresser, was injured by excessive chromic acid solution in a hair dye lotion sold to the latter by defendants, and obtained by them from the maker. In holding the defendants liable Judge Stable said, "They were, in essence, dealing with a gentleman who had emerged quite unexpectedly from Spain. . . . They never saw where (the dye) was manufactured. They took no steps to ascertain under what sort of supervision the manufacturing was carried on. When deliveries were made, no test of any sort, kind or description was made. . . . Last . . . this commodity of which they knew singularly little . . . was put out to the trade . . . as being the hair dye which . . . was absolutely safe and harmless, . . . and positively needed no preliminary tests." The court also pointed out that the defendant's own circular recognized that many hair dyes are dangerous. In view of these facts the court's further statement that while the defendants were negligent there was no evidence of fraud is surprising. The statements seem clearly to be fraudulent, as reckless statements, within Lord Herschell's famous definition in Peek v. Derry.

In other cases the facts are not so clear but they appear to be instances of the same class. In Pearlman v. Garrod Shoe Co. the vendor represented "that the shoes which it sold marked the latest step in the progress of shoe making and embodied every proven principle of health, of fit and of orthopedic design". These representations were made to the purchaser who was assured that her purchase was " 'perfect shoes for perfect feet' and that the fit was perfect". Actually the shoes sold varied from standard orthopedic design and the lining was "loose, bunched and creased". As a result a blister developed on the toe of the wearer which became infected and caused death. The

54. Id. at 181.
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57 The decision should be limited to its facts.58 Penny Co. v. Morris 59 was a case where the plaintiff in the course of purchasing shoes from defendant pointed out that the heel looked defective, as in fact it was and later caused the plaintiff to fall. According to the plaintiff the defendant “said there was not any danger of that heel, . . . and the man being in business like that as long as he was, I took his word for it and bought the shoes, and he said ‘I will guarantee you that heel will not come off’”.60 This was certainly a reckless statement after the plaintiff had pointed out the condition of the shoe. Similarly, in Cunningham v. Pease House Furnishing Co.61 the defendant, in answering an inquiry about the use of a new stove blacking purchased from it said “the warmer the stove the better it works”. When used on a hot stove the blacking exploded.62 In King Hardware Co. v. Ennis 63 the defendant sold a gasoline stove, containing a leaky feed pipe, and “assured (plaintiff) that it was impossible for said stove to explode”. Fumes from the leak did explode. In overruling the defendant's demurrer the court said: "It certainly could not be held that they were without a duty of discovering the defect when they assumed to represent that the stove was safe and could not explode. If a person is without knowledge as to whether a particular thing is true or not, he ordinarily will act at his peril in representing it to be true." 64

57. Id. at 177, 11 N. E. (ad) at 719.
58. There is nothing in the opinion to indicate the court thought that a vendor is under a general duty to inspect. Any such interpretation finds no support in the authorities cited by the court, namely RESTATEMENT, TORTS (1934) §§ 398, 399, 401, 402, and Bourchiex v. Willow Brook Dairy, 268 N. Y. 1, 163 N. E. 617 (1935). The Bourchiex case involved the liability of a dairy which had allowed broken glass to get into milk bottled, as well as sold, by it. Section 398 deals with the liability of a manufacturer, Section 399 with liability for a known dangerous chattel and Sections 401 and 402 with narrowly limited types of cases discussed hereafter.
59. 173 Miss. 710, 163 So. 124 (1935).
60. Id. at 714, 163 So. at 124. The court relied on RESTATEMENT, TORTS (1934) § 401, discussed hereafter.
61. 74 N. H. 435, 69 Atl. 120 (1908).
62. The court said: "The test, therefore, . . . is to inquire whether the ordinary man, having no more knowledge of the situation and its dangers than the defendants are shown to have had, would have told the plaintiff it was safe to use the blacking on a hot stove." Id. at 438, 69 Atl. at 121.
64. Id. at 363, 147 S. E. at 123. (Italics added.) The court cited, inter alia, the Cunningham case, supra, and continued: "Thus, if a dealer, in placing upon the market an article which is manufactured by another, is without knowledge as to whether it be sound, or, on the contrary, defective, he should stand where the law places him and pass the article on, upon the assumption, without more, that the manufacturer has performed the duty of properly constructing the article and of making it safe for the common use intended." Ibid. (Italics added.) In Segal v. Carroll Furniture Co., 51 Ga. App. 164, 170 S. E. 775 (1935), the defective bed was not only sold by defendant but also installed by it and expressly warranted to be "extra strong". In addition the question was raised on a demurrer to the declaration, and courts today are loath to put plaintiffs in personal injury cases out of court on the pleadings. In Smith v. Clark Hardware Co., 100 Ga. 163, 28 S. E. 73 (1897), the plaintiff asked defendant vendor for a .38 calibre Winchester rifle cartridge and was given a different size and
In all of these cases the defendant, on the basis of the data he had, acted in a foreseeably dangerous, and unreasonably dangerous, manner. It is submitted that no one of them is authority for a rule imposing any general duty of inspection upon a vendor. Rather, each case contained a positive assurance of safety by the vendor. Such an assurance is quite different from a statement by a vendor that he "guarantees the appliance against defects in manufacture for a period of one year and will replace free, any part which an examination by the vendor shall disclose to be defective". This is not an assurance of safety. It is, on the contrary, a recognition that the chattel may contain defects and an assurance that if it does the vendor will remedy the defect without further expense to the purchaser. Such a case falls into a wholly different class.

HONEST MISREPRESENTATION OF CHATTEL'S SAFETY

The next type of case is where the vendor does actually have a firm belief that the chattel he sells is safe. This is generally the case where the chattel is not normally dangerous and will become so only if it is defective. The vendor may well have such a belief without having himself inspected the chattel. For example take the case of the vendor who has obtained the chattel from a reputable source of supply and his prior orders have been uniformly free of defective chattels; add the fact that the manufacturer's literature and salesmen have educated the vendor to believe in the efficacy of the meticulous precautions the manufacturer usually takes to put out a perfect product (as in the case of modern automobile manufacturers). On such facts it may be said that the vendor has a firm conviction he is speaking the truth when he represents to a customer that the chattel sold is safe. Such a statement, false though it turns out to be, is not fraudulent under the rule in Peek v. Derry. Nor can it be established that such

make cartridge, though quite similar, which, because of the difference in size, exploded in plaintiff's gun. (This is one type of negligent act, just as the giving of poisonous boiled linseed oil for harmless raw linseed oil in Wright v. Howe, 46 Utah 588, 150 Pac. 956 (1915), was a type of negligent act.) In view of these Georgia cases, and ordinary rules of negligence, the judgment of non-suit in Robbins v. Georgia Power Co., 47 Ga. App. 517, 171 S. E. 218 (1933) seems incredible. Plaintiff, as defendant knew, had just had a surgical operation. Defendant sold plaintiff a fat reducing vibrating machine, assuring her that its use would be beneficial and that "she could use the machine for ten minutes at a time . . . at its highest rate of speed". Such use displaced plaintiff's kidney. Only a syllabus opinion, which may not give a complete picture, is reported.

66. See the analysis of "conviction", "belief" and "knowledge" in RESTATEMENT, TORTS (1934) § 526. A number of states permit an action of deceit to be based on even innocent misrepresentations, thus giving
a representation is a negligent act. People act reasonably in doing many things upon the assumption that certain facts exist even though they have not personally investigated the evidence, and know the "facts" only as hearsay. Indeed only a tiny fraction of what a person regards as his "knowledge" is based upon personal investigation. By far the greater part of it is obtained from "sources believed to be reliable". Life would become intolerable if we were permitted to act only upon facts disclosed by personal investigation. As to many things we are incompetent to form a reliable conclusion even if we do examine the evidence. Every day we engage in activities which we reasonably believe to be safe because we assume certain facts to exist, and believe they exist, and yet know that if the facts do not exist the activity will be highly dangerous. That is true, for example, of every driver of a new automobile, of every person who fires a new rifle. Every day all of us constantly make "factual" statements about matters on which we have no more than second hand information. Consequently a vendor's honest representation that a chattel is free of defects, when based upon reliable past experience, cannot be branded as a negligent act merely because the vendor has not personally investigated the chattel. Such a representation is in accord with practically universal human conduct.

Two comparatively recent cases illustrate this point. In State to use v. Consolidated Gas, E. L. & P. Co. the defendant demurred to a declaration which averred that he sold to plaintiff a defective gas heater which emitted carbon monoxide fumes, killing plaintiff's son, and that defendant had represented that the heater could be used with perfect safety. In sustaining the demurrer the court held that the vendor had no duty to inspect and pointed out that it sold the heater "in the same condition as received from its vendor, and there is no allegation of any knowledge on its part that same was not perfectly safe, nor any allegation that the article was purchased from an irresponsible or incompetent manufacturer". In Camden Fire Ins. Co. v. Peterman the defendant sold a gasoline stove containing a defective control valve which would not shut off the flame, and the cus-

such representations the effect of a warranty. See Bohlen, Misrepresentation as Deceit, Negligence, or Warranty (1929) 42 Harv. L. Rev. 733. But in all of these cases the action has been by the purchaser against the vendor to recover the pecuniary loss caused by the chattel or land being of less value than represented. The limit of liability for a "Negligent Misrepresentation Involving Risk of Bodily Harm" is stated in Restatement, Torts (1934) § 311, and the rule applies only to "one a part of whose business or profession it is to give information upon which the bodily security of others depends and who in his business or professional capacity gives false information . . .", such as a boiler inspection company or a physician. Cf. § 552, comment c.
68. 146 Md. 390, 126 Atl. 105 (1924).
69. 146 Md. 390, 398, 126 Atl. 103, 105 (1924).
70. 146 Md. 390, 398, 126 Atl. 103, 105 (1924).
customer's property was destroyed by fire the first time the stove was lighted. In fact the vendor's own employee had lighted the stove. It had been received from a reputable manufacturer, uncrated in vendor's store and delivered without any inspection, and with the representation that it was "fool proof". The Supreme Court of Michigan held the vendor was not liable.\[72\]

**INNOCENT DELIVERY WITHOUT AN EXPRESS REPRESENTATION**

The next type of situation is where the vendor delivers a chattel without saying anything about its condition and honestly believes it to be harmless for any use for which it is designed. This can happen only when the chattel is normally free of danger. If the chattel is of a type which is dangerous even when perfect, the vendor is almost certain to have knowledge of that fact and if the purchaser is likely to be ignorant of it, the vendor can well foresee that a delivery without warning of the normal danger is a dangerous act. On the other hand if the vendor reasonably believes the normal dangers of using the chattel are known to the purchaser there is no need to call attention

\[72\] In Shroder v. Barron-Dady Motor Co., 113 S. W. (2d) 66 (Mo. 1937), the defendant was a local dealer for Graham automobiles. It delivered a car to a prospective customer for him to try out with the representation that it was "in perfect condition". While the plaintiff was using the car, grease leaked out from inside a wheel, affected the brake bands, and an accident resulted. In fact, the defendant had tested the brakes and they were working properly when the car was delivered. In an opinion directing judgment for the defendant the court said, quoting from 24 R. C. L. 509: "The distinction between the liability of the manufacturer and the liability of the seller consists in this: the seller is under no obligation to test articles manufactured or packed by others for the purpose of discovering latent or hidden dangers." Id. at 70.

It also said, "It is true, of course, that defendant, receiving new cars from the manufacturer, had some duty of inspection, before selling them . . . Its duty as to inspection, because of exclusive selling rights in certain territory . . . would no doubt be greater than that of an ordinary retail merchant in the examination of less complicated articles of merchandise. This duty would undoubtedly require them to observe the cars as they received and operated them to see if they did operate properly, to investigate the cause of any unusual condition apparent to them, and also to investigate the condition of and check the operation of parts or appliances, which they might reasonably expect (as a result of their experience and knowledge of these cars) would need attention before being delivered to purchasers." Id. at 71.

This can well be justified by the fact, known to every car purchaser, that cars are not ready for delivery when received by the dealer. He regularly does considerable work, such as oiling, greasing, adjusting brakes and other parts, before approving the car for delivery. He knows that until this work is done and some final check-up is made the car is not ready for operation.

Much less tenable is the distinction between a wholesale distributor and a retailer announced in Sicard v. Kremer, 133 Ohio St. 291, 13 N. E. (2d) 290 (1938). The wholesaler is, if anything, even more of a conduit than the retailer. In the other cases involving wholesalers there is no suggestion that they owe a greater duty than do retailers. In the Sicard case the plaintiff was injured by a deleterious hair dye, apparently sold by defendant distributor in the original package. The court says the defendant represented the dye to be "safe and proper in every respect". In fact, the circular, as quoted in the opinion, says nothing about safety. The court, relying on cases involving manufacturers, held the defendant liable. The decision seems wrong unless it can be defended on the ground that as the defendant had practically the same name as the manufacturer it appeared to be such and should be held liable under the rule in Restatement, Torts (1934) §400, already discussed. But this was not the basis for the decision as announced by the court.
VENDOR'S TORT LIABILITY

to them. For reasons already advanced the delivery of a chattel normally harmless, not known to be defective and honestly believed to be perfect, is not a negligent act. Foreseeable risk of harm is determined by the actor's reasonable belief as to what the facts are. In any ordinary case a reasonable man would not believe it necessary to investigate before acting. There may be a rare and exceptional situation where a defect will cause a catastrophe and even an off chance that the chattel may be defective is such as to demand some looking into by the vendor. But such cases will be few and far between.

Ordinarily, if a vendor is held liable for selling a chattel without inspection, liability is being imposed not because he did a foreseeably dangerous act but because he omitted to do something. In other words an affirmative duty to act is being imposed. Generally, affirmative obligations are imposed only as the price of a benefit. If it be said that the vendor benefits from the sale of a chattel, it may also be said that the primary benefit of using the chattel accrues to the purchaser. If that use benefit is not strong enough to raise a duty of inspection by the purchaser, why should the sale benefit be sufficient to raise a duty of inspection by the vendor? If the purchaser's belief that the chattel is free from defects is reasonable, so that his use without inspection is not negligent as to a third person or contributory negligence as to himself, how can it be said that the vendor's equally reasonable belief and sale without inspection is negligence? After all, the risk of harm is to the purchaser, not to the vendor. It is doubtful (at least, in the absence of a positive statement by the vendor) if it can be answered that the purchaser relies on the vendor. Occasionally that may be true of a purchaser dealing with a great metropolitan store. But even there, in this age of national advertising and familiar trademarks, the purchaser is equally likely to rely on the manufacturer. The man who is contemplating purchasing an automobile pays far more attention to who the manufacturer is than to the identity of the

73. Rogers v. Kresge Co., 23 Ohio N. P. (n. s.) 448 (1921), and Crandall v. Stop & Shop, Inc., 288 Ill. App. 543, 6 N. E. (2d) 685 (1937), appear to be such cases.

74. "...circumstances which exist at the time of his action or inaction, but of which the actor neither knows nor should know, although known to third persons" are "immaterial". RESTATEMENT, TORTS (1934) § 282, comment g.

75. The "omission to do something" as being negligence, under Baron Alderson's definition in Blyth v. Birmingham Water Works, II Ex. 781 (1856), is not accurate as a general rule. An affirmative duty to act is limited to certain relationships: BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 33, 42-46, 62-64. Even knowledge that action is necessary to prevent harm is not, in itself, enough to create a duty to act: RESTATEMENT, TORTS § 314. Although in recent years it has become fashionable in certain circles to deny there is any distinction between misfeasance and nonfeasance, and in some situations the lines draw close, there still remains a fundamental difference between the act of pushing a man into a well and the omission of a bystander to pull him out.

76. E. g., the possessor of land owes a duty to a business visitor to inspect, but only owes to other licensee a duty to warn of known defects: RESTATEMENT, TORTS (1934) §§ 342, comment c, and 343, comment a.
local dealer. In the case of the small store the purchaser generally trusts to his own judgment. In considering whether a retailer should have a duty to inspect it must not be overlooked that the rule will apply to the individual owner of the small town hardware store who is proprietor, clerk, and bookkeeper (and who will find suing the manufacturer just as inconvenient as it is for his customer) as well as to a store like John Wanamaker or Marshall Field.

Because of these reasons and until quite recently, it has generally been thought that a vendor had no duty of inspection; and that he was not liable (in the absence of a warranty) for harm caused by a defect where he did not know it existed or was not possessed of information, which should have made him suspicious. Writing in 1905 Professor Bohlen said: "But the vendor is not bound to inspect the articles which he sells in order to discover any possible defects which may unfit them for use." 77 Similar statements appear in Ruling Case Law 78 and Corpus Juris 79 and have been repeatedly cited or quoted with approval by the courts. Also there is a considerable body of case law in which vendors who did not inspect chattels which, by reason of hidden defects, caused harm, have been absolved from liability. In a number of these cases the defect was not detectable by an ocular inspection and could have been disclosed only by thorough testing. 80 As to these cases it may be said that the vendor could not have discovered the defect even if he had used "reasonable care" in inspecting them. 81

78. "The dealer who purchases and sells an article in common and general use in the usual course of trade and business, without knowledge of its dangerous qualities, is not under a duty to exercise ordinary care to discover whether it is dangerous or not. He may take it as he finds it on the market. He is not required to investigate its qualities, or endeavor to ascertain whether it is dangerous for the use intended before he can absolve himself from liability in the event injury results from its use." 24 R. C. L. 509-10.
79. 45 C. J. 893.
Probably the same thought is partly behind the rule that a vendor who sells goods "in the original package" is not liable for harm caused by them. It would seem that this rule is based also upon the idea that ordinarily such a vendor neither knows nor from facts in his possession has reason to know that the article is dangerous. In this age of cellophane wrappers a sale in an original package would not protect the vendor who sees the defect, just as the sale of chlorinated lime in the original package in Clarke v. Army & Navy Co-operative Society, Ltd. did not protect the vendor who had been warned by other purchasers of cans out of the same lot that they were dangerous. In two cases involving observable defects but in which the vendor did not inspect and learn of them, he was held not to have any such duty. In Miller v. Svensson the vendor had made an inspection, apparently cursory, of a fur coat which had a furrier's knife concealed in the lining and it cut the purchaser. Liability was denied, the court saying "defendants were not bound to anticipate and search for that which was unusual and unforeseen".

In fact when the rules relating to a vendor were drafted by Professor Bohlen and his advisory group for The American Law Institute in 1929 and 1930, there was not a single decision by a court of last resort in England or America which had held a vendor, who neither knew of the defect nor had made reckless statements about the chattel's safety, liable for physical harm to person or property caused by a defective chattel. In presenting the draft to the Institute in May 1930 Professor Bohlen had only this to say of the four sections of the Restatement of Torts dealing with a vendor: "I don't think there is any doubt about it that if I buy a chattel from a reputable manufacturer I may sell without subjecting it to any extended investigation beyond revealing known defects. In some of the others the court used language to the effect that the vendor neither "knew nor by the exercise of ordinary care could have known" of the defect. It is difficult to determine what importance should be attached to such wording. It may be that the court was merely stating the case most favorably to the plaintiff and holding, even then, that he had no case. On the other hand, it is possible to argue that the language implies some duty of inspection. However, courts frequently use language without the precision of meaning with which "should know" is defined in Restatement, Torts (1934) §12, and distinguished from "reason to know".


85. 189 Ill. App. 355 (1914).

86. Id. at 356.

87. Restatement, Torts (Tent. Draft No. 5 1930).

88. §§ 269-272 in the Tentative Draft which are now §§ 399-402.
unless there is some reason to suppose it is defective. I do not know whether there may or may not be chattels so dangerous that even a retailer would be under a duty of carefully checking up." 89

THE RESTATEMENT

In view of this background and of the fact that the function of The American Law Institute is limited to a restatement of the existing law the scope of Sections 401 and 402 merit examination. The first says:

"A vendor of a chattel made by a third person which is bought as safe for use in reliance upon the vendor's profession of competence and care is subject to liability for bodily harm caused by the vendor's failure to exercise reasonable competence and care to supply the chattel in a condition safe for use."

The extent of and the limitations on the application of this rule are explained in the comments. With respect to goods in their original packages the comment says "the retailer is not subject to liability for bodily harm caused by their defective condition, unless the condition is such that even the cursory inspection which a dealer should make of any article which he puts in stock and sells, would disclose some indication that the goods had deteriorated to a dangerous extent." If this means no more than that the vendor of canned goods, for example, is liable when the defect has swollen the can to produce an obvious bulge, there can be no real objection because it is practically certain the bulge will be seen and that fact is a danger signal to the vendor. 90

A broader interpretation, involving a duty to seek defects in goods in original packages, has no authority to support it. The comment continues, "if the purchaser depends upon the recommendation of the retailer, he is entitled to expect that the retailer will know something of the manufacturer of the goods he sells and will not recommend goods made by a manufacturer whom the retailer, by reputation or previous experience with his products, should know to be careless or incompetent". That relates to a case where the retailer either has knowledge or suspicions that the goods are defective and his representation to the contrary is a fraudulent or reckless act. The comment adds: "So, too, one who buys goods which a retailer has kept in storage and which are likely to become deteriorated to the danger point unless

89. (1930) 8 Proc. A. L. I. 239.
90. The writer was not appointed an adviser on Torts to the Institute until after these sections were completed. Hence he is unfamiliar with the discussions about them in the conferences. In any event the meaning of the sections must be ascertained from their wording, keeping in mind that it is to be assumed the Institute did not intend to go farther than justified by existing authority.
properly kept, is entitled to expect that the retailer will exercise both competence and care in their keeping." This is made even clearer by the illustration that a purchaser of meat "is entitled to expect that the retailer has not kept it in close contact with any substance which will render it unfit for consumption". That, too, is clear. Putting meat close to something which will spoil it is a negligent act similar to putting the rat poison close to the flour bin, as in Heinemann v. Barberfield.\(^9\) It involves no duty of inspection. As worded, the comment, in its application to the purchaser, is a specific application of the rule that in some situations one is entitled to assume that another will not act negligently,\(^9\) which frequently finds judicial expression in cases of automobile accidents.

The comment then says that where the selection of an article is left to the retailer "the purchaser is entitled to expect that the retailer will exercise reasonable care to select from his stock articles fit for the purpose for which they are bought". This also deals with negligent acts, as, in Wright v. Howe,\(^9\) where the purchaser told the retailer he wanted linseed oil as medicine for a horse and the retailer carelessly gave him poisonous boiled linseed oil instead of wholesome raw linseed oil. No question of duty to inspect is involved. It is like the case of a druggist who is told the purchaser desires something for a cough and who carelessly selects from his stock a poison instead of a cough medicine.\(^9\)

The final situation referred to in the comment is the sale of an article "which is dangerous for use unless its character and properties are disclosed" in which case "the retailer must exercise reasonable care to make its character and properties known to the purchaser". This relates to a non-defective article of a "character" which makes it normally dangerous for use unless the user is aware of its "character and properties". A retailer knows the normal "character" of articles sold by him. Handing over a known dangerous chattel to a person unfamiliar with its dangerous "properties" without warning him of them is active negligence. An example would be handing a person a known loaded, cocked gun without informing him of those facts. No question of inspection is involved and liability does not depend on any finding that the defendant is a vendor.

It is therefore clear that this section, as explained in the comments, does not impose any duty of inspection upon a vendor where

\(^9\) 136 Ark. 456, 207 S. W. 58 (1918), cited note 33 supra.
\(^9\) 2. RESTATEMENT, TORTS (1934) § 290, comment b.
\(^9\) 3. 46 Utah 588, 150 Pac. 956 (1915), cited note 32 supra.
he has no reason to believe the goods are dangerously defective. Indeed the absence of any such duty is thus expressly stated in the explanatory note to the Tentative Draft of this section: “A vendor is not under obligation to inspect goods bought of a reputable manufacturer in order to ascertain whether they are fit for the purpose for which they are sold.” The wording of the blackletter does not define what is meant by “failure to exercise reasonable competence and care”, and the meaning must be gleaned from the comments. But the use of the word “failure” is misleading and unfortunate. The vendor is really being held not for his “failure” to act but for doing an act which, on the knowledge he had, was an unreasonably dangerous act.

The other Restatement section (402) requires equally close scrutiny. It says:

“A vendor of a chattel manufactured by a third person is subject to liability as stated in Section 399, if, although he is ignorant of the dangerous character or condition of the chattel, he could have discovered it by exercising reasonable care to utilize the peculiar opportunity and competence which as a dealer in such chattels he has or should have.”

The critical words are “by exercising reasonable care” and the question is when does the exercise of “reasonable care” require the vendor to inspect? The answer must be found in the authority which is being restated and in the comments to the section.

One of the two cases cited in the explanatory note to this section involved a vendor who neither knew nor could have known of the structural defect in a boiler. In holding that a directed verdict for defendant was proper the court said: “Unless the defendant knew, or ought to have known, that boilers soldered but not riveted together were unsafe, it could not be found to be negligent in supplying them.” Consideration has already been given to what weight the

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95. Restatement, Torts, Explanatory Notes (Tent. Draft No. 5, 1930) 37, Commentary to Section 271 (now § 401).

96. It is using the word in the same way as referring to the engineer’s “failure” to blow the locomotive whistle for the grade crossing. Actually the victim’s family complains of the engineer’s act of running over him and killing him. That’s action!

97. Section 399 states the liability for selling a chattel known to be dangerous.

98. Restatement, Torts, Explanatory Notes (Tent. Draft No. 5, 1930) 38, Commentary on Section 272 (now § 402): “See Giberti v. Barrett Mfg. Co., 165 N. E. 19 (Mass. 1929) and Karsteadt v. Gross Co., 179 Wis. 110 (1922).” This is the entire explanatory note to the section. These notes were prepared by the Reporter, and it has been the practice, when the point was not well settled, to set forth in the explanatory notes all the cases which could be found which supported the proposed rule.


100. Id. at 73, 165 N. E. at 20.
words "or ought to have known" carry.\footnote{101} Also, the soldered bottom was a normal characteristic of all the boilers sold by the defendant and known to him. In addition Massachusetts still clings to the law announced in the \textit{Huset} case\footnote{102} which limits the vendor's liability to the case of a known defect. In \textit{Karsteadt v. Gross Co.},\footnote{103} the second case cited, the vendor knew of the danger, expressly pointed out certain hazards to the plaintiff but did not warn of the danger in the unguarded gears of a washing machine. Neither of these cases holds that a vendor has a duty to inspect.

Let us turn to the comments to Section 402, keeping in mind Professor Bohlen's statement to the Institute, quoted above, and the positive statement in the explanatory note to the preceding section, denying any duty to inspect goods bought of a reputable manufacturer. The first part of the comment says:

"A wholesale or retail dealer, who sells in the original packages goods bought from reputable manufacturers, acts as a conduit through which the goods pass from manufacturers to consumer, who buys them in reliance upon the manufacturer's reputation for competence and care. A vendor of such goods, therefore, is under no duty to subject them to rigid inspection or tests before selling them. He may, however, as dealer, have a special opportunity to know of circumstances, which to his experience as dealer, would indicate that the goods are likely to have deteriorated, as when he knows that goods, subject to deterioration by lapse of time, have been long kept in stock. \textit{If such is the case}, he is subject to the same liability as though he knew of their defective character if he does not exercise reasonable care to inform the purchaser of the chance that the goods may have deteriorated."\footnote{104}

This language does not impose any duty of inspection upon a vendor who has no reason to believe the chattel is defective. The illustration of "goods subject to deterioration" emphasizes that a typical case is the sale of perishable goods. The milk dealer, for example, knows from "his experience as dealer" that after $X$ hours milk may turn sour, and after $X + Y$ hours it is sure to turn sour. He also knows he has had his milk on hand for $X$ hours. He is "ignorant of the dangerous character or condition" of the milk, i. e., the fact it is sour, but he knows that it may be. A sale of fresh meat, under like circumstances, would, on the facts actually known to the vendor, be a foreseeably dangerous act. Knowing what he does the vendor must either look

\footnotesize{\begin{footnotes}
\footnote{101} Note 81 \textit{supra}.
\footnote{102} Huset v. Case Threshing Co., 120 Fed. 865 (C. C. A. 8th, 1903).
\footnote{103} 179 Wis. 110, 190 N. W. 844 (1922), cited note 26 \textit{supra}.
\footnote{104} Italics added.
\end{footnotes}}
into the matter further or put the purchaser on guard by conveying
to him the knowledge the vendor possesses. That is all.
The remainder of the comment says:

"A retail or a wholesale vendor may, in the cursory inspection which he gives to the goods while handling them for the purpose of receiving and selling them, or during the periodical taking of stock, have an opportunity to observe indications which as a competent dealer in such commodities should cause him to realize that the goods are or are likely to be in a condition dangerous for use. These indications may be so slight that the vendor is not entitled to expect that they will be observed by any inspection which customers make or should make before buying and using the goods. Even if the conditions are plainly observable by the customer they may be such that, although enough to cause a competent dealer to realize that they make the goods unsafe, they may convey no such intimation to a customer having no special experience with such goods. The rule stated in this Section requires the retail or wholesale dealer to utilize not only the special opportunities which he has to observe the condition of the goods but also the special competence which he, as a dealer in such goods, should have to realize the dangerous implication of conditions which though observable by the customer are not likely to be appreciated by him. His failure to inform his vendees that the goods are or are likely to be dangerous is not excused by his ignorance thereof, if his ignorance is due to his failure to utilize his special opportunities and exercise his special competence for the purpose of discovering whether the goods are or are not safe for the use for which they are sold." 105

This language, also, does not impose a duty to inspect for the purpose of discovering defects in a chattel believed to be safe. In referring to "the cursory inspection which he gives" the comment is describing a factual situation rather than laying down a duty to inspect. The grocer while putting cans on his shelves "has an opportunity to observe" a bulge in a particular can. His experience and competence tell him that this may indicate gas inside the can, formed by deteriorated contents. The "plainly observable" bulge carries no such message to the customer, lacking the grocer's knowledge, gained from experience. The grocer is "ignorant" of the condition of the food, because the bulge may also have been formed by causes other than deterioration; but he knows enough to arouse his suspicions. This actual knowledge flashes a danger signal to the grocer, if not to his customer. The situation discussed in the comment is a special application of a general rule that the act of a person possessing special knowledge, which enables him to see

105. Italics added.
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a risk of harm, is judged in the light of that fact although the act of one lacking such knowledge would not be. The physician who sees a symptom which may or may not indicate a contagious disease and who sends the patient out to mingle with people does something which his own special knowledge tells him is unreasonably risky. A further inspection of the patient to determine whether he has "deteriorated" is in order. So, too, is a further inspection of the bulged can of food.

The only language which could possibly be construed to impose any greater duty of inspection is the statement "The rule stated . . . requires the wholesale or retail dealer to utilize . . . the special opportunities which he has to observe the condition of the goods . . . ." It can be argued that this requires the dealer to search for "observable" defects. Taking the sentence in its context does not warrant such a broad interpretation; nor does the rationale of a vendor's liability. If the evidence of the defect is plain on the outer face of the chattel it is practically certain the vendor did know of it. His denial will generally be met with incredulity by the jury just as the jury views with incredulity the defendant's protestations of ignorance of the falsity of his statements in a deceit action where the evidence makes such ignorance highly improbable. But so far as the rule of law is concerned the test should be the vendor's actual knowledge of the defect or of facts pointing to it, while the degree of observableness of the defect should be merely evidence bearing upon the existence or non-existence of that controlling fact; just as in the deceit case, under the rule of Peek v. Derry, the controlling fact is the honesty of the defendant's belief, while the lack of any reasonable grounds for such belief is evidence of the fact it was not actually entertained and that the defendant, despite his denial, knew his statement was false.

Further, the issue of the vendor's knowledge is easily understandable while a rule of law requiring inspection for observable defects but not for unobservable defects draws a line very difficult of application. Does observable mean visible to the eye from the outside? Does it mean observable only if you look for it seeking danger, or observable by the casual glance given in the usual unpacking and handling? Does it require the removal of easily removable parts to see what is visible underneath? Does it mean visible as you view the chattel from a normal standing or sitting posture or visible as you get down and look all over it? Does it mean detectable by the sense of feel, or smell, or hearing, or taste as well as sight? Must the vendor look at, handle,

106. Restatement, Torts (1934) § 290, comment e.
107. Restatement, Torts (1938) § 526, comment d.
108. Many things are seen but not observed. How many people can describe the details of even familiar objects, or state the patterns or even colors of the suits worn by the last three persons talked to?
smell, taste and listen to the chattel? Must he palpate the chattel inside to feel the defect? Must he tap it with a handy hammer to hear the defect? If an equally simple and not inconvenient test, such as using litmus paper will make the defect observable by sight, as palpation makes it observable by feeling, is this required?

And why stop with "observable defects"? If danger to the customer and others imposes a duty of inspection, danger from the unobservable but discoverable defect is even greater because the purchaser cannot observe it. If the presence of an unobservable defect may bring death why not require the vendor to employ the facilities of modern testing laboratories to discover it? Into such a maze do we get once we depart from the rule that the vendor's liability is predicated upon his knowledge of the danger creating defect or of other facts from which he has reason to suspect its existence.

**Cases Imposing Duty to Inspect**

A careful search has disclosed only three cases in which the courts have held that a vendor is under some general duty of inspection. Only one of these is by a court of last resort, and the other two are in the Appellate Division of the Supreme Court of New York. The earliest, decided in 1910 by a divided court, is *Garvey v. Namm*. The plaintiff purchased a 59¢ wrapper at a department store sale. Unknown to either party a basting needle 1 or 1 1/4 inches long had been left in an unfinished seam and it scratched the plaintiff when she washed the garment. In fact the defendant had inspected these wrappers for quality and workmanship but had not seen the needle. The majority of the court held that the vendor had a duty of careful inspection and allowed the plaintiff to recover. In 1940 the same court followed this decision in *Santise v. Martins, Inc.*, in which the plaintiff, while trying on a pair of shoes in a department store, was injured by a nail protruding from the inner sole of one of the shoes.

To say that the vendors in these cases, particularly on their facts, were negligent seems absurd. Negligence is conduct which involves an unreasonable risk of foreseeable harm. The magnitude of the foreseeable risk of harm must outweigh the utility of the act containing that risk. What "reasonable man" would think it necessary to inspect meticulously every one of a thousand cheap wrappers before

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110. In Miller v. Svensson, 189 Ill. App. 355 (1914) the furrer's knife in the fur coat lining could probably have been found by feeling the coat, yet the court held the defendant was not liable. This case seems to be squarely contrary, on its facts, to the New York case.
111. 258 App. Div. 663, 17 N. Y. S. (2d) 741 (2d Dep't 1940).
112. RESTATEMENT, TORTS (1934) §§291-293.
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putting them on sale where there is no past history of hidden needles? Since when has the sale of wearing apparel, without checking it for lethal qualities, been an unreasonably dangerous thing to do? Is the vendor who sells shoes without palpating the inner soles of his whole stock doing something unreasonably dangerous? If so, why not require floorwalkers to palpate the pockets of all present on the chance that one may be a hold-up man with a hidden gun which may kill a customer? The "reasonable man" may be a paragon of virtue whose motto is "safety first" but he is not an apotheosized archangel and he does take some chances. The magnitude of the risk in these cases was slight. Who has not been scratched frequently or had a nail in his shoe? How often has it required more than a drop of iodine and a day or two to remedy the trifling injury?

These decisions are not only a departure from sound theory but on their facts they are unwholesome precedents which invite litigious purchasers and unscrupulous lawyers to build up cases to mulct retailers in damages.

For authority the majority opinion in the Garvey case said that the facts came under the rule declared in Heaven v. Pender, which is entirely inapplicable. That case dealt with the duty of a drydock owner to inspect his own equipment used for his own business purposes. The case announced the rule which is restated in Section 392 of the Restatement of Torts, and there carefully distinguished from the rules applying to a vendor. The opinion in the Santise case said that the Garvey case "is the applicable precedent", and that Pearlman v. Garrod Shoe Co. "is very similar". The latter case has been analyzed above and the only similarity is that both cases involved shoes. The controlling facts are entirely different. The Santise opinion says that the vendor's duty to inspect "requires the seller to discover defects which may be found by inspection alone, as distinguished from dangers so concealed that mechanical tests are needed to disclose them". Until an authoritative pronouncement by the Court of Appeals is handed down the New York law cannot be considered as settled, particularly by cases departing so far from sound tort theory and the realities of life.

The third case, also decided by a divided court, is Ebbert v. Philadelphia Electric Co. The defendant sold, installed and demonstrated

113. "Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behaviour must conform." Palsgraf v. Long Island R. R., 248 N. Y. 339, 343, 162 N. E. 99, 100 (1928) per Cardozo, Ch. J.
114. 11 Q. B. D. 503 (1883).
an electric washing machine and wringer. The safety release bar was defective in that a cam shaft at one end was bent. This did not show up in the demonstration because the demonstrator happened (in good faith) to tap the good end of the safety release and it worked. The chamber containing the safety device was open at the bottom and if the cam shaft had been inspected the defect could have been seen. In using the wringer the purchaser caught her hand in the rollers, tapped the defective end of the release bar with her free hand, but the release did not operate and her caught hand was severely injured. The wringer was sold with the vendor's guarantee "against defects of manufacture for a period of one year . . . and (vendor) will replace free, any part which an examination by the company shall disclose to be defective". There was testimony that the vendor had employees who "serviced" the washers and that the vendor did make a routine inspection of the washers "only for appearance to make sure they are not damaged by the railroad". The jury found a verdict for the plaintiff.

The Superior Court affirmed the judgment on the ground that there was the breach of "an express warranty against mechanical defects and the dealer thereby assumed the responsibility of the manufacturer for the working of the wringer". The court also said, "In view of the express warranty as to the condition of this wringer, it is not necessary to decide whether a duty of inspection would have been cast upon the dealer if he had not given an express warranty." While it is not within the scope of this article to discuss the question of warranty it would seem, as indicated by Mr. Justice Drew in his dissenting opinion in the Supreme Court, that the vendor had not warranted the safety of the machine but had merely agreed to replace, without cost, any parts which were found to be defective.

In the Supreme Court, Mr. Justice Maxey, writing for the majority of the court, said, "While not differing with the trial court and the Superior Court in basing defendant's liability on breach of warranty, we think an equally solid basis for recovery is defendant's inadequate performance of the duty of inspection and demonstration." He also said, "An imperative social duty requires a vendor of a mechanical device to take at least such easily available precautions as are reasonably likely to prevent serious injury to those who by using such a device may be exposed to dangers arising from its defective construction." In refusing to agree that the vendor was a "mere

118. Id. at 363, 191 Atl. at 389.
119. Id. at 363, 191 Atl. at 390.
121. Id. at 268, 198 Atl. at 329.
122. Id. at 263, 198 Atl. at 327.
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conduit" from the manufacturer to the buyer, Mr. Justice Maxey said that the vendor "took upon itself the duty of subjecting the wringer to 'inspection and tests' before selling. It is a legitimate inference that the cost of such inspection and tests was added to the price of the equipment." 123 This statement of fact was challenged in the dissenting opinion, which appears to be more accurate in saying that "defendant has done nothing but sell a washing machine and demonstrate generally how to use it". 124

The majority opinion relied upon King Hardware Co. v. Ennis,125 Moore v. Jefferson Distilling & Denaturing Co.,126 Guinan v. Famous Players-Lasky Corp.,127 Restatement of Torts, Section 388, and Garvey v. Namm.128 While there is language in the King case to support Mr. Justice Maxey, on its facts the case involves, as pointed out earlier, a reckless statement by the vendor without knowledge of the facts.129 The decision in the Moore case was reversed by the Supreme Court of Louisiana, which refused to recognize a duty of inspection.130 The Guinan case involves the gift of a chattel known to be dangerous without giving warning of the known danger. The Restatement section applies to all suppliers of chattels and is limited to the case of a chattel known to be, or likely to be, dangerous. The section imposes liability only where the requirements of all three of its clauses (a), (b) and (c) are fulfilled. The opinion quotes clause (c) but omits clauses (a) and (b) and thus succeeds in the interesting mathematical feat of making c = a + b + c. The Garvey case, involving the basting needle in the lady's wrapper, does support the opinion, and it is the only authority cited in the opinion which does.131 As the opinion purports to follow existing authority rather than to make new law this actual lack of support in the precedents relied upon seems significant in appraising the weight of this case as an authoritative precedent.

123. Id. at 265, 198 Atl. at 327.
124. Id. at 272, 198 Atl. at 330.
126. 12 La. App. 405, 123 So. 384 (1929), rev'd, 169 La. 1155, 126 So. 291 (1930.)
129. If the case stands for anything more it is, on its facts, contrary to State to use v. Consolidated Gas, E. & P. Co., 146 Md. 390, 126 Atl. 105 (1924), and Camden Fire Ins. Co. v. Peterman, 278 Mich. 615, 270 N. W. 807 (1937).
130. In addition Article 2531 of the Civil Code of Louisiana [LA. CIVIL CODE ANN. (Dart, 1932) Art. 2531] provides that "The seller who knew not the vices of the thing is only bound to restore the price, and to reimburse the expenses occasioned by the sale . . . ." See discussion of this statute in Boyd v. J. C. Penney Co., 195 So. 87, 89 (La. App. 1940).
131. The facts of Pound v. Popular Dry Goods Co., 139 S. W. (2d) 347 (Tex. Civ. App. 1940) in which there was a verdict and judgment for the defendant, also involved the sale of a washing machine and wringer with a safety release bar which failed to operate because of a mechanical defect.
Conclusion

In this Article an endeavor has been made to cite and analyze every case relating to a vendor's purely tort duty which could be found in the reports. In view of the large number of people who are vendors (to say nothing of purchasers) the subject seems worthy of consideration. In any type of situation the question of imposing or not imposing liability is, in the last analysis, a question of public policy. Tort liability has expanded greatly in the last century. It has been, on the whole, a desirable expansion. Changed conditions have often cried out for a change in the law. The enlarged liability of the manufacturer, for example, and Judge Cardozo's masterly rationalization of the proper basis for it, have met with almost universal approval. But the vendor's position is fundamentally different from that of the manufacturer, and it is difficult to see why the public welfare requires the imposition upon vendors of this new duty of inspection. On the contrary it requires continued adherence to the present weight of authority. Today the purchaser generally has a cause of action against the manufacturer for harm caused by a dangerously defective chattel. In many cases he has a cause of action against even an innocent vendor for breach of an express or implied warranty. The purchaser seems to have all the protection he reasonably needs without leaving it to a jury to determine, in retrospect, what the vendor might have found out if he had done what the jury (now) thinks he should have done about examining a chattel which he had no real reason to believe had anything the matter with it. If the failure to inspect is called "negligence", the issue, on the record made, will be for the jury in all but the occasional case. How the jury will react is indicated in the cases of the needle in the wrapper, the nail inside the shoe, and the wringer release bar which failed to work.