Michigan Law Review

Volume 64 | Issue 7

1966

Products Liability Based Upon Violation of Statutory Standards

Joseph H. Ballway Jr.
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Civil Law Commons](#), [Consumer Protection Law Commons](#), [Criminal Law Commons](#), [Food and Drug Law Commons](#), [Law and Economics Commons](#), and the [Torts Commons](#)

Recommended Citation

Joseph H. Ballway Jr., *Products Liability Based Upon Violation of Statutory Standards*, 64 MICH. L. REV. 1388 (1966).

Available at: <https://repository.law.umich.edu/mlr/vol64/iss7/11>

This Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Products Liability Based Upon Violation of Statutory Standards

In recent years, products liability litigation has been centered upon causes of action premised upon theories of warranty or strict liability in tort.¹ The doctrine of civil liability based on defendants' violations of regulatory statutes has been utilized less frequently by plaintiffs who have suffered injuries caused by defective, substandard, or misrepresented merchandise, although this concept is often more effective than any other.² Of course, the theory is available only where legislatures have chosen to act, but Congress and state assemblies did take action long ago in relation to a number of types of consumer merchandise by passing laws regulating the manufacture and sale of food, drugs, and cosmetics,³ the vending of highly flammable or explosive substances,⁴ the sale to minors of certain dangerous instrumentalities,⁵ and the labeling of hazardous household products.⁶ Moreover, in the near future congressional enactments may govern the interstate sale and delivery of firearms,⁷ truth-in-packaging,⁸ and the quality of automobile tires.⁹

1. For discussions of recent developments in the law of both warranty and strict tort liability for injuries caused by defective or substandard merchandise, see Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430 (1966); Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350 (1966).

2. See Comment, *Tort Liability of Food Manufacturers in New York—Statutory and Common Law*, 42 CORNELL L.Q. 225, 246-47 (1957).

For the purposes of this discussion, a "regulatory statute" is any enactment which provides a standard of care against which the conduct of a person accused of a violation will be measured. Regulatory statutes are of two kinds: those which provide for the imposition of fines or terms of imprisonment upon violators (penal statutes) and those which authorize at most the issuance of cease-and-desist orders against further violations or authorize the imposition of civil liability (pure regulatory statutes). It should be noted that some enactments which meet the test of a regulatory statute are not used as bases of civil liability. See note 18 *infra*.

3. See, e.g., Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301-92 (1964), after which most similar state legislation is patterned. See generally 1 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* § 22.03 (1965).

4. Federal Flammable Fabrics Act, 67 Stat. 111 (1953), 15 U.S.C. §§ 1191-1200 (1964). In addition, most states have laws which not only prescribe either the kind of container which must be used for storing a flammable substance such as gasoline or the type of labeling which must appear on any container used for this purpose, but also limit the amount of gasoline which may be sold to a consumer when the fuel is not delivered into the tank of an automobile. Typical is the statute relied upon in *Dart v. Pure Oil Co.*, 223 Minn. 526, 27 N.W.2d 555 (1947).

5. This legislation generally encompasses the sale of firearms and ammunition or the sale of certain types of drugs. See, e.g., *Tamiami Gun Shop v. Klein*, 109 So. 2d 189 (Fla. Ct. App.), *aff'd*, 116 So. 2d 421 (Fla. 1959).

6. Federal Hazardous Substances Labeling Act, 74 Stat. 372 (1960), 15 U.S.C. §§ 1261-73 (1964).

7. Proposed legislation would make unlawful certain interstate sales of firearms to minors and to unlicensed dealers. See S. 14, 89th Cong., 1st Sess. § 2(c) (1965).

8. A bill entitled the Fair Packaging and Labeling Act would proscribe product

Regulatory enactments controlling production and distribution can give rise in several different ways to civil liability on behalf of persons injured by non-conforming merchandise. For instance, if a statute codifies existing common-law rules of negligence, its effect is merely to place the weight of legislative authority behind ordinary negligence principles.¹⁰ Since an injured party's recovery under such a provision still depends largely upon his proving in the traditional manner that a defendant failed to exercise due care, this kind of statute merits no further discussion. On the other hand, if particular legislation expressly states that a violator may be subjected to a civil action for damages caused by an injury resulting from his infraction, absolute civil liability may be said to flow directly from a breach of the statute.¹¹ In order to recover, a victim need prove only the occurrence of the violation, the causal relation between it and his injury, and the amount of his damages. On balance, however, the most common form of civil liability based upon statutory infringement arises when a penal statute is held to provide a standard of care, the breach of which is not only a crime,

labeling designed to deceive consumers regarding the actual price of an item or the quantity of merchandise contained in a package. S. 985, 89th Cong., 1st Sess. §§ 2-5 (1965). See generally Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, 64 MICH. L. REV. 1255 (1966).

Since the possibility of personal injury arising from the failure to label a package properly with respect to weight, volume, or price is rather remote, this bill, even if passed, would probably not provide the basis of a significant amount of products liability litigation.

9. Proposed legislation provides for the periodic publication in the Federal Register of federally established standards for automobile tires and for the development of a uniform grading system for such tires. The latter part of the bill is intended to aid the consumer in making an intelligent tire purchase in the same manner that legislation establishing a system of meat grading guides a housewife. S. 2669, 89th Cong., 1st Sess. §§ 3-6 (1965).

10. See, e.g., GA. CODE ANN. § 105-1101 (Supp. 1965), which provides: "Any person who knowingly or carelessly sells to another unwholesome provisions of any kind, the defect being unknown to the purchaser, by the use of which damage results to the purchaser or his family, shall be liable in damages for such injury." (Emphasis added.) Since the statutory language suggests that a plaintiff must, in order to recover on the basis of the enactment, prove that a violator acted either intentionally or negligently, the statute merely codifies a portion of the common law of tort liability.

It should be noted that proof that a defendant violated another statute, such as a pure food law, is sufficient to establish the degree of negligence which would prove a violation of the provision set out above. See *Donaldson v. Great Atl. & Pac. Tea Co.*, 186 Ga. 870, 199 S.E. 213 (1938). See generally text accompanying notes 14-23 *infra*.

11. This type of statute is exemplified by the enactment upon which liability was based in *Neff Lumber Co. v. First Nat'l Bank*, 122 Ohio St. 302, 171 N.E. 327 (1930). The legislation in *Neff* provided that anyone who sold a firearm to a minor would be liable in damages to any person injured by the minor's use of the weapon. A Kentucky statute, similar in effect but more widely applicable, states: "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." KY. REV. STAT. § 446.070 (1962). Some city ordinances expressly provide for civil liability. See *Daggett v. Keshner*, 284 App. Div. 733, 134 N.Y.S.2d 524 (1954).

but also, because of the willingness of courts to treat an infraction of the criminal law as a ground for civil liability, negligence per se, or at least some evidence of negligence.¹² Furthermore, there are a few regulatory enactments, such as the Federal Trade Commission Act, which, although not penal, can be said to establish standards of care and can therefore be treated like penal statutes, so as to provide the bases of recovery for persons injured because of violations of the statutes.¹³ The following discussion is primarily concerned with this type of civil liability arising from penal legislation or its equivalent through the process of judicial implication.

I. NEGLIGENCE BASED UPON VIOLATION OF A LEGISLATIVE STANDARD —THE THEORIES

Any common-law negligence action is predicated upon the breach by one person, the defendant, of a duty owed to another, the plaintiff. The jury generally has the power to determine the standard of care which defines this duty—the power to decide what the reasonably prudent man in defendant's situation would have done—as well as the authority to determine whether a breach of the applicable standard has occurred.¹⁴ However, when a defendant can be shown to have violated a regulatory statute which established a minimum standard of conduct for someone in his position, it can be argued that a jury's role in determining the minimum standard of care applicable to him has been pre-empted by the legislature.¹⁵

12. 2 RESTATEMENT (SECOND), TORTS §§ 285(b), 286 (1965) [hereinafter cited as RESTATEMENT 2D].

Other more esoteric theories of recovery based upon statutory enactments have been proposed. For example, imaginative counsel have suggested that a restitutionary remedy should be made available to a consumer who purchases a product of a kind later taken off the market by the Food and Drug Administration acting pursuant to its power conferred by the Federal Food and Drug Act, on the ground that the sale to the consumer is a violation of the act. Actually the FDA once did request, on behalf of previous buyers, restitution equivalent to the amount paid by them in their purchase of a particular kind of product. This demand would have cost the manufacturer ten million dollars, but the case terminated in a consent decree which made no mention of restitution. See *United States v. Mytinger & Casselberry, Inc.*, (S.D. Cal. 1951), as set forth in 3 KLEINFELD & DUNN, *FEDERAL FOOD, DRUG, & COSMETIC ACT* 204 (1953). For an evaluation of the FDA's contention, see Lev, *The Nutrilite Consent Decree*, 7 *FOOD DRUG COSM. L.J.* 56, 65-67 (1952); *Developments in the Law: The Federal Food, Drug, and Cosmetic Act*, 67 *HARV. L. REV.* 632, 718-20 (1954).

13. See text accompanying notes 149-55 *infra*.

14. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 *MINN. L. REV.* 361, 368 (1932).

15. See Thayer, *Public Wrong and Private Action*, 27 *HARV. L. REV.* 317, 319-28 (1914). Legislative pre-emption is no more an encroachment on the jury's function than is a judge's exercise of his power to prevent the jury from deciding an issue in any civil case. Indeed, a judge may declare a certain defendant's conduct to have been negligent as a matter of law if "reasonable minds could not reasonably differ" with respect to the standard of care applicable to that conduct and with regard to the fact that defendant violated it. See generally 9 WIGMORE, *EVIDENCE* § 2494 (3d ed. 1940).

Indeed, it seems anomalous to accord such a standard of conduct, promulgated by the community through its elected representatives, anything less than the force of law by failing to admit that a breach of a guideline of this type is negligence per se in the context of a civil suit.¹⁶ On the other hand, some have argued with respect to penal regulatory statutes that if the legislature had wanted a standard ostensibly adopted as a measure of criminality to foreclose automatically a jury determination of the test of negligence applicable in a civil action, it would have made that intention express.¹⁷ However, it is rather late in the day to accept this contention, since legislatures may well believe that civil liability will result, through the intervention of the courts, from violations of essentially criminal statutory enactments. Indeed, judging from the quantity of judicial precedent, they would be naive if they did not make such an assumption.¹⁸

Nevertheless, Professor Charles Lowndes did not accept the preemption rationale, at least when it was put forward to justify the

16. See 2 HARPER & JAMES, TORTS § 17.6, at 994-1014 (1956) (arguments on both sides fully presented). *But see* PROSSER, TORTS § 35, at 191-93 (3d ed. 1964); James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 103-24 (1950); Lowndes, *supra* note 14, at 367-70; Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949); Thayer, *supra* note 15, at 319-28.

In most civil-law jurisdictions, a person who violates a regulatory statute is considered to be liable for any damages caused by the breach. However, many of the limitations which have been placed upon the application of the negligence per se doctrine in common-law jurisdictions, such as "statutory purpose" restrictions (see generally text accompanying note 27 *infra*), are not relevant in civil-law countries. See Newman, *Breach of Statute as the Basis of Responsibility in the Civil Law*, 27 CAN. B. REV. 782, 798-800 (1949).

17. See Lowndes, *supra* note 14, at 367-70.

18. An episode from relatively recent legislative history attests to the validity of this observation. The Copeland Bill, which became the Federal Food, Drug, and Cosmetic Act of 1938, provided in § 24: "A right of action for damages shall accrue to any person for injury or death proximately caused by a violation of this Act." S. 1944, 73d Cong., 2d Sess. § 24 (1933). The following exchange took place in committee before the bill, with § 24 deleted, was enacted into law:

SEN. COPELAND: Let me ask you about section 24, on page 31. Is that a little gratuitous?

MR. CAMPBELL: That is a statement of legal rights.

SEN. COPELAND: They have that power now, if they will ever get it?

MR. CAMPBELL: Right.

Hearings on S. 1944 Before a Subcommittee of the Senate Committee on Commerce, 73d Cong., 2d Sess. 81-82 (1933).

However, not every regulatory statute becomes a source of negligence per se liability. Dean Prosser has suggested that:

[T]he most tenable explanation is that the court finds in [some statutes] an expression of a policy for the protection of a particular class of people against the forbidden conduct, and that in furtherance of that policy it is proceeding by a species of judicial legislation well grounded in precedent, to afford an additional remedy of its own. If there has to be a theory, this one at least preserves some leeway for discrimination, and avoids the strait-jacket of any reasoning which would result in a rigid rule allowing a tort action for all damages resulting from any criminal act.

PROSSER, *Contributory Negligence as a Defense to Violation of a Statute*, 32 MINN. L. REV. 105, 108 (1948).

implication of civil liability from a penal statute. He argued that the pre-emption concept was a mask designed to hide unjustified judicial improvisation—that the use of the negligence per se doctrine was merely a legerdemain by which a court acted in derogation of its obligation to interpret criminal legislation strictly.¹⁹ Since no penal enactment, if strictly construed, contains even an implicit suggestion that it was meant to be applicable in any way in civil proceedings between private parties, the conclusion which logically follows from Lowndes' premise is that the violation of such a statute ought to have no bearing at all upon civil liability for negligence. However, Lowndes believed that a showing of an infraction of a penal law should be some evidence for the jury to consider in deciding whether the violator was negligent, for he felt that "the basic idea at the root of negligence is that a defendant should be held for the unintentional consequences of socially undesirable conduct, or conduct which appears to the jury to be socially undesirable"²⁰ and that a jury could consider a violation of a regulatory statute to be socially undesirable conduct.

Some courts, notably the Court of Appeals for the District of Columbia Circuit, have taken a third view of the relationship between civil negligence and the violation of a regulatory enactment. These courts have maintained that some of the harshness of the per se rule can be alleviated without denying that civil significance attaches to the breach of a regulatory statute by charging a jury that proof of a statutory violation is *prima facie* evidence of negligence and by allowing the jury to decide the question whether the manufacturer, distributor, or retailer is "at fault," where "fault" is defined in terms of the primary responsibility for a particular product defect.²¹ Thus, courts adopting this analysis would permit a par-

19. Lowndes, *supra* note 14, at 369. Lowndes dismissed the negligence per se theory too quickly. Certainly there is nothing fundamentally wrong with depriving a jury of the opportunity to determine the standard of care governing the conduct of a particular defendant. See note 15 *supra*. Furthermore, it seems reasonable to suggest that the fact that the use of the negligence per se theory happens to bring about the same result in a particular case as that which would be reached if civil liability were expressly provided by the statute does not necessarily indicate that a court has abused an enactment to reach this result.

For another discussion giving additional reasons why the Lowndes view is untenable, see Note, *A Rationale of Negligence Per Se*, 26 IND. L.J. 419, 421 (1951).

20. Lowndes, *supra* note 14, at 369-70. But see *Donaldson v. Great Atl. & Pac. Tea Co.*, 186 Ga. 870, 199 S.E. 213, 128 A.L.R. 456 (1938) (suggesting that decisions resting upon the "some evidence of negligence" theory do not pass the test of reason).

21. *Whetzel v. Jess Fisher Management Co.*, 282 F.2d 943, 946-48 (D.C. Cir. 1960); see Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 463-64 (1933); cases collected in note 25 *infra*.

A party need not have had actual knowledge of a product defect in order to have been "at fault." All the parties in the chain of distribution of a particular product may have lacked actual knowledge of the defect, yet one may have had *greater opportunity to discover* the defect; it is that party who is primarily "at fault" if an injury is attributable to the imperfection.

ticular defendant (for example, a retailer) to escape liability despite his having technically violated a statute, if another party in the distributive chain (such as a manufacturer) had a better opportunity to prevent the injury. However, this approach seems to have appealed to courts only in those cases in which the statute allegedly breached has been one containing no requirement that an accused violator's subjective guilt (*mens rea*) be proved to establish the violation.²² Therefore, it appears that the "prima facie evidence of negligence" concept is actually designed to prevent the disquieting result which would be reached if the per se doctrine were applied in cases involving this type of statute, rather than to supplant the negligence per se theory itself. Generally speaking, this dilution of the per se concept is made unnecessary by the tendency of most "per se" jurisdictions to enforce rules of indemnity quite liberally, so that a person against whom a judgment has been obtained although he was not "at fault" may easily recover from the party who bears the primary responsibility.²³ Indeed, the indemnity route would often lead to a more equitable outcome than would the modified per se theory, for when a party who has been held liable although not "at fault" is unable for some reason (such as the running of the applicable statute of limitations) to recover from the party primarily responsible, the "fault" approach would effectively deprive him of all relief.

II. THE CASE LAW CONCERNING VIOLATION OF A LEGISLATIVE ENACTMENT

A. *The Weight and Scope of the Violation*

The tripartite split in theory outlined above is reflected in the case law of products liability. Courts in a majority of jurisdictions have held that a violation of a standard of conduct established by a regulatory statute is negligence per se for the purpose of a civil tort

A case illustrating this analysis would be one involving a retailer who had sold a defective product in a package sealed by the manufacturer and unopened since it left the latter's control. If the retailer technically violated a regulatory statute, he could be liable to an injured consumer on a negligence per se theory, although he could not have prevented the injury without opening the package, thereby destroying or at least reducing the marketability of the contents. Since the product remained sealed inside the package from the time it left the manufacturer, the defect probably occurred while the manufacturer had control of the merchandise; therefore, the manufacturer had the best opportunity to correct the defect, or at least to discover it and to prevent the distribution of the product. Under these circumstances, the manufacturer would be primarily responsible to the consumer, for it was primarily through his fault that the injury occurred. See, e.g., *Gantt v. Columbia Coca-Cola Bottling Co.*, 193 S.C. 51, 7 S.E.2d 641 (1940). For other examples, see *Morris, The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 457-70 (1933).

22. See text accompanying notes 36-39 *infra*.

23. See text accompanying note 81 *infra*.

action;²⁴ others have said that a showing of such an infraction is prima facie evidence of negligence.²⁵ A few courts treat proof of a violation as merely "some evidence" of negligence.²⁶ However, courts have imposed certain restrictions on the application of the per se and the prima facie evidence theories; the restrictions are designed to make these concepts as consistent as possible with the legislative purpose in establishing a standard of conduct in a particular enactment. The four "statutory purpose limitations" prevent a plaintiff from recovering on a per se or a prima facie evidence

24. The court in *Donaldson v. Great Atl. & Pac. Tea Co.*, 186 Ga. 870, 876, 199 S.E. 213, 217 (1938) stated: "As to civil actions, the only effect of the pure food act is that whereas *before* its passage an action for damages resulting from negligence could be sustained only by allegation and proof of such negligence as a matter of fact, . . . the plaintiff may *now* show negligence as a matter of law by establishing a breach of the statutory duty. . . ." (Emphasis added.)

Other leading cases are: *Hunter v. Derby Foods*, 110 F.2d 273 (2d Cir. 1940) (applying Ohio law); *Allen v. Gornito*, 100 Ga. App. 744, 112 S.E.2d 368 (1959); *Marigny v. DeJoie*, 172 So. 808 (La. Ct. App. 1937); *Meshbesher v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N.W. 428 (1909); *Murray v. Bensen Aircraft Corp.*, 259 N.C. 638, 131 S.E.2d 367 (1963); *Reynolds v. Murph.*, 241 N.C. 60, 84 S.E.2d 273 (1954); *Portage Mkts. Co. v. George*, 111 Ohio St. 775, 146 N.E. 283 (1924); *Tedder v. Coca-Cola Bottling Co.*, 224 S.C. 46, 77 S.E.2d 293 (1953); *Tate v. Mauldin*, 157 S.C. 392, 154 S.E. 431 (1930); *Pizzo v. Wiemann*, 149 Wis. 235, 134 N.W. 899 (1912). See generally 2 RESTATEMENT 2d § 288B; PROSSER, TORTS § 35, at 202-03 (3d ed. 1964); Annot., 128 A.L.R. 464 (1940). With respect to *Tate v. Mauldin*, *supra*, and *Teddar v. Coca-Cola Bottling Co.*, *supra*, see note 25 *infra*. For a discussion of Louisiana (civil) law in this area, see Comment, *Liability for Damages Resulting From Consumption of Deleterious Foodstuffs in Louisiana*, 22 LA. L. REV. 435 (1962).

25. West Virginia is one state in which it is clear that the "prima facie evidence" rule is in effect. See Davis, *West Virginia Negligence Cases and Legislative Standards of Conduct*, 61 W. VA. L. REV. 1 (1958). The South Carolina Supreme Court has vacillated between the "negligence per se" and the "prima facie evidence" doctrines. Compare *Turner v. Wilson*, 227 S.C. 95, 86 S.E.2d 867 (1955), with *Tate v. Mauldin*, *supra* note 24, and *Teddar v. Coca-Cola*, *supra* note 24. See Comment, *Negligence Per Se in South Carolina: The Effect Given in Civil Actions to the Violation of Criminal Statutes*, 11 S.C.L.Q. 207, 217-27 (1959), where it is noted that the "negligence per se" rule is generally followed in that jurisdiction and that only cases involving the state's pure food law are in conflict. The author of the comment concludes that since no explanation has been offered for the deviation, the rule in all cases ought to be that of per se liability.

The status of the law in Illinois is also unclear. Compare *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N.E.2d 739 (1943) ("prima facie evidence" theory), with *Ankenbrandt v. Joachim*, 173 Ill. App. 158 (1912) ("per se" theory, but contributory negligence a successful defense), and *Cada v. The Fair*, 187 Ill. App. 111 (1914) (same).

26. *Sinclair Ref. Co. v. Piles*, 215 Ark. 469, 221 S.W.2d 12 (1949); *Flynn v. Grower's Outlet*, 307 Mass. 373, 30 N.E.2d 250 (1940); *Pudlo v. Dubiel*, 273 Mass. 172, 173 N.E. 536 (1930); *Gearing v. Berkson*, 223 Mass. 257, 111 N.E. 785 (1916) (plaintiff lost because a violation of a regulatory statute was the only evidence of negligence); *Wright v. Carter Prods., Inc.*, 244 F.2d 53 (2d Cir. 1957) (dictum) (applying Massachusetts law). The status of the law in New Hampshire is unclear, but the cases in this jurisdiction can be read to have held that the violation of a regulatory statute is not even evidence of negligence unless the legislature specifically so provides with respect to a particular enactment. At most, therefore, the New Hampshire Supreme Court will deal with the statutory violation as evidence of negligence. See *Wadleigh v. Howson*, 88 N.H. 365, 189 Atl. 865 (1937); *Howson v. Foster Beef Co.*, 87 N.H. 200, 177 Atl. 656 (1935).

theory unless he can prove: (1) that he belonged to the class of persons whose interests were sought to be protected by the legislation upon which he relies; (2) that the particular interest invaded by a defendant's alleged misconduct was of the type which the legislature sought to safeguard; (3) that the enactment was intended to protect this interest from the particular hazard which caused the injury giving rise to the litigation; and (4) that the statute was designed to guard against the kind of harm exemplified by this injury.²⁷ However, it is important to note that even if a plaintiff is prohibited from relying upon a *per se* or a *prima facie* evidence theory because he failed to carry his burden of proof on any of the four issues growing out of the statutory purpose limitation, a showing that a defendant violated a regulatory statute may still provide some evidence of his negligence.²⁸

In a fairly recent case illustrating the application of these restrictions, a small boy had collided with the front of a parked car, with the result that a pointed hood ornament pierced his left eyeball and caused the loss of vision in that eye.²⁹ The boy sued the manufacturer of the automobile upon a negligence *per se* theory, alleging that the defendant had violated a California statute forbidding the sale within the state of any new motor vehicle "equipped with a . . . radiator ornament . . . which extends or protrudes to the front of the face of the radiator grill of such motor vehicle."³⁰ The court held that the plaintiff had failed to state a cause of action because the class which the statute had been designed to protect included only those persons who might be struck by a moving automobile, and also because the risk which the enactment had been designed to alleviate was the "hazard created by the pointed ornament when the car was in movement, thus rendering the ornament capable through its own motion of piercing the anatomy of a person with whom the car collided."³¹

Some enactments are intended merely to secure to individuals the rights and privileges to which they are entitled as members of the public, rather than to protect a particular group of persons from

27. See 2 RESTATEMENT 2D § 286. See generally PROSSER, TORTS § 35, at 193-98 (3d ed. 1964).

28. See *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961), *aff'd*, 304 F.2d 149 (9th Cir. 1962) (clothier's knowledge or lack of knowledge of the existence of Federal Flammable Fabrics Act relevant to the question whether he used due care in conducting his business); *Butler v. L. Sonneborn Sons, Inc.*, 296 F.2d 623 (2d Cir. 1961) (for the limited purpose of allowing proof of violation of a regulation to serve as some evidence of negligence, it is unnecessary that the injured person be within the precise class intended to be protected); 2 RESTATEMENT 2D § 288B(2).

29. *Hatch v. Ford Motor Co.*, 163 Cal. App. 2d 293, 329 P.2d 605 (Dist. Ct. App. 1958).

30. Now CAL. VEHICLE CODE § 27601.

31. *Hatch v. Ford Motor Co.*, 163 Cal. App. 2d 393, 399, 329 P.2d 605, 608 (Dist. Ct. App. 1958).

any type of harm.³² Therefore, when an individual has been injured while exercising a public right so safeguarded, the harm which he has suffered is ordinarily not the kind from which the provision was designed to protect him; as a result, the statute will not be considered as having established a standard of conduct with respect to the activity which caused the harm.³³ As an example of a statute intended to protect persons only as members of the public, the *Second Restatement of Torts* suggests a municipal ordinance which prohibits the washing of vehicles on a public highway; such an enactment is generally construed to have been intended only to expedite travel.³⁴ Actually, it is difficult to see why this "public right" exception to the per se rule is accorded separate treatment in the *Second Restatement*, since the underlying rationale of the exception is no more than an expression of the "statutory purpose" doctrine, which provides that a statute must have been designed to guard against the kind of harm exemplified by the injury incurred by the plaintiff before he may rely upon that statute as a basis for imposing per se civil liability upon the defendant.³⁵

With the exception of the fact that the "statutory purpose" restrictions have no relevance where a showing of a statutory infraction is treated as nothing more than evidence of negligence, the same law governs the application of the three basic views—per se, prima facie evidence, some evidence—regarding the effect in negligence litigation of proof that a defendant violated a regulatory enactment. For the sake of convenience, therefore, the term "negligence per se" will be used below, unless noted otherwise, to refer to all three of these positions.

Since most of the penal statutes upon which a per se theory may be based do not indicate that the unlawful intent (*mens rea*) of a violator must be shown to establish criminal guilt, the result of their application in a civil suit is liability regardless of subjective fault.³⁶ For the same reason, the common-law doctrine that ordinary

32. See 2 RESTATEMENT 2D § 288(b); Kepner, *Violation of a Municipal Ordinance as Negligence Per Se in Kentucky*, 37 Ky. L.J. 358, 359-60 (1949).

Most statutes of this type are also unsuitable sources of per se liability either because a plaintiff cannot prove that a violation was the proximate cause of his injury (e.g., Sunday blue laws), or, even more fundamentally, because the statutes themselves do not provide a standard of care (e.g., licensing statutes). For instance, a person's failure to obtain a driver's license implies neither that he cannot drive a car nor that he is violating any standard of care applicable to drivers. His conduct merely indicates that he is attempting to obtain a privilege without paying for it. See generally Gregory, *Breach of Criminal Licensing Statutes in Civil Litigation*, 36 CORNELL L.Q. 622, 630-42 (1951).

33. See 2 RESTATEMENT 2D § 288, comment c.

34. See *id.*, § 288, illustration 3.

35. See condition (4) in text accompanying note 27 *supra*.

36. *Wolfe v. Great Atl. & Pac. Tea Co.*, 143 Ohio St. 643, 56 N.E.2d 230 (1944); *Leonardi v. A. Habermann Provision Co.*, 143 Ohio St. 623, 56 N.E.2d 232 (1944); *Niemann v. Grand Cent. Mkt., Inc.*, 9 Utah 2d 46, 337 P.2d 424 (1959).

negligence may be excused in certain situations, such as emergencies, is not available as a defense to liability in a per se action.³⁷ These considerations are valuable to a plaintiff attempting to fasten negligence liability upon the retailer of a product which traveled in a sealed container from the manufacturer to the ultimate purchaser. Here the principle of liability regardless of subjective fault provides a consumer relying on a per se theory with a negligence remedy where he may have none otherwise because the only person against whom he could possibly prove negligence without the assistance of the standard of care supplied by a regulatory statute may not be subject to the court's jurisdiction or because that individual, as a defendant, could introduce sufficient evidence of due care to merit a verdict of nonliability.³⁸ Although the effect of the im-

However, since the language of the applicable statute is controlling, proof that a defendant knew that his goods were adulterated may be required in some states. Consider the following statute: "No person shall knowingly manufacture, introduce into the state, solicit orders for, sell, deliver, transport, have in his possession with the intent to sell, or offer or expose for sale, any article which is adulterated according to the provisions of this title." IOWA CODE § 189.15 (1962).

It is noteworthy that some courts have also used the lack of a *mens rea* requirement in regulatory statutes to justify the imposition of liability in the absence of culpable intent in implied warranty cases. See, e.g., *Valdosta Milling Co. v. Garretson*, 217 F.2d 625 (5th Cir. 1954) (applying Florida law); *Walker v. Great Atl. & Pac. Tea Co.*, 131 Tex. 57, 112 S.W.2d 170 (1938); *Brumit v. Cokins*, 281 S.W.2d 154 (Tex. Civ. App. 1955).

One may object to this concept of liability irrespective of subjective intent because, as Professor Llewellyn has suggested, "the number of dead mice in Coca-Cola, in the appellate reports, seems to . . . [demonstrate the point that fraudulent claims occur]. It is as in poker: four aces appearing too many times, in too short a time, spell the reign of art, in A. G. Keller's lovely phrase: the reign of chance is over. I remain unpersuaded of any fatal facination of Coca-Cola syrup for the mouse." Llewellyn, *On Warranty of Quality and Society*, 36 COLUM. L. REV. 699, 704 n.14 (1936). However, Llewellyn concluded that this was the price that had to be paid for the necessary consumer protection.

For an explanation for the fact that most statutes from which civil negligence standards are derived lack a *mens rea* requirement, see note 18 *supra*.

37. See 2 RESTATEMENT 2D § 288A (1965); PROSSER, TORTS § 35, at 198-202 (3d ed. 1964). See also 2 RESTATEMENT 2D § 288A, comment c & illustration (1), where it is suggested that negligence based upon violations of these types of statutes cannot be excused, because the enactments are construed to disallow a lack of *mens rea* as a defense in criminal actions. Furthermore, one of the prerequisites for finding negligence excusable in a particular case is a showing that plaintiff's injury resulted from causes or events beyond the control of the defendant; in most negligence per se cases concerning products liability the sellers or manufacturers have technically had sufficient control of the instrumentalities of harm to render the excusable negligence doctrine inapplicable on this score alone. See *McAleavy v. Lowe*, 259 Wis. 463, 477, 49 N.W.2d 487, 493-94 (1951).

38. If a plaintiff had to depend upon proving ordinary negligence instead of negligence per se on the basis of a statutory violation, he would probably rely upon the doctrine of *res ipsa loquitur*. Even where this principle can be invoked, a defendant may conceivably introduce enough evidence of his due care to win a jury verdict. See generally Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350 (1966). This would be especially true in those jurisdictions in which proof of food poisoning is deemed to be sufficient evidence to show a violation of a pure food statute. See generally text accompanying note 63

sition of liability without subjective fault is particularly harsh upon a retailer, who cannot be expected to examine the contents of every sealed package which enters his establishment, he is, after all, often in a position to protect himself by obtaining from the manufacturer or distributor of the merchandise which he resells a warranty that the goods meet all applicable statutory standards.³⁹

Three additional general considerations concerning per se recovery deserve brief discussion. First, a per se concept may normally be used to recover compensation for property damage as well as for personal injury, since most regulatory statutes were designed to protect against both kinds of harm.⁴⁰ For example, regulatory legislation dealing with food products has generally been held to have been enacted to guard against the loss of business sustained by a retailer as a result of its becoming known that some of his customers had suffered injuries caused by a manufacturer's unwholesome merchandise.⁴¹ Second, a plaintiff's reliance upon a per se concept does

infra. Granted that a defendant may still use evidence of due care in a per se case in an attempt to show that he did not violate a particular statute, a plaintiff here has the benefit of the psychological impact upon the jury of an instruction concerning negligence as a matter of law.

It should be noted that although a plaintiff could be denied a negligence recovery from a retailer were it not for the per se rule of liability regardless of subjective fault, he still might have a cause of action against that retailer on an implied warranty theory. However, this approach may be unavailable in some cases because of the absence of privity of contract between the retailer and the injured plaintiff. See generally Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430 (1966).

39. A retailer obviously cannot be expected to open every sealed package which enters his establishment and to inspect its contents for defects, because his doing so would destroy or sharply reduce the marketability of his goods (especially food products). Yet the rule of per se liability without subjective fault is not excessively harsh, since past decisions indicate that a retailer will encounter little difficulty in obtaining from a manufacturer who is primarily liable a full recovery in the amount of any judgment rendered against the retailer in a sealed-package case. See the discussion of indemnity in the text accompanying note 81 *infra*.

One court balanced the consumer's interest against that of the retailer in a similar situation and concluded: "Any other rule would generally leave the injured purchaser, in his effort to place responsibility, without any practical remedy. This places a heavy burden upon the seller, but he may require a warranty from the person who sells the [product] . . ." *Leonardi v. A. Habermann Provision Co.*, 143 Ohio St. 623, 632-33, 56 N.E.2d 232, 237 (1944).

40. *Hoskins v. Jackson Grain Co.*, 63 So. 2d 514 (Fla. 1953); *Pine Grove Poultry Farm, Inc. v. Newtown By-Products Mfg. Co.*, 248 N.Y. 293, 162 N.E. 84 (1928); *Abounader v. Strohmeier & Arpe Co.*, 243 N.Y. 458, 154 N.E. 309 (1926).

41. *Abounader v. Strohmeier & Arpe Co.*, *supra* note 40.

The defendant in such an indemnity action may allege plaintiff retailer's negligence per se, already established in the consumer's action against the retailer, as an affirmative defense (contributory negligence per se). However, his effort would probably be unavailing, since it is dubious that the indemnity defendant in the indemnity suit would belong to the class of persons sought to be protected by the legislation. See text accompanying note 27 *supra*; see also the discussion of an analogous problem in text accompanying note 57 *infra*.

not prevent his concurrent use of another negligence theory. The typical statute from which *per se* relief has been derived has usually been regarded as expressive of only the *minimum* obligation of care demanded of a defendant who violated it.⁴² Therefore, a jury is free to determine from the facts of a particular case that a reasonable man in the position of the defendant would have exercised more than the minimum degree of care, as well as a greater degree than the defendant did exercise, and conclude that the defendant was negligent despite his compliance with the statute. Nevertheless, it is generally felt that a showing that a defendant complied with a regulatory statute does constitute some evidence that he exercised due care.⁴³ Third, just as the rule that lack of knowledge is no defense aids an injured consumer in litigation against his *immediate* supplier of goods produced and sold in violation of regulatory legislation, the absence of the necessity for a plaintiff to be in privity of contract with a defendant in order to recover in a statutory tort suit aids a consumer in reaching his *remote* supplier or manufacturer.⁴⁴

B. *Effect of Violation of Standards Less Authoritative Than Statutes*

Although a showing of a violation of a city ordinance constitutes only evidence of negligence in some jurisdictions which have adopted a *per se* theory in cases dealing with statutory infringements, the greater weight of authority seems to attribute the same effect to proof of an infraction of an ordinance as that given to a showing of a statutory violation.⁴⁵ The latter view is more reasonable, because in establishing an ordinance, just as in enacting a statute, public representatives adopt a standard of care to govern certain types of conduct, albeit a standard applicable only in the local community.

A defendant's failure to comply with a regulation issued pursuant to statutory authorization by an agency, commission, or department, such as a directive promulgated by the Interstate Com-

42. See note 75 *infra* and accompanying text.

43. See note 76 *infra* and accompanying text.

44. See, e.g., *Rubbo v. Hughes Provision Co.*, 138 Ohio St. 178, 34 N.E.2d 202 (1941). The defense of lack of privity was pleaded in a recent negligence *per se* case in Mississippi. Although the court disallowed the defense, it seemed to indicate that it had previously considered a showing of privity to be a prerequisite for a *per se* recovery. See *Cox v. Laws*, 244 Miss. 696, 145 So. 2d 703 (1962).

45. Among the cases indicating that some courts give the same effect to infractions of city ordinances as they do to violations of statutes are the following: *Milton Bradley Co. v. Cooper*, 79 Ga. App. 302, 53 S.E.2d 761 (1949); *Great Atl. & Pac. Tea Co. v. Dupee*, 71 Ga. App. 148, 30 S.E.2d 365 (1944); *Zamora v. J. Korber & Co.*, 59 N.M. 33, 278 P.2d 569 (1954); cf. 2 RESTATEMENT 2D § 286, comment *a*.

Cases holding that a showing of a violation of a city ordinance is merely evidence of negligence are collected in 2 HARPER & JAMES, TORTS § 17.6, at 1011 (1956); PROSSER, TORTS § 35, at 203 (3d ed. 1964).

merce Commission or by the Food and Drug Administration, has been held to be at most merely evidence of negligence.⁴⁶ A New Jersey court has held, for example, that the violation of a duly issued state police regulation specifying the minimum standards for the odorization of liquified petroleum gases simply constituted a disregard of a warning which a reasonably prudent man would have heeded, and was not negligence as a matter of law; proof of the violation did not even constitute *prima facie* evidence of negligence.⁴⁷

46. See, e.g., *Raab v. Liebnitzsky*, 38 N.J. Super. 585, 120 A.2d 256 (1956). For examples of federal agency regulations which may have a bearing upon consumer protection, see 49 C.F.R. §§ 71-78 (1965) (ICC regulations), and 21 C.F.R. §§ 1-165 (1965) (FDA regulations). However, very rarely will consumers be within the class intended to be protected by ICC regulations, since their aim is the safety of transportation employees and the general public while shipments of a dangerous nature are *in transit*. *Garrett v. E. I. du Pont de Nemours & Co.*, 257 F.2d 687, 690 (3d Cir. 1958). Nevertheless, a showing of a violation of one of these enactments may serve as evidence of negligence. See note 28 *supra* and accompanying text.

Not to be confused with regulations made pursuant to statutes are safety codes promulgated under government auspices. For instance, the Bureau of Standards, acting pursuant to 15 U.S.C. § 274 (1964), issues the National Electric Safety Code solely for its informational value to the public. Besides compilations of this type, other codes have been drawn up by manufacturers' associations and similar bodies merely to reflect a consensus within a particular trade regarding minimum safety standards. Were it not for the fact that both kinds of codes do not have the force of law behind them, they would probably be said to have pre-empted a jury's power to determine the standard of care applicable in a negligence action to which they are clearly relevant, since both rest upon a broad base of expertise. At present, however, in a products liability negligence case the issue with respect to a codification of either type is whether it is even admissible as evidence to assist a plaintiff in showing that a defendant's conduct was negligent in that it did not meet the standard set out in a particular compilation. Generally these codes have been held to be inadmissible under the hearsay rule, on the theory that they are like books or treatises that contain only expert opinion which is not subject to cross-examination, qualification, or explanation. See, e.g., *Mississippi Power & Light Co. v. Whitescarver*, 68 F.2d 928, 930 (5th Cir. 1934); *Sloan v. Carolina Power & Light Co.*, 248 N.C. 125, 102 S.E.2d 822 (1958). However, a trend toward admissibility as "evidence only" is developing. See *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Tampa Drug Co. v. Wait*, 103 So. 2d 603 (Fla. 1958); *Otis Elevator Co. v. LaPore*, 229 Md. 52, 181 A.2d 659 (1962); *Heise v. J. R. Clark Co.*, 245 Minn. 179, 71 N.W.2d 818 (1955); *Wilson v. Lowe's Asheboro Hardware Inc.*, 259 N.C. 660, 131 S.E.2d 501 (1963); *McComish v. DeSai*, 42 N.J. 274, 200 A.2d 116 (1964); *Andrews v. DelGuzzi*, 56 Wash. 2d 381, 353 P.2d 422 (1960). See generally 1 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* § 5.04 (1965); Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEXAS L. REV. 143 (1949); Philo, *Use of Safety Standards, Codes and Practices in Tort Litigation*, 41 NOTRE DAME LAW. 1, 7-10 (1965). It is clear that if a safety code has been incorporated by reference into a state statute or a city ordinance, the rule of the jurisdiction in question with respect to the effect to be given in a civil action to evidence of a violation of a statute or ordinance controls. For instance, in North Carolina, where the National Electric Code of 1936 was incorporated by reference into the state's 1953 Building Code, which was in turn enacted into law by the legislature in 1957 (see N.C. Sess. Laws 1957, ch. 1138, § 1, at 1086), negligence per se liability can be premised upon a defendant's violation of the Electric Code. See *Drum v. Bisaner*, 252 N.C. 305, 113 S.E.2d 560 (1960); *Lutz Indus. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E.2d 333 (1955).

47. *Raab v. Liebnitzski*, 38 N.J. Super. 585, 120 A.2d 256 (1956), where plaintiffs were injured when a tank of cooking gas supplied by defendants (commercial gas dealers) leaked its unscented contents into their home. The statute in question is now 21 N.J. STAT. ANN. § 1B-2(a) (Supp. 1965), providing in part: "[T]he Superintendent

Perhaps the standards provided in a regulation lack the force of those set out in a statute because no elected representatives directly establish or even review regulations after they have been promulgated by a panel of so-called experts pursuant to a vaguely defined delegation of legislative authority. If the distinction between the effect given a violation of a statute and that attributed to a breach of a regulation made pursuant to a statute must rest upon so slender a reed, it would be better to do away with the distinction altogether and to allow both types of infractions to give rise to negligence per se liability.⁴⁸

Equally unsettled is the status of the law on the closely related question whether evidence that the FDA has withdrawn a certain kind of product from distribution ought to be admissible in a civil action in which a product of that type is alleged to have been substandard and to have caused a plaintiff's injury. If the FDA withdrew the merchandise because it feared the possibility of a recurrence of the very type of harm which plaintiff suffered, it would seem that such evidence should be received, at least on the issue of causation.⁴⁹

C. *Affirmative Defenses*

In any negligence action, a regulatory statute can at most serve only to establish a standard of care; thus, all the usual common-law negligence defenses are appropriate in a suit premised on a per se theory.⁵⁰ However, the practical effects of a plaintiff's reliance upon the breach of a criminal statute as either evidence or proof of a defendant's negligence are to curtail the efficacy of the defenses of assumption of risk and contributory negligence and to make it

of State Police shall make, promulgate, and enforce regulations setting forth minimum standards . . . specifying the odorization of said [liquified petroleum] gases and the degree thereof."

48. One seemingly tenable theory which would support the elimination of the distinction is that the authority to promulgate reasonable regulations was granted by the representatives of the community, and that they ratified the regulations so promulgated by not revoking this authority.

49. In an analogous situation, one court allowed the admission into evidence of a Civil Aeronautics Board directive suspending the use of a certain type of aircraft fuel pump, on the theory that the order was evidence that a particular pump of this kind had been substandard. *Carter Carburetor Corp. v. Riley*, 186 F.2d 148 (8th Cir. 1951). There are also dicta to the effect that a court should take judicial notice of the fact that subsequent to the occurrence of an injury allegedly attributable to a particular drug, the FDA had removed the product from distribution. *Andrews v. Olin Mathieson Chem. Corp.*, 334 F.2d 422 (8th Cir. 1964). Regarding the admissibility of evidence of government action of this nature at least on the causation question, see 2 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* § 33.01(3)(a) (1965).

50. *Dart v. Pure Oil Co.*, 223 Minn. 526, 27 N.W.2d 555 (1947) (amicus curiae brief by Dean Prosser); see 1 FRUMER & FRIEDMAN, *PRODUCTS LIABILITY* § 22.03(1)(e) (1965); PROSSER, *TORTS* § 35, at 202 (3d ed. 1964); 2 RESTATEMENT 2D § 483. See generally Prosser, *Contributory Negligence as a Defense to Violation of a Statute*, 32 MINN. L. REV. 105 (1948).

difficult in several ways for a defendant to maintain that, even if he was negligent, his malfeasance was not the factual cause or the proximate cause of the plaintiff's injury.

Actually, the defense of assumption of risk has rarely been discussed in products liability suits based on a per se theory, probably because courts have tended to merge the doctrine of assumption of risk with that of contributory negligence and to speak in terms of the latter principle.⁵¹ However, one distinct limitation on the availability of the assumption of risk defense, which is not peculiar to per se cases but has extensive application in such cases, is the rule that a plaintiff cannot be said to have assumed a particular risk associated with the use of a product if he had no reasonable way of ascertaining the danger because of a defendant's failure to fulfill his duty to label hazardous merchandise in a special way.⁵²

Courts have generally held that consumers are entitled to believe that everyone associated with the production or distribution of a product has complied with the law.⁵³ Since such obedience is usually sufficient to prevent the harm from which a statute was designed to safeguard a particular class of persons, it follows by implication that a reasonable man belonging to that class need not inspect merchandise covered by the enactment with an eye toward preventing the evil against which the statute was directed. Because the typical factual context of a per se case is one in which, according to this reasoning, the plaintiff has no duty to inspect a given product, as well as one in which the time span between the purchase and use of the merchandise is minimal, the opportunity for him to be contributorily negligent in dealing with the product is very limited. Moreover, some statutes, such as those forbidding the sale of firearms to minors, which are intended to safeguard members of the protected classes from the unusually high degree of irresponsibility of the per-

51. A few of the cases in which a plaintiff's contributory negligence has been held to bar his attempt to recover on a negligence per se theory have involved his use of a product in the face of his knowledge that it was defective. See, e.g., *Meyer v. King*, 72 Miss. 1, 16 So. 245 (1894) (druggist not liable for selling chloroform to minor who knew its dangers); *Friedman v. Beck*, 250 App. Div. 87, 293 N.Y. Supp. 649, *appeal dismissed*, 274 N.Y. 566, 10 N.E.2d 554 (1937) (plaintiff admitted that canned lobster smelled bad but that she had eaten it anyway).

52. See *Wright v. Carter Prods., Inc.*, 244 F.2d 53, 60-61 (2d Cir. 1957); *McClanahan v. California Spray-Chem. Corp.*, 194 Va. 842, 75 S.E.2d 712 (1953). See generally Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122 (1961). Assumption of risk has thus been a poor defense in the many per se actions arising from alleged violations of statutory provisions requiring that the labels on containers of poisons, drugs, cosmetics, and food products bear warnings of any dangers connected with the use of the goods or carry directions indicating the manner in which the merchandise may be used safely. See generally Federal Hazardous Substances Labeling Act, 74 Stat. 372 (1960), 15 U.S.C. §§ 1261-73 (1964); Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301-92 (1964).

53. See, e.g., *Caines v. Marion Coca-Cola Bottling Co.*, 198 S.C. 204, 17 S.E.2d 315 (1941).

sons named in the enactments, have been held to impose upon defendants standards of care so strict that neither contributory negligence nor assumption of risk on the part of a member of the protected class can be allowed as defenses in per se actions arising from alleged violations of such legislation.⁵⁴

Another apparent limitation upon the availability of the contributory negligence defense is highly artificial. It was illustrated in the case of *Taughner v. Ling*,⁵⁵ in which defendant had sold plaintiff some Jamaica ginger (an intoxicant) containing a poisonous substance, but had not complied with legislation requiring the label on the bottle to indicate the presence of the toxic ingredient. However, since both parties had also violated a statutory prohibition against the purchase or sale of intoxicating beverages, defendant contended that plaintiff had been contributorily negligent as a matter of law. The court disagreed and, in allowing plaintiff to recover, stated what it believed to be the general rule:

In respect to offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties and to administer justice between them, although both parties are wrongdoers.⁵⁶

However, if the basis of any per se theory—that regulatory legislation establishes standards of care governing the conduct of the persons covered—is valid, this position and the reasoning behind it must be rejected. Evidence of a plaintiff's statutory violation must be just as conclusive a showing of contributory fault as proof of a defendant's infraction is of primary negligence. Moreover, the result in *Taughner* could easily have been reached by reliance upon reasoning which would have been more consistent with a negligence per se approach. Even if the plaintiff had violated the statute prohibiting the purchase of intoxicating beverages, it is doubtful whether the defendant was a member of the class intended to be protected by the prohibition enactment; therefore, proof of the plaintiff's breach would have been at most some evidence of contributory negligence, and the jury would have been able to indulge in the type

54. *Tamiami Gun Shop v. Klein*, 116 So. 2d 421 (Fla. 1959), *affirming* 109 So. 2d 189 (Fla. Ct. App. 1959); see 2 RESTATEMENT 2d § 286. See generally 2 *id.* § 286, comment c; Prosser, *Contributory Negligence as a Defense to Violation of a Statute*, 32 MINN. L. REV. 105, 118-22 (1948). For a discussion of the closely related question whether a minor's misuse of a weapon sold to him in violation of a statute gives rise to a defense of intervening cause in a per se suit brought against the seller by a third party victim of the misuse, see notes 69-70 *infra* and accompanying text.

55. 127 Ohio St. 142, 187 N.E. 19 (1933).

56. *Id.* at 144-45, 187 N.E. at 21 (quoting from WOODWARD, QUASI-CONTRACTS 216 (1913)).

of balancing which the court attempted.⁵⁷ If courts follow the reasoning in *Taugher* and "inquire into the relative delinquency of the parties" when both a plaintiff and a defendant violate regulatory enactments rather than applying equally to both parties the essential concept of the per se doctrine—the notion that a showing of a violation of such a statute is prima facie or conclusive evidence of negligence—legislatures may be encouraged to adopt the principle of comparative negligence with respect to products liability cases in lieu of the doctrine of contributory negligence.⁵⁸ The defense bar, traditionally the most vociferous opponent of the comparative negligence rule, could be expected to endorse the legislature's action quite vigorously if the alternative were a contributory negligence doctrine of very restricted applicability.

Although proving that defendant's activity caused the injury in question is an integral part of any plaintiff's negligence case, causation is here discussed in conjunction with defenses because it appears that in a typical per se case the plaintiff can easily introduce sufficient evidence of a causal connection between the defendant's statutory violation and the plaintiff's own injury to place upon the defendant the risk of losing a jury verdict, or of not getting to the jury at all, if no evidence is offered in rebuttal.⁵⁹ However, it seems that a defendant is likely to be hindered in his attempt to refute a plaintiff's contention on the causation issue precisely because plaintiff, in demonstrating that defendant was negligent, will already have offered evidence of defendant's violation of a relevant regulatory statute.

In speaking of the relationship between a defendant's misconduct and a plaintiff's injury, courts have often drawn a distinction between factual causation and legal causation.⁶⁰ The former is usually defined in terms of the "but for" test—defendant's negligence is considered to have been the factual cause of plaintiff's injury if the harm would not have occurred but for the defendant's act or omission in breach of the standard of care which governed his relationship to the plaintiff.⁶¹ On the other hand, harm actually attributable to a defendant's wrongful conduct is said to have been proximately caused by that misconduct only if a "reasonable man" in the situation of the defendant at the time the misfeasance occurred would have foreseen "the injury as a natural and probable result of

57. See generally Comment, *Plaintiff's Violation of a Statute as Affecting Recovery for Negligence—"Proximate Cause,"* 41 Ky. L.J. 317 (1953).

58. See Prosser, *supra* note 54, at 128.

59. See, e.g., cases cited in notes 63-64 *infra*. For a general discussion concerning the allocation between a plaintiff and a defendant of the burden of going forward with evidence and of the burden of ultimate persuasion, see McCORMICK, EVIDENCE § 306 (1954).

60. See, e.g., *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961).

61. See, e.g., *Cole v. Shell Petroleum Corp.*, 149 Kan. 25, 86 P.2d 740 (1939).

the activity.⁶² A defendant's effort to refute an allegation that his negligence was the cause-in-fact of a plaintiff's injury has sometimes been unjustifiably hindered in per se cases by a court's acceptance of circumstantial evidence as sufficient to demonstrate that the defendant had violated a regulatory statute. For example, a mere showing that a plaintiff was the only member of a group who had eaten a certain food product processed by a defendant and was also the only one who had subsequently become ill has been considered sufficient to establish defendant's breach of a statute prohibiting the sale of adulterated foods.⁶³ However, in order to hold that the evidence of the illness was proof of the statutory violation, the court must have assumed that the conduct which gave rise to the infraction also caused the injury, for if it had been thought possible that a factor other than defendant's activity had caused plaintiff's illness, plaintiff's evidence could have been said to show nothing more than that defendant had sold a product; it could not have been felt to establish that he had sold adulterated merchandise.⁶⁴ A defendant's attempt to escape liability by showing that his product did not cause a plaintiff's injury should not be jeopardized by the type of circuitous reasoning manifested in this instance.

The nature of a plaintiff's cause of action in a negligence per se case also limits a defendant's opportunities to refute an allegation that the conduct which gave rise to a statutory violation was also the legal (proximate) cause of a particular injury. When an attempt is made to rely upon a defendant's violation of a regulatory statute in order to establish his negligence, a plaintiff must be shown to have been one of the persons meant to be protected by the enactment in question, and the alleged injury must be proved to have been one from which the legislature in passing the law intended to safeguard members of the protected class.⁶⁵ When the plaintiff has satisfactorily shown that the legislature foresaw and sought to protect against the injury in question, it is difficult for a defendant to

62. *Ehrgott v. Mayor of New York*, 96 N.Y. 264, 48 Am. Rep. 622 (1884); *Overseas Tankship Ltd. v. Morts Dock & Eng'r Co.*, [1961] 1 All E.R. 404 (P.C.) (N.S.W.). *Contra*, *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859 (1961); *Re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560.

63. See *Great Atl. & Pac. Tea Co. v. Hughes*, 131 Ohio St. 501, 3 N.E.2d 415 (1936); *Drock v. Great Atl. & Pac. Tea Co.*, 61 Ohio App. 291, 22 N.E.2d 547 (1939).

64. See *Turner v. Wilson*, 227 S.C. 95, 100, 86 S.E.2d 867, 869 (1955), where, judging from the following excerpt from its opinion, the court was clearly willing to assume that the conduct which gave rise to the infraction of a pure food statute also caused plaintiff's injury: "When under the same conditions, several persons who have eaten the same food become similarly ill an inference may be warranted that the food which all had eaten was unwholesome and the cause of the illness." (Emphasis added.) Some courts have been more reluctant to find that the conduct which gave rise to a defendant's violation of a statute also caused a plaintiff's injury. See, e.g., *Smith v. Atco Co.*, 6 Wis. 2d 371, 94 N.W.2d 697, 74 A.L.R.2d 1095 (1959).

65. See text accompanying note 27 *supra*.

argue that a *reasonable man* would not have foreseen the injury as a probable result of the prohibited conduct.⁶⁶ It would thus appear that in many per se suits a defendant's use of the proximate-cause dialectic could be characterized as an inept method of duplicating the "statutory purpose" inquiry.

A defendant may also try to escape liability by attempting to prove that an unforeseeable intervening force severed the otherwise proximate causal connection between his conduct and a plaintiff's injury and thus, according to traditional negligence principles, absolved the defendant of responsibility for the harm.⁶⁷ Even this effort is fruitless in some per se cases, such as those in which a plaintiff can prove a defendant manufacturer's violation of a statute only by showing that there was no tampering with the offending product after it left the hands of its producer.⁶⁸ Furthermore, there are some per se cases in which proof of the actual existence of what is ordinarily considered an intervening cause has not prevented a plaintiff's recovery. Thus, in a case where the defendant, in contravention of a statute prohibiting the sale to minors of firearms and ammunition, sold cartridges to a boy under sixteen, and where the plaintiff was injured by the youth's failure to use the shells properly, the court noted that even the minor's willful misuse of the cartridges would not have constituted an intervening cause of the plaintiff's injury.⁶⁹ Another court, suggesting by implication that a consumer's negligent handling of ammunition would ordinarily be an intervening cause exonerating a negligent gun dealer from liability for

66. For example, a purchaser seeking to recover from a defendant whose product allegedly caused the plaintiff to experience an allergic reaction is likely to have great difficulty in convincing a jury, in an action *not* premised upon a per se theory, that the harm of which he complains was a foreseeable result of the defendant's failure adequately to advise the buyer of the nature of the ingredients in the product. This problem is obviated when a plaintiff is permitted to employ a per se theory based upon a defendant's violation of a labeling statute, for the plaintiff is not allowed to rely upon such an enactment (usually covering either food, drugs, cosmetics or hazardous household products) unless he first shows that the statute represented a legislative determination that the allergic reaction in question was foreseeable and that the possibility that such a reaction could occur should have been advertised by the manufacturer of a product covered by the provision. See *Bennett v. Pilot Prods. Co.*, 120 Utah 474, 235 P.2d 525, 26 A.L.R.2d 958 (1951). See also Friedman, *Allergy and Products Liability Today*, 24 OHIO ST. L.J. 479 (1963).

Regulatory enactments which provide a basis for negligence per se liability attributable to product mislabeling are treated in the text accompanying notes 132-43 and 156-67 *infra*.

67. See *Scott v. Greenville Pharmacy, Inc.*, 212 S.C. 485, 48 S.E.2d 324 (1948); *Milton Bradley Co. v. Cooper*, 79 Ga. App. 302, 311, 53 S.E.2d 761, 767, 11 A.L.R.2d 1028 (1949) (dissenting opinion).

68. Compare *Wilson v. Phillips Petroleum Co.*, 262 S.W.2d 604 (Mo. 1953) (evidence insufficient to go to jury on question whether kerosene was contaminated before delivery by defendant refiner to middleman), with *Sinclair Ref. Co. v. Piles*, 215 Ark. 469, 221 S.W.2d 12 (1949) (refiner's violation of statute proved because there was no middleman and thus refiner must have had exclusive control when the defect arose).

69. *Driesse v. Verblauw*, 9 N.J. Misc. 173, 153 Atl. 388 (Sup. Ct. 1931).

an injury, explained why a minor's careless use of a cartridge does not absolve a seller whose negligence is premised upon a violation of a firearms statute: "The storekeeper-seller cannot escape responsibility by reason of the negligence of the boy to whom he sells. The [statute] . . . is drastic and intends to put a stop to such sales by imposing an unusual responsibility on the seller."⁷⁰

A unique defense may be available to a defendant upon whom liability is sought to be imposed on the basis of an alleged violation of a pure food act containing a "guaranty clause"—a provision that a retailer of a product covered by the enactment is not to be held criminally liable for selling offending merchandise if, prior to the sale, he obtains from either the distributor or the manufacturer a guaranty that the product conforms to the statutory standards.⁷¹ Of course, a defendant retailer in a per se case who received such a guaranty will contend that it also serves to absolve him of any civil liability based upon his technical, but unintentional, violation of the statute.⁷² It appears that no court has squarely decided what weight should be given to such an argument.⁷³ However, since the

70. *McMillen v. Steele*, 275 Pa. 584, 587-88, 119 Atl. 721, 722 (1923). The court commented in unexplained dicta that the firearms statute was irrelevant in cases involving injuries to third persons and that the legal rights of such persons are the same as if the statute did not exist. However, the greater weight of authority supports the proposition that a person injured by a minor's handling of a firearm who was not a party to the sale which violated such a statute is included within the class meant to be protected by the enactment. See *Driesse v. Verblauw*, *supra* note 69; *Bernard v. Smith*, 36 R.I. 377, 90 Atl. 657 (1914).

71. See, e.g., Federal Food, Drug, and Cosmetic Act § 303(c)(2), 52 Stat. 1043 (1938), 21 U.S.C. § 333(c)(2) (1964). Another defense occasionally raised by a retailer in a per se products liability action is based upon a "disclaimer" procured from a consumer-plaintiff and purporting to absolve the seller of all liability for injuries occurring to the buyer on account of any defects in the product sold. The disclaimer defense has usually been rejected on the ground that permitting it to defeat recovery would be contrary to public policy expressed by the very regulatory statute upon the breach of which a consumer-plaintiff had based his negligence per se cause of action. See, e.g., *Hunter v. American Rentals, Inc.*, 189 Kan. 615, 371 P.2d 131 (1962); *Metz v. Medford Fur Foods, Inc.*, 4 Wis. 2d 96, 90 N.W.2d 106 (1958). Compare *Mulder v. Casho*, 61 Cal. 2d 633, 39 Cal. Rptr. 705, 394 P.2d 545 (1964).

72. See generally note 36 *supra* and accompanying text.

73. The few negligence per se cases in which guaranty clauses are discussed at all are weak authority. See *Donaldson v. Great Atl. & Pac. Tea Co.*, 186 Ga. 870, 199 S.E. 213, 128 A.L.R. 456 (1938) (dictum); *Burns v. Colonial Stores, Inc.*, 90 Ga. App. 492, 83 S.E.2d 259 (1954) (dictum). In both these cases defendants failed to plead defenses based upon a guaranty clause. However, the courts reasoned in dicta that a dealer who sold food which was adulterated within the meaning of the statute *would be held not to have violated the statute at all*, and thus could not be liable on a negligence per se theory, if he obtained a guaranty which complied with statutory requirements. The leading case allowing negligence per se recovery despite a defendant retailer's having obtained a guaranty from his supplier is *Bolitho v. Safeway Stores, Inc.*, 109 Mont. 213, 95 P.2d 443 (1939). In that case the court reasoned that it might just as well hold that the defendant's compliance with the terms of a guaranty clause did not absolve him from civil liability based on a violation of a pure food law, since defendant would remain liable on a warranty regardless of his having procured a guaranty.

civil liability imposed upon a defendant in a per se action is based upon his breach of a legislatively established standard of care, this defense should be rejected; the standard is no less breached because he has secured a guaranty. Indeed, a guaranty clause is by its terms of no significance unless the standard has been violated.⁷⁴

A related question is presented when a defendant argues that his compliance with a statutory standard of care constitutes an absolute defense to a charge of negligence. Such a contention has uniformly been rejected on the ground that a particular legislative standard merely establishes the *minimum* duty of care owed by a person dealing with a product covered by the enactment.⁷⁵ If the circumstances giving rise to a particular suit are such that a jury believes that a reasonable man in the defendant's position would have acted with a greater degree of care than that demanded by the statute, the defendant's conduct is measured against the higher standard. Of course, even if a higher standard is employed, a defendant's compliance with a statutory command is some evidence that he used due care.⁷⁶

D. Ancillary Problems—Pleading, Joinder, and Indemnity

A plaintiff in a negligence per se action generally does not have to plead the statute upon which he intends to rely, for courts take judicial notice of domestic legislation of general application.⁷⁷ Thus, if a plaintiff discovers in the course of a trial that the facts which he

74. The language of a typical guaranty clause states in essence that no person will be subject to criminal penalties for having violated the statute of which the clause is a part if he establishes his compliance with the requirements of the guaranty clause.

Most of the policy reasons behind the enactment of a guaranty clause support the proposition that a retailer's compliance with such a provision should not be permitted as a defense in a negligence per se action. See generally Noel, *Products Liability of Retailers and Manufacturers in Tennessee*, 32 TENN. L. REV. 207, 223-24 (1965).

75. *Love v. Wolf*, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (Dist. Ct. App. 1964); *Phillips v. Roux Labs.*, 286 App. Div. 549, 145 N.Y.S.2d 449 (1955). See generally Garment, *The Allergic Consumer*, 1959 TRIAL & TORT TRENDS—BELLI SEMINAR, 125, 129. Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability*, 20 FOOD DRUG COSM. L.J. 372, 376 (1965).

76. *Arata v. Tonegato*, 152 Cal. App. 2d 837, 314 P.2d 130 (Dist. Ct. App. 1957); *Howson v. Foster Beef Co.*, 87 N.H. 200, 177 Atl. 656 (1935); 2 RESTATEMENT 2D § 288C (1965); PROSSER, TORTS § 35, at 205 (3d ed. 1964).

77. See, e.g., *Kelley v. John R. Daily Co.*, 56 Mont. 63, 181 Pac. 326 (1919). See generally 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 22.03 (1965). The prevailing view has been that a statute must be pleaded unless the facts alleged in the complaint bring the case within the provisions of the enactment. See *Andrews v. Olin Mathieson Chem. Corp.*, 334 F.2d 422 (8th Cir. 1964); *Criswell Baking Co. v. Milligan*, 77 Ga. App. 861, 50 S.E.2d 136 (1948); *Gantt v. Columbia Coca-Cola Bottling Co.*, 193 S.C. 51, 7 S.E.2d 641 (1940); *Cohan v. Associated Fur Farms*, 261 Wis. 584, 53 N.W.2d 788 (1952). However, it appears that in New York a plaintiff may raise the negligence per se theory for the first time in an appellate court. See *Alphin v. LaSalle Diners, Inc.*, 197 Misc. 415, 98 N.Y.S.2d 511 (N.Y. City Ct. 1950) (dictum); *Gimenez v. Great Atl. & Pac. Tea Co.*, 264 N.Y. 390, 191 N.E.2d 27 (1934) (dictum).

alleged to support recovery on an ordinary negligence theory are sufficient to prove a defendant's breach of a regulatory statute, his failure to plead the statute initially does not foreclose him from demanding a jury charge based upon the *per se* concept.

In the context of negligence *per se* liability, the difference between primary and secondary liability plays an important role with respect to the questions of joinder and indemnity. The distinction itself is based on the fact that in most situations in which several parties in the chain of distribution are technically guilty of having violated a regulatory statute, such as legislation prohibiting the sale of a substandard product, one of the parties in the chain had a greater opportunity than the others to prevent, or at least to discover, the occurrence of the violation. For example, neither distributors nor retailers of commodities have any meaningful opportunities to discover the possible unwholesomeness of products which they buy and sell in sealed packages, while, on the other hand, the manufacturers of these products have at least some opportunities before the goods are packed to detect any defects in them. Therefore, assuming that a defect in a product sold to a consumer in a sealed package can be shown to have arisen while the merchandise was under the control of the manufacturer, that manufacturer is said to be primarily liable if the consumer is injured, while the retailer and the distributor of the product are considered to be merely secondarily liable.⁷⁸

The practical effect of the primary-secondary distinction is two-fold. First, if a court follows the traditional rule that only joint tortfeasors can be joined as defendants in the same lawsuit, the manufacturer, distributor, and retailer of offending merchandise cannot be made defendants in one action if any of them is only secondarily liable to a plaintiff, even though the product passed through the hands of all of them on its way to the victim; although under these circumstances all may be liable for selling a defective product in violation of a particular statute, they are *related* rather than *joint* tortfeasors.⁷⁹ Of course, liberal rules of joinder in many jurisdictions would now allow all these parties to be joined as defendants in one suit for the sake of judicial economy.⁸⁰

The second effect of the distinction between primary and secondary liability is that a party who is only secondarily liable but is nevertheless a defendant in a consumer's negligence *per se* suit may

78. See, e.g., *Kneiss v. Armour & Co.*, 134 Ohio St. 432, 17 N.E.2d 734 (1938).

79. See *Canton Provision Co. v. Gauder*, 130 Ohio St. 43, 196 N.E. 634 (1935).

80. *Milton Bradley Co. v. Cooper*, 79 Ga. App. 302, 53 S.E.2d 761 (1949); *Alphin v. LaSalle Diners, Inc.*, 197 Misc. 415, 98 N.Y.S.2d 511 (N.Y. City Ct. 1950); *Peters v. Double Cola Bottling Co.*, 224 S.C. 437, 79 S.E.2d 710 (1954); *Naryoks v. Suhrmann*, 9 Utah 2d 84, 337 P.2d 967 (1959); *Schneider v. Suhrmann*, 8 Utah 2d 35, 327 P.2d 822 (1958). See also FED. R. Civ. P. 20.

rely upon the distinction in bringing an indemnity action against a party who bears primary responsibility. A party secondarily liable has traditionally had no difficulty in getting an indemnity recovery in an amount equal to the full sum of any verdict obtained against him.⁸¹ However, since in modern times it is frequently argued that losses from personal injuries should be shifted to the persons who can best distribute them, it has been suggested that the amount of an award in an indemnity action may soon turn upon a determination of which party is the better loss distributor.⁸²

III. ESTABLISHING THE NEGLIGENCE—PROOF OF BREACH OF RELEVANT STATUTES

A. General Limitations Upon the Applicability of Statutes

Proving a defendant's statutory violation is often the only significant problem faced by a plaintiff in a typical negligence per se action.⁸³ In theory, any federal or state enactment can be the basis of per se liability in a particular case if the "statutory purpose" prerequisite can be satisfied and if a "jurisdictional fact" upon the existence of which the application of the statute depends can be established.⁸⁴ As was mentioned previously, the "statutory purpose"

81. See, e.g., *Hughes Provision Co. v. LaMear Poultry & Egg Co.*, 242 S.W.2d 285 (Mo. Ct. App. 1951); *Abounader v. Strohmeier & Arpe Co.*, 243 N.Y. 458, 154 N.E. 309 (1926); *Southwest Ice & Dairy Prod. Co. v. Faulkenberry*, 203 Okla. 279, 220 P.2d 257 (1951); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633 (1913).

The question of indemnity may be brought before a court in one of three ways: (1) by means of a cross-complaint if both the parties primarily and secondarily liable are already in the suit (see *Alphin v. LaSalle Diners, Inc.*, 197 Misc. 415, 98 N.Y.S.2d 511 (N.Y. City Ct. 1950)); (2) by means of a separate action commenced by the party secondarily liable against the party primarily liable, if in a previous lawsuit a judgment was obtained against the former by an injured plaintiff (see *Abounader v. Strohmeier & Arpe Co.*, *supra*; *Southwest Ice & Dairy Prod. Co. v. Faulkenberry*, *supra*; *Mazetti v. Armour & Co.*, *supra*); (3) by means of impleader (see FED. R. CIV. P. 14(a)).

82. See Comment, *The Right to Indemnity in Products Liability Cases*, 1964 U. ILL. L.F. 614. The application of such a criterion would mean, for example, that if a large retailer such as A & P were the party secondarily liable and a large producer such as Coca-Cola were the party primarily responsible, the indemnity action may result in only partial contribution in favor of A & P. On the other hand, a small neighborhood grocer seeking indemnity from Coca-Cola would recover the full amount of the judgment taken against him by an injured consumer.

83. A plaintiff relying upon a negligence per se theory in a products liability case will ordinarily have only minor difficulty in overcoming alleged defenses and in proving that the conduct which gave rise to a statutory violation also caused his injury. See text accompanying notes 50-76 *supra*. Thus, his only major undertaking is to prove defendant's violation of a relevant regulatory enactment.

84. Any statute providing a standard of care may theoretically be the basis of a negligence per se cause of action. However, practice has not followed theory in this regard. See note 18 *supra*.

It is interesting to note that federal regulatory statutes have not often been used by injured plaintiffs as bases for negligence per se actions. Indeed, federal enactments seem to have been most frequently employed in civil products liability litigation by *defendants* who have pointed to their own compliance with the requirements of these

requirement demands in essence that a plaintiff have been within the class of persons sought to be protected by a particular statute and that his injury have been one from which the statute was designed to safeguard the members of that class.⁸⁵ The "jurisdictional fact" concept requires a plaintiff to demonstrate that a defendant's misconduct came within the range of activity which a particular legislature could have constitutionally regulated and had actually chosen to govern. In order to rely upon a congressional enactment as the basis of liability, a plaintiff in a products liability action must prove that a defendant introduced or attempted to introduce the product in question into interstate commerce, that the defendant received it by way of such commerce, that the defendant dealt with the merchandise in an unlawful manner while it was in interstate commerce, or that he manufactured the product within any territory of the United States.⁸⁶ Similarly, offending merchandise must be shown to have been manufactured or sold within a particular state before a statute of that jurisdiction can be the basis of a *per se* recovery.⁸⁷

B. *The Issue of Tampering*

A retailer is, in general, strictly liable for his sale of an injury-causing product in violation of an applicable statute, for most legislation relied upon in *per se* products liability actions imposes criminal responsibility upon any offender without regard to his lack of knowledge of the substandard quality of particular merchandise.⁸⁸

acts as evidence that they had exercised due care. See, *e.g.*, *Love v. Wolf*, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964) (FDA approval of drug); *Arata v. Tonegato*, 152 Cal. App. 2d 837, 314 P.2d 130 (1957) (compliance with cosmetic labeling requirement in Federal Pure Food Act). The true value of the federal enactments lies in the fact that they have frequently served as models for the state regulatory statutes, such as pure food laws, which have generated the bulk of negligence *per se* litigation. See Woods, *The Effect of the Food, Drug, and Cosmetic Act on Private Litigation*, 8 FOOD DRUG COSM. L.J. 511, 514 (1953).

85. See text accompanying notes 27-30 *supra*.

86. See, *e.g.*, Federal Food, Drug and Cosmetic Act, §§ 201(a)-(b), 301, 52 Stat. 1041, 1042 (1938), as amended, 21 U.S.C. §§ 321(a)-(b), 331 (1964). In *Midwest Game Co. v. M. F. A. Milling Co.*, 320 S.W.2d 547, 552-53 (Mo. 1959), the court noted that "there would be no violation of the [Federal Pure Food and Drug Act] . . . unless the particular food in question was introduced into interstate commerce by the defendant. . . . In the situation presented we deem it advisable to point out that upon a trial of these cases there should be no submission of the question of liability under the second count [negligence *per se*] unless there is proof that defendant introduced the particular food complained of into interstate commerce."

87. *Hopkins v. Amtorg Trading Corp.*, 265 App. Div. 278, 38 N.Y.S.2d 788 (1942) (New York statute inapplicable because no transaction shown to have occurred in New York); *Boylston v. Armour & Co.*, 196 S.C. 1, 12 S.E.2d 34 (1940) (state pure food law irrelevant because product had been manufactured outside state); *McAleavy v. Lowe*, 259 Wis. 463, 49 N.W.2d 487 (1951) (to be in violation of statute, sale must occur within the state).

88. See text accompanying notes 36-39 *supra*.

However, additional considerations are pertinent when an injured person attempts to fasten liability upon a party further back in the chain of manufacture and distribution. In order to prove a statutory violation by a manufacturer or a remote distributor, it must be shown (1) that there was a defect in the product in question and (2) that the defect occurred before a particular defendant disposed of the goods.⁸⁹ The second requirement may be considered fulfilled when a plaintiff can establish that a product left the hands of a manufacturer in a package which he had sealed and which remained unopened until it reached the consumer. Occurrence of the defect before disposal may also be assumed if the alleged deviations from statutory standards could only have arisen before merchandise left the factory. Thus, a meat packer is presumed to be responsible for injuries caused by the presence of trichinae parasites in pork products because the parasites can infect an animal only before it is slaughtered.⁹⁰ On the other hand, it cannot as readily be assumed that the second condition is satisfied with respect to a defendant producer or distributor if a product was never packaged before it reached the retailer, or if the merchandise was packaged but its container could easily have been opened and resealed before the goods were sold to a consumer.⁹¹ In these situations, however, an inference that a manufacturer or a distributor, rather than a retailer, sold or introduced offending merchandise into commerce has sometimes been drawn from purely circumstantial evidence from which several other inferences might also have been drawn. For example, a food processor who made and marketed sandwiches was held liable for selling unwholesome goods which allegedly caused a factory worker's illness; the inference that the product was defective at the time of sale by the processor was drawn from the fact that the sandwiches had been sold the same day that they were made (leaving the impression that they had been in the hands of the retailer only briefly), and from the fact that several persons in other factories had become ill from eating sandwiches made by the same defendant.⁹² Since the sandwiches had been marketed in easily opened packages so that a deleterious substance could have been introduced

89. In the present context, evidence of intervention by a third party is relevant not in resolving a proximate cause issue but rather in determining whether a particular defendant actually violated the regulatory statute in question. If the product which caused plaintiff's injury did not become defective until after it left defendant's hands, he obviously cannot be held to have violated the enactment. See cases cited note 68 *supra*.

90. *Accord*, *Kneiss v. Armour & Co.*, 134 Ohio St. 432, 17 N.E.2d 734 (1938).

91. See *Turner v. Wilson*, 227 S.C. 95, 86 S.E.2d 867 (1955); *accord*, *Naryoks v. Suhrmann*, 9 Utah 2d 84, 337 P.2d 967 (1959); *Schneider v. Suhrmann*, 8 Utah 2d 35, 327 P.2d 822 (1958). See generally Noel, *Products Liability of Retailers and Manufacturers in Tennessee*, 32 TENN. L. REV. 207 (1965).

92. *Turner v. Wilson*, *supra* note 91.

into them even during the short time that they were in the retailer's possession, the court might just as easily have drawn an inference that the retailer had received the goods before the defect occurred. Indeed, most courts have held a particular defendant liable only when the sole possible inference from the circumstantial evidence presented was that the defect occurred before the product had been sold or introduced into commerce by the defendant (or, conversely, that there had been no reasonable opportunity for one other than the defendant to tamper with the product after the latter disposed of it).⁹³ Apposite here are ordinary negligence cases tried on the theory of *res ipsa loquitur* and thus involving the issue whether a particular defendant had control of the instrumentality which caused plaintiff's injury. Such cases undoubtedly give the best indication of how much evidence will be demanded in a particular jurisdiction on the question whether a defect occurred before a particular defendant disposed of a product which subsequently caused injury.⁹⁴

C. Problems of Statutory Construction

Since the statutes involved in negligence per se suits are invariably penal, the question often arises whether the criminal-law rule of strict statutory construction should be followed in these civil actions. Theoretically, the strict construction rule should be controlling, for the standard of care established by a penal statute—and such enactment has no function in connection with civil litigation other than to provide a standard of care—is intended to apply only in regard to (1) the specific types of defects or conduct mentioned in the legislation and (2) the limited class of products covered by the enactment. In determining the type of merchandise that is within the purview of a particular statute, courts in per se cases have been true to the strict interpretation approach by relying upon the *ejusdem generis* rule, among other principles.⁹⁵ For example, in *Wiles v. Peerson*,⁹⁶ in which defendant sold the minor plaintiff a toy pistol from which the latter attempted to discharge a real

93. *Accord*, *Coca-Cola Bottling Works v. Sullivan*, 178 Tenn. 405, 158 S.W.2d 721 (1942); *Phipps v. Carmichael*, 376 S.W.2d 499 (Tenn. App. 1963). Both of these are *res ipsa* cases. See generally Noel, *Products Liability of a Manufacturer in Tennessee*, 22 TENN. L. REV. 985, 995-1001 (1953).

94. See generally Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350 (1966).

95. *Smith v. Nussmann*, 156 So. 2d 680 (Fla. Ct. App. 1963) (*ejusdem generis* rule); *McClaren v. G. S. Robins & Co.*, 349 Mo. 653, 162 S.W.2d 856 (1942) (*ejusdem generis* rule); *Porter v. Yoder & Gordon Co.*, 246 N.C. 398, 98 S.E.2d 497 (1957) (paint not covered by statute requiring labeling of poisons because statute appeared in portion of legislative code entitled "Pharmacy"); *Delk v. Liggett & Meyers Tobacco Co.*, 180 S.C. 436, 186 S.E. 383 (1936) (chewing tobacco not covered by pure food statute). *But see* *McAleavy v. Lowe*, 259 Wis. 463, 49 N.W.2d 487 (1951) (component of a mix used for feed held to be "feed" within meaning of statute).

96. 175 Okla. 328, 52 P.2d 814 (1935).

cartridge, thereby injuring himself, the youth alleged that defendant had violated an Oklahoma statute which prohibited the sale to minors of several types of dangerous instrumentalities, such as pistols, revolvers, bowie knives and "any other offensive or defensive weapon."⁹⁷ In denying recovery, the court held that the words "or any other . . . weapon" could not be construed to include a toy, but rather had to be taken to refer exclusively to articles of the same kind as those expressly named in the statute. The court then observed that the toy pistol, unlike the items specifically mentioned, had not been designed primarily to inflict injury.⁹⁸

In determining what types of defects or activities are violative of a statutory standard, a number of courts have deviated from the strict construction principle. Reasoning that statutes which are made to serve a dual purpose should be subject to two interpretations, these courts feel that legislation involved in negligence per se litigation may be given a liberal construction in this context despite being interpreted strictly in criminal actions.⁹⁹ One court has stated that "it is by no means new in our law to hold that statutes of a double aspect [penal and remedial] may be given a liberal construction in the civil courts when applied remedially, and yet be strictly construed in the criminal courts, when one is prosecuted in the latter for a violation."¹⁰⁰ There may be merit from the standpoint of consumer protection in a rule of liberal construction; nevertheless, even if a legislature had anticipated that a penal law would furnish a standard of care in a civil action, it seems unlikely that it would have expected the statute to be interpreted to provide a standard of care for use in a civil action—a purpose for which the legislation was not specifically enacted—different from and more widely applicable than that employed in a criminal prosecution. Certainly the pre-emption argument used to show that a standard of care established by the legislature should be *made applicable* in the civil sphere in negligence per se cases cannot be relied upon to demonstrate that the statute should be *given a different meaning* as the context shifts from that of a criminal suit to that of a civil action.¹⁰¹

The following discussion demonstrates some typical problems of

97. OKLA. COMP. STAT. § 1993 (1921), the predecessor of present OKLA. STAT. § 21-1273 (1961).

98. *Wiles v. Pearson*, 175 Okla. 328, 330, 52 P.2d 814, 815-16 (1935).

99. See, e.g., *Arndt Bros. Minkery v. Medford Fur Foods, Inc.*, 274 Wis. 627, 80 N.W.2d 776 (1957); *Bloom v. Gimbel Bros.*, 147 N.Y.S.2d 843 (Sup. Ct. 1955); *McKenzie v. Peoples Baking Co.*, 205 S.C. 149, 31 S.E.2d 154 (1944); *Irick v. Peoples Baking Co.*, 187 S.C. 238, 196 S.E. 887 (1938).

100. *McKenzie v. Peoples Baking Co.*, 205 S.C. 149, 152, 31 S.E.2d 154, 155 (1944).

101. See notes 15-18 *supra* and accompanying text.

construction around which questions of liability in negligence per se cases may turn.¹⁰²

1. *Adulteration Under Food and Drug Laws*

Pure food and drug legislation has been the basis of a significant amount of negligence per se litigation and has consequently given rise to a number of interpretative difficulties, the first of which is that of determining the kinds of products embraced by the statutory terms "food" and "drug." The former is defined in a rather uninformative manner in the typical food and drug act to include "articles used for food or drink by man or other animals, chewing gum, and articles used for components of any such article."¹⁰³ Courts which have construed the scope of the term "food" in pure food and drug laws have usually given a strict interpretation to the unspecific definitional provisions.¹⁰⁴ With respect to drugs, it has been less difficult to determine whether a particular product is to be considered a "drug" within the meaning of a typical enactment, since this term is usually defined quite specifically in the statute to include all articles and their components, other than "food" and "devices" and their components, if the articles are recognized in the United States Pharmacopoeia or one of several similar publications, if they are "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; [or if they are] intended to affect the structure or any function of the body of man or other animals. . . ."¹⁰⁵

102. In order to obtain a better picture of some of the broader variations between state statutes, see charts in 2 CCH FOOD DRUG COSM. L. REP. ¶ 10005-61 (1965). An effort to treat the construction of each provision of every pertinent enactment would be well beyond the scope of this comment.

103. See Federal Food, Drug, and Cosmetic Act § 201(f), 52 Stat. 1040 (1938), 21 U.S.C. § 321(f) (1964) (hereinafter cited Fed. Food Act); cf. Model State Food, Drug, and Cosmetic Bill § 2(c), CCH FOOD DRUG COSM. L. REP. ¶ 10102 (1961) (hereinafter cited as Model Act).

In a few states, the statutory definitions of food and drugs are more restrictive. For instance, "food," as defined in the Wisconsin act, WIS. STAT. § 97.01 (1963), can include only articles consumed by human beings. See generally *Cohan v. Associated Fur Farms*, 261 Wis. 584, 53 N.W.2d 788 (1952). The Wisconsin Act deals with animal feeds in a separate provision. WIS. STAT. § 94.72 (1963). See generally *Arndt Bros. Minkery v. Medford Fur Foods, Inc.*, 274 Wis. 627, 80 N.W.2d 776 (1957); *McAleavy v. Lowe*, 259 Wis. 463, 49 N.W.2d 487 (1951).

104. See, e.g., *Delk v. Liggett & Meyers Tobacco Co.*, 180 S.C. 436, 186 S.E. 383 (1936) (chewing tobacco held not to be "food" within the meaning of the South Carolina food and drug act). The present South Carolina Code defines food as "every article used for food or drink by man, including all candies, teas, coffees, and spirituous, fermented, and malt liquors." S.C. CODE ANN. § 32-1511 (Supp. 1965). Thus, chewing tobacco is probably still not covered by the South Carolina pure food law. See also note 95 *supra* and accompanying text.

105. E.g., Fed. Food Act § 201(g), 52 Stat. 1041 (1938), 21 U.S.C. § 321(g) (1964); cf. Model Act § 2(d).

In addition to clauses defining the types of merchandise covered, a typical statute contains several provisions listing many types of defects which constitute adulteration when they appear in food or drugs;¹⁰⁶ but only those factors most commonly involved in civil litigation will be treated here. For example, under federal law food is adulterated if:

- (1) it bears or contains any poisonous or deleterious substance which may render it injurious to health; . . . or
- (2) it bears or contains any added poisonous or added deleterious substance . . . ;
- (3) it consists in whole or in part of any filthy, putrid, or decomposed substances, or if it is otherwise unfit for food, or
- (4) it has been prepared, packed or held under unsanitary conditions whereby it may have become contaminated with filth or whereby it may have been rendered injurious to health, or
- (5) it is, in whole or in part, the product of a diseased animal or of an animal which has died otherwise than by slaughter¹⁰⁷

Perhaps the most difficult question of construction arising with respect to pure food legislation is whether adulteration, determined by reference to any of these criteria, can be caused by a product defect which is absolutely undiscoverable by anyone in the chain of production and distribution but which can be remedied by a consumer who takes certain safeguards in using the merchandise. This problem is present, for example, when damages are sought from a meatpacker by a plaintiff who has incurred trichinosis, a disease caused by the infestation of the human body by parasites called trichinae.¹⁰⁸ These parasites develop in the muscle tissue of swine; their transference to the human body is usually through the medium of pork products which have been inadequately treated by the processor and insufficiently cooked by the consumer. The presence of trichinae in pork products cannot be ascertained by any method short of a microscopic examination of every muscle fiber in

In a typical statute the excepted articles—"food" and "devices"—are separately defined. With respect to the meaning of "food," see note 103 *supra* and accompanying text. "Devices" are defined in the Federal Food and Drug Act as "instruments, apparatus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, care, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals." Fed. Food Act § 201(h), 52 Stat. 1041 (1938), 21 U.S.C. § 321(h); *cf.* Model Act § 2(e).

106. *E.g.*, Fed. Food Act §§ 402, 501, 52 Stat. 1046, 1049 (1938), as amended, 21 U.S.C. §§ 342, 351 (1964); *cf.* Model Act §§ 10, 14.

107. Fed. Food Act § 402(a), 52 Stat. 1046 (1938), as amended, 21 U.S.C. § 342(a) (1964); *cf.* Model Act § 10.

108. For a good discussion of the issues involved in a typical negligence per se case involving trichinosis, see *Leonardi v. A. Habermann Provision Co.*, 143 Ohio St. 623, 56 N.E.2d 232 (1944).

the meat—an impossible burden to place upon any packer or grocer, for such an inspection would destroy the marketability of the product.¹⁰⁹ However, all trichinae can be killed if the pork is cooked so that all muscle tissue is heated to a temperature of 137 degrees F., or if the meat is frozen or properly smoked.¹¹⁰ Obviously, the consumer demand for fresh pork forces the processor and seller to abstain from cooking, smoking, or freezing pork products prior to sale. The issue, then, is whether the distribution of fresh pork infested with trichinae automatically constitutes the sale of adulterated food, or merely becomes the basis of a statutory violation if the parasites are still present and alive in the meat after the buyer has cooked it thoroughly. The courts of New York and Ohio, in applying virtually identical pure food laws,¹¹¹ have given different answers to this question. It has been held in New York that a quantity of trichinae-infested pork was not a portion of an animal “unfit for food,” as that phrase was used in the applicable legislation, because the meat would have been harmless if it had been cooked in the normal manner; moreover, the pork in question was held not to be the “product of a diseased animal,” because the infestation was not “so significant” a malady for the animal that it would have been characterized as a “disease” within the common meaning of that term.¹¹² The court went on to say that the pure food statute would be violated only by the sale of trichinae-infested pork which remained unfit for consumption after it had been properly cooked. The New York approach means, in effect, that trichinae-infested meat can never be considered adulterated in the statutory sense, since all the parasites are killed by proper cooking. However, since the sale of adulterated food is the essence of a violation of a statute of the type under consideration, it would seem the issue of adulter-

109. See *Feinstein v. Daniel Reeves, Inc.*, 14 F. Supp. 167, 168 (S.D.N.Y. 1936); *Leonardi v. A. Habermann Provision Co.*, *supra* note 108.

110. 9 C.F.R. § 18.10 (1965) contains detailed instructions regarding the manner in which certain pork products are to be refrigerated, cured, or heated by packers in order to ensure the destruction of all trichinae. However, the regulation does not apply to fresh pork intended to be retailed as such, presumably because it is assumed that the consumer will cook it prior to serving it.

If the pork is sold under circumstances indicating that the meat has been treated in one of these ways (that is, if its container is labeled “pre-cooked” or “smoked”) and trichinosis still results from its consumption, courts readily find the pork to have been adulterated. See *Catalanello v. Cudahy Packing Co.*, 264 App. Div. 723, 34 N.Y.S.2d 37 (1942); *Kurth v. Krumme*, 143 Ohio St. 638, 56 N.E.2d 227 (1944).

111. Compare N.Y. AGR. & MKT. LAW §§ 200(3), (5) (Supp. 1965) with OHIO REV. CODE §§ 3715.59(C), (E) (1965).

112. *Dressler v. Merkel, Inc.*, 247 App. Div. 300, 303, 284 N.Y. Supp. 697, 702, *aff'd*, 272 N.Y. 574, 4 N.E.2d 744 (1936); *Blume v. Trunz Pork Stores, Inc.*, 269 App. Div. 1059, 59 N.Y.S.2d 217 (1945) (memorandum decision); *accord*, *Feinstein v. Daniel Reeves, Inc.*, 14 F. Supp. 167 (S.D.N.Y. 1936); *Zorger v. Hillman's*, 287 Ill. App. 357, 4 N.E.2d 900 (1936); *Cheli v. Cudahy Bros.*, 267 Mich. 690, 255 N.W. 414 (1934); *cf.* *Naryoks v. Suhrmann*, 9 Utah 2d 84, 337 P.2d 967 (1959); *Schneider v. Suhrmann*, 8 Utah 2d 35, 327 P.2d 822 (1958).

ation should depend upon the quality of a product at the time of sale, and should not be made contingent upon its condition just prior to consumption. More reasonable is the Ohio view that trichinae-infested pork is the product of a diseased animal and is thus "adulterated" within the meaning of the applicable legislation.¹¹³ Adoption of this position does not mean that a processor or a grocer will necessarily be found liable in every trichinosis case, for the defenses of contributory negligence and assumption of risk, based upon a plaintiff's failure to cook the pork thoroughly, can be raised to avoid liability.

There has been a substantial amount of dispute over the proper interpretation of that portion of the typical pure food statute which provides that a product is adulterated if it contains any added poisonous or other added deleterious "ingredient" (or "substance") which may render the product injurious to health.¹¹⁴ It has already been noted that in per se cases courts are inclined to disregard the rule of strict statutory construction when confronted with the problem of determining what types of product defects meet a specific criterion for adulteration,¹¹⁵ and the various interpretations given to the word "ingredient" (or "substance") bear witness to this tendency. For instance, in two cases in which injuries had been sustained from the consumption of store-purchased cakes containing, in one instance, a piece of steel and, in the other, a bit of broken glass, the South Carolina Supreme Court read the term "ingredient" to mean anything contained in a product.¹¹⁶ A New York court, however, reached a different result, holding that glass fragments in a bottle of cream were not "ingre-

113. *Troietto v. G. H. Hammond Co.*, 110 F.2d 135 (6th Cir. 1940) (applying Ohio Law); *Leonardi v. A. Habermann Provision Co.*, 143 Ohio St. 623, 56 N.E.2d 232 (1944); *accord*, *Meyer v. Greenwood*, 125 Ind. App. 288, 124 N.E.2d 870 (1955).

Perhaps the best solution to the trichinosis problem would be to require that all fresh pork products bear labels designed to notify consumers that the meat should be thoroughly cooked to 137°F. See generally text accompanying note 110 *supra*.

114. Most statutes provide that food is adulterated if: "(1) it bears or contains any poisonous or deleterious substance which may render it injurious to health . . . or (2) it bears or contains any added poisonous or added deleterious substance. . . ." See, e.g., Fed. Food Act § 402(a)(2)(A), 52 Stat. 1046 (1938), as amended, 21 U.S.C. § 342(a)(2)(A) (1964). (Emphasis added.) However, there are some state pure food statutes which substitute the word "ingredient" for the word "substance" in subdivision (2). See, e.g., S.C. CODE ANN. § 32-1514(5) (Supp. 1965).

Subdivision (2) of the typical food adulteration statute does not cover the same subject matter as that treated in subdivision (1). Courts seem to have restricted the scope of the former provision to the natural, or at least not totally foreign, ingredients of the product, while the "added" language of the second provision seems to be applied to at least non-natural ingredients which impair the purity of the product, such as dirt. This distinction may be inferred from the reasoning of *Piazza v. Fischer Baking Co.*, 197 Misc. 418, 419-20, 98 N.Y.S.2d 508, 510-11 (N.Y. City Ct. 1950).

115. See text accompanying notes 99-101 *supra*.

116. *McKenzie v. Peoples Baking Co.*, 205 S.C. 149, 31 S.E.2d 154 (1944) (steel in cake); *Irick v. Peoples Baking Co.*, 187 S.C. 238, 196 S.E. 887 (1938) (glass in cake).

dients" of the product as that word was used in the applicable enactment.¹¹⁷ Thereupon the New York legislature changed the statutory language to its present form by substituting the word "substance" for the term "ingredient."¹¹⁸ In two actions arising subsequent to this modification, one involving the presence of a small screw in a loaf of bread and the other arising from the presence of a piece of wire in a pie, the New York City Court reached opposite results. It held in the former case that in order to be a "substance" within the meaning of the amended statute an element had to be an "ingredient" in the sense in which this term had been employed prior to the statutory change,¹¹⁹ but in the latter action it indicated that "substance" had a much broader significance than "ingredient."¹²⁰ It thus remains undecided in New York whether the word "substance" has a legal significance different from that of the restrictively defined term "ingredient." That its significance should be different seems clear, for "substance" can hardly be interpreted as narrowly as "ingredient." Indeed, courts in a number of other jurisdictions have applied adulteration provisions containing the word "substance" in a manner which indicates that they would give the term a broad construction, although they have not specifically addressed themselves to the question of the meaning of the word.¹²¹

A slightly different issue arises when an inedible but natural, or at least non-foreign, component of a food product causes injury. Two decisions illustrate the problem involved in this type of case. In one, harm was attributable to the presence of a small piece of pork bone in a barbecued pork sandwich;¹²² in the other, injury was caused by a fragment of a prune pit lodged in a quantity of prune butter.¹²³ No statutory violation was found in either instance because none of the applicable criteria for finding adulteration had been met. In the case involving the sandwich, the court paid particular attention to a local provision which declared food to be adulterated if it contained "a portion of an animal unfit for food," and concluded that while the piece of bone may have been inedible, its presence had not rendered the whole product unfit for consumption. The court further reasoned that if it were to find liability in the case before

117. *Bourcheix v. Willow Brook Dairy, Inc.*, 268 N.Y. 1, 196 N.E. 617 (1935).

118. N.Y. Sess. Laws, 1939, ch. 797, § 1 (now N.Y. AGR. & MKT. LAW § 200(2)).

119. *Piazza v. Fischer Baking Co.*, 197 Misc. 418, 98 N.Y.S.2d 508 (N.Y. City Ct.), *aff'd*, 200 Misc. 834, 111 N.Y.S.2d 245 (Sup. Ct., App. Term 1950).

120. *Alphin v. LaSalle Diners, Inc.*, 197 Misc. 415, 98 N.Y.S.2d 511 (N.Y. City Ct. 1950).

121. See, e.g., *Criswell Baking Co. v. Milligan*, 77 Ga. App. 861, 50 S.E.2d 136 (1948); *Bolitho v. Safeway Stores, Inc.*, 109 Mont. 213, 95 P.2d 443 (1939); *Drock v. Great Atl. & Pac. Tea Co.*, 61 Ohio App. 291, 22 N.E.2d 547 (1939).

122. *Norris v. Pig'n Whistle Sandwich Shop, Inc.*, 79 Ga. App. 369, 53 S.E. 2d 718 (1949).

123. *Courter v. Delbert Bros., Inc.*, 19 Misc. 2d 935, 186 N.Y.S.2d 334 (Sup. Ct. App. Term 1958).

it, "numerous articles of food which necessarily contain inedible portions of animal matter would have to be deemed adulterated."¹²⁴ In the prune butter case the court relied on previous New York authority to the effect that the presence in a product of a foreign article, such as glass, does not constitute adulteration, and held that the presence of a particle which is non-foreign to the product—a prune pit in prune butter—therefore did not constitute adulteration.¹²⁵ A policy argument often put forth by courts in cases in which non-foreign but inedible elements of food products have caused injuries is that a consumer who eats such a product should anticipate the presence of these particles and be prepared to protect himself from injury.¹²⁶

Fewer suits have arisen under pure drug laws because, as mentioned earlier, these enactments contain quite specific and narrow criteria for determining adulteration. A typical statute provides that a drug is adulterated if it is composed wholly or partially of any filthy, putrid, or decomposed substance.¹²⁷ A case vividly exemplifying the difference between the statutory tests for food adulteration and those for drug adulteration is one brought against a blood plasma processor by a plaintiff who had contracted jaundice from plasma containing a certain type of virus.¹²⁸ The presence of a virus of that particular kind could not have been detected even with the aid of a microscope; thus, the defect in the plasma was not discovered until after the plaintiff had become ill.¹²⁹ The court held that

124. *Norris v. Pig'n Whistle Sandwich Shop, Inc.*, 79 Ga. App. 369, 376, 53 S.E.2d 718, 723 (1949). A few sentences earlier, the court had said: "The clear intent of the statute expressed by the use of these words ['portions of an animal unfit for food'], when considered with the other language of the statute, and the purpose and scope of the pure food and drug laws, is to refer to any portion of an animal unfit for food and contained in the food which thereby renders such food unfit for its intended consumption." (Emphasis added.)

125. *Courter v. Delbert Bros., Inc.*, 19 Misc. 2d 935, 945, 186 N.Y.S.2d 334, 345 (Sup. Ct. App. Term 1958). The cases cited by the court to support its premise that the presence in a product of a foreign article did not constitute adulteration were *Piazza v. Fischer Baking Co.*, 197 Misc. 418, 98 N.Y.S.2d 508 (N.Y. City Ct.), *aff'd*, 200 Misc. 834, 111 N.Y.S.2d 245 (Sup. Ct. App. Term 1950), and *Bourcheix v. Willow Brook Dairy, Inc.*, 268 N.Y. 1, 196 N.E. 617 (1935). See generally notes 117 & 120 *supra* and accompanying text. (The court evidently overlooked *Alphin v. LaSalle Diners, Inc.*, 197 Misc. 415, 98 N.Y.S.2d 511 (N.Y. City Ct. 1950). See text accompanying note 120 *supra*.)

126. *Norris v. Pig'n Whistle Sandwich Shop, Inc.*, 79 Ga. App. 369, 53 S.E.2d 718 (1949); *Courter v. Delbert Bros., Inc.*, 19 Misc. 2d 935, 186 N.Y.S.2d 334 (Sup. Ct. App. Term 1958).

127. *E.g.*, Fed. Food Act § 501(a)(1), 52 Stat. 1049 (1938), 21 U.S.C. § 351(a)(1) (1964); *cf.* Model Act § 14(a)(1). The Federal Act contains other criteria for determining drug adulteration, but the one mentioned in the text is the criterion most frequently involved in civil litigation.

128. *Merck & Co. v. Kidd*, 242 F.2d 592 (6th Cir.), *cert. denied*, 355 U.S. 814 (1957).

129. The jury in this case apparently relied upon circumstantial evidence in finding that plaintiff's illness had been caused by the blood plasma, which had been administered to him when he was treated for a previous leg injury. That finding was not challenged by defendant on appeal. *Id.* at 593.

the word "filthy," as used in the statute, was not synonymous with "injurious to health" or "infected," but rather was intended to be interpreted according to its ordinary meaning, so as to signify a condition which could be perceived by the senses.¹³⁰ Since the virus could not have been detected with the aid of the senses alone, the plasma was not "filthy." Clearly, if plasma were a food product, adulteration would have been easily established in most states because the virus would have constituted a deleterious substance which might have rendered the plasma injurious to health.¹³¹ The establishment of more restrictive criteria for determining adulteration in the case of drugs doubtless indicates that the drafters of food and drug acts realized that in using certain medications a patient often assumes a calculated risk that one or a number of undesirable and unpreventable side effects may result.

2. Misbranding and False Advertising

As thousands of new items flood the market place, the consumer is forced to rely less upon his own experience and more upon a manufacturer's messages—those accompanying the merchandise and those appearing in advertising—in order to determine the proper manner of using a particular product. In many instances, therefore, personal injury or property damage will ensue if the warnings and directions on a product label are insufficient or inaccurate, or if a seller's advertising is otherwise deceptive.

One important weapon in the consumer's arsenal of remedies for harm attributable to inadequate or misleading labeling is a *per se* cause of action based upon a state penal statute requiring the labels on poisonous and explosive substances to contain language calling attention to the risks associated with the merchandise or its use.¹³² For instance, a storekeeper who had sold a container of crab-grass killer bearing no indication of the toxicity of the product's ingredients was held liable in a *per se* suit premised on a state statute for the loss suffered by a purchaser who had permitted livestock to graze upon land treated with the chemical.¹³³ Such state enactments generally prescribe merely that labels on certain types of products must display simple specified words of warning. However, in recent years legislatures in some jurisdictions, such as California, have passed statutes patterned after the Federal Hazardous Substances Labeling Act.¹³⁴ These state enactments cover misbranding of common but

130. The court suggested that the term was interchangeable with "wormy" or "dirty." *Id.* at 595-96.

131. *Id.* at 595.

132. *Mossrud v. Lee*, 163 Wis. 229, 157 N.W. 758 (1916). See also *Panther Oil & Grease Mfg. Co. v. Segerstrom*, 224 F.2d 216 (9th Cir. 1955).

133. *Mossrud v. Lee*, *supra* note 132.

134. See, e.g., CAL. HEALTH & SAFETY CODE §§ 28740-90.

dangerous household products and usually require the label to contain a detailed warning, which may have to include a description of the hazard connected with the use of particular merchandise as well as an indication of the steps to be taken to alleviate the danger, and first-aid instructions for assistance in the event of an injury caused by the product.¹³⁵

Furthermore, the Federal Food, Drug, and Cosmetic Act and state statutes modeled upon it have from their earliest days been important sources of recovery for injuries resulting at least in part from inadequate product labeling.¹³⁶ In their present forms, these enactments usually provide that a typical product covered by their terms is misbranded, with the result that its sale is in violation of the law, if its "labeling is false or misleading in any particular."¹³⁷ The word "labeling" encompasses printed material either appearing on a product container or wrapper or accompanying the merchandise at any time.¹³⁸ In order not to be misleading, therefore, a product's label must contain all warnings and directions necessary to instruct a consumer on the safe use of the merchandise; in other words, labeling can be misleading in the statutory sense although it bears no affirmative misstatement.¹³⁹ The application of this principle is illustrated by a case involving the alleged misbranding of fish food.¹⁴⁰ At trial there were shown to have been two classes of fish food on the market: the "complete" and the "incomplete" varieties, of which only the former contained all the dietary elements necessary to sustain fish life. Plaintiff, a trout-breeder, bought some fish food manufactured by defendant which was similar in price and appearance to "complete" foods, but which was actually of the "incomplete" type. Plaintiff's subsequent use of the product resulted in the sickness or death of a large number of trout. Since it was shown to have been customary for those who marketed fish food to sell only "complete" foods, defendant was held liable under the

135. Cf. Federal Hazardous Substances Labelling Act § 2(p)(1), 74 Stat. 372 (1960), 15 U.S.C. § 1261 (p)(1) (1964). The federal act is discussed more thoroughly in notes 156-67 *infra* and accompanying text.

136. See, e.g., *Armour v. Wanamaker*, 202 Fed. 423 (3d Cir. 1913), where hair tonic containing 60% to 80% alcohol caused an explosion and was held to have been misbranded under the 1906 Federal Food and Drug Act because its container had not borne a statement of the quantity of alcohol contained.

137. E.g., Fed. Food Act §§ 403(a), 502(a), 602(a), 52 Stat. 1047, 1050, 1054 (1938), 21 U.S.C. §§ 343(a), 352(a), 362(a) (1964). See *Hoskins v. Jackson Grain Co.*, 63 So. 2d 514 (Fla. 1953) (false labeling of agricultural seed; crop which came up was different from crop advertised on the package); cf. Model Act §§ 11(a), 15(a), 18(a). There are other tests of misbranding, but that stated in the text has been involved in the most civil litigation.

138. Fed. Food Act § 201(m), 52 Stat. 1041 (1938), 21 U.S.C. § 321(m) (1964); cf. Model Act § 2(j).

139. *McClanahan v. California Spray-Chem. Corp.*, 194 Va. 842, 75 S.E.2d 712 (1953).

140. *Midwest Game Co. v. M.F.A. Milling Co.*, 320 S.W.2d 547 (Mo. 1959).

federal act for having failed to indicate on his packages that his product was not a "complete" food.

A manufacturer can be liable for misbranding even though the regulations promulgated by the FDA pursuant to the Food, Drug, and Cosmetic Act do not require him to place any label at all on his product. In *Orthopedic Equip. Co. v. Eutsler*,¹⁴¹ a manufacturer of surgical nails, who was excused under the act from giving directions for the use of his products because they were designed for use by skilled professionals,¹⁴² marked some of his packages "9 x 40." A surgeon, reasonably assuming that this designation meant that the diameter of the nails in the boxes so labeled was nine millimeters, used one such nail on the basis of this assumption, but was later unable to remove it from the plaintiff's body because its diameter was actually greater than nine millimeters. Plaintiff's leg eventually had to be amputated as a result of infection attributable to the nail. The court held that once the defendant had voluntarily undertaken to label his containers, the act required him to avoid misbranding them.

Despite the wide scope of the deceptive labeling provisions of the Federal Food, Drug, and Cosmetic Act illustrated by these cases, the statute has not been the basis of a large volume of civil litigation. The explanation probably lies partially in the fact that the FDA has established a series of stringent pre-marketing tests for both drugs and cosmetics, and to a greater extent in the fact that most manufacturers have willingly observed the labeling provisions of the act because, when a plaintiff contends that a producer has negligently failed to fulfill his common-law duty to warn consumers of the dangers associated with the use of a particular product, compliance with the act is held to constitute at least some evidence of a manufacturer's due care.¹⁴³

False and misleading advertising is a problem which continues to grow, despite the fact that many years ago legislatures in a majority of states enacted statutes proscribing such activity.¹⁴⁴ A typical state provision provides broadly for a criminal penalty for any person who places before the public an advertisement which "contains

141. 276 F.2d 455 (4th Cir. 1960). *But cf.* *Ball v. Mallinkrodt Chem. Works*, 381 S.W.2d 563 (Tenn. App. 1964).

142. See 21 C.F.R. § 1.106(d) (1965).

143. For an excellent article discussing the stringent pre-marketing tests applied to cosmetics under the Federal Food, Drug and Cosmetic Act, see Whitmore, *Allergies and Other Reactions Due to Drugs and Cosmetics*, 19 Sw. L.J. 76 (1965). For a thorough article ranging across the entire field of drug liability, see Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability*, 18 *RUTGERS L. REV.* 947 (1964).

In order to show evidence of their due care, manufacturers sometimes attempt to demonstrate that they complied with the standards established by the Federal Food, Drug and Cosmetic Act. See text accompanying note 76 *supra*.

144. See generally Kintner, *Federal Trade Commission Regulation of Advertising*, 64 *MICH. L. REV.* 1269 (1966).

any assertion, representation, or statement of fact which is untrue, deceptive, or misleading, and which such person knew, or might on reasonable investigation have ascertained to be untrue, deceptive, or misleading"¹⁴⁵ The misconduct toward which false advertising laws have been directed usually consists of a manufacturer's making inaccurate claims that a particular product may be used for a certain purpose. Although the enactments have given rise to very little civil litigation, they should not be considered less suitable as sources of negligence per se relief than their counterparts dealing with misbranding.¹⁴⁶

On the other hand, discovering a basis in federal statutes for per se liability for false advertising is more difficult. An action for damages resulting from a defendant's use of false advertising with respect to many types of food, drugs, cosmetics, and medical devices may be based upon defendant's breach of the misbranding provisions of the Federal Food, Drug, and Cosmetic Act. As mentioned above, adequate warnings and directions for use must accompany most products covered by the act lest their labeling be sufficiently misleading to constitute misbranding.¹⁴⁷ Therefore, where such merchandise is either expressly or implicitly advertised as suitable for a particular use, an omission from its labeling of any pertinent warnings or directions relative to that use causes it to be misbranded.¹⁴⁸ Furthermore, it appears that per se civil liability for false advertising similar in scope to that outlined above with respect to the Federal Food, Drug, and Cosmetic Act could be imposed on the basis of a violation of sections 12, 13, 14, or 15(a)¹⁴⁹ of the Federal Trade Commission Act. By virtue of these provisions, the Commission has authority to issue cease and desist orders curbing false

145. MASS. LAWS. ANN. ch. 266, § 91 (Supp. 1964). This statute contains a proviso excluding from the coverage of the act the management and employees of newspapers, and "any agent of the advertiser who in good faith and without knowledge of the falsity or deceptive character thereof publishes, causes to be published, or participates in the publication of such advertisement." (Emphasis added.)

It would appear that certain types of advertising, such as "actual demonstrations" on television, may have a greater impact on the consumer than does a product label. It can thus be argued that the states should enact even more stringent false advertising legislation than is currently in force. See Comment, *Advertising Law and Products Liability*, 8 CLEV.-MAR. L. REV. 62 (1959). Section 19 of the Model Act provides: "An advertisement of a food, drug, device, or cosmetic shall be deemed to be false if it is false or misleading in any particular."

146. See *Wright v. Carter Prods., Inc.*, 244 F.2d 53, 61 (2d Cir. 1957).

147. See text accompanying notes 137-39 *supra*.

148. See *Colgrove v. United States*, 176 F.2d 614 (9th Cir. 1949), *cert. denied*, 338 U.S. 911 (1950) (condemnation proceeding—express advertisement of suitability); *United States v. 38 Dozen Bottles Labeled in Part Tryptacin*, 114 F. Supp. 461 (D. Minn. 1953) (condemnation proceeding—implied advertisement of suitability).

149. 52 Stat. 114 (1938), 15 U.S.C. §§ 52-55(a) (1964). See *Fresh Grown Preserve Corp. v. FTC*, 125 F.2d 917 (2d Cir. 1942). For a general discussion of the concurrent jurisdictions of the FTC and the FDA, see Comment, *Federal Regulation of False Advertising*, 5 B.C. IND. & COMM. L. REV. 704, 734-37 (1964).

advertising with respect to food, drugs, cosmetics, and medical devices. There are, however, some differences between the Federal Food, Drug, and Cosmetic Act and the FTC Act which would make reliance on the former statute more desirable in a per se suit. For instance, the relevant sections of the FTC Act cover only advertising *other than* that found in product "labeling"—printed material accompanying, or on packages containing, merchandise—whereas under the provisions of the Federal Food, Drug, and Cosmetic Act false or misleading statements in product "labeling" are specifically prohibited since by definition they constitute misbranding.¹⁵⁰ Furthermore, the applicability of a per se theory premised on sections 12 through 15(a) of the FTC Act would be limited by the fact that an advertisement is violative of this statute only if it is "misleading in a *material* respect."¹⁵¹ In this regard, the FTC Act differs from the Federal Food, Drug, and Cosmetic Act, which prohibits advertisements which make product labeling "misleading in *any particular*."¹⁵²

A third possible approach to basing per se false advertising liability upon federal statutes has the broadest significance. It involves the use of section 5(a)(1) of the FTC Act, which prohibits "unfair methods of competition in commerce, and unfair or *deceptive* acts or practices in commerce."¹⁵³ False advertising clearly constitutes a deceptive practice within the meaning of this provision.¹⁵⁴ Section 5(a) encompasses misleading advertising of *all* products, not just food, drugs, cosmetics, and medical devices. Moreover, it discourages all types of deceptive advertising, including that accomplished by means of product "labeling." However, the "statutory purpose doctrine" could thwart an attempt to impose civil liability for physical injuries upon an advertiser under either of the proposed FTC Act theories, for it is doubtful that the act was intended to protect the consumer from anything but purely economic harm.¹⁵⁵

3. Hazardous Substances Labeling Act¹⁵⁶

Some mention should be made of the Federal Hazardous Substances Labeling Act of 1960, which was designed to prevent the

150. Compare FTC Act § 15(a), 52 Stat. 114 (1938), 15 U.S.C. § 55(a) (1964), with Fed. Food Act §§ 403(a), 502(a), 602(a), 52 Stat. 1047, 1050, 1054 (1938), 21 U.S.C. §§ 343(a), 352(a), 362(a) (1964). For a discussion of these sections of the Federal Food, Drug, and Cosmetic Act, see note 137 *supra* and accompanying text.

151. FTC Act § 15(a), 52 Stat. 114 (1938), 15 U.S.C. § 55(a) (1964). (Emphasis added.)

152. Fed. Food Act §§ 403(a), 502(a), 602(a), 52 Stat. 1047, 1050, 1054 (1938), 21 U.S.C. §§ 343(a), 352(a), 362(a) (1964). (Emphasis added.)

153. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(1) (1964). (Emphasis added.)

154. See Kintner, *supra* note 144, at 1276-79.

155. See in particular limitation number (4) discussed in text accompanying note 27 *supra*.

156. Federal Hazardous Substances Labeling Act, 74 Stat. 372 (1960), 15 U.S.C.

occurrence of some product-related injuries which arise because consumers often have insufficient knowledge of the nature of the merchandise which they buy. The act affects primarily the manufacturers and interstate distributors of such household products as cleaners, polishes, waxes, and detergents; none of these products is covered by other federal legislation.¹⁵⁷ Although the act has received little attention to date, the widespread use of products with which it deals indicates that it has considerable potential for becoming the basis of a significant amount of civil litigation.

The statute establishes three conditions which must be present before particular merchandise is considered to be a "hazardous substance." First, the product must be in a container "intended or suitable for household use."¹⁵⁸ Second, the article must be a toxic substance or mixture of substances, an irritant, a strong sensitizer, a product capable of generating pressure through decomposition, heat, or other means, or a corrosive or flammable item.¹⁵⁹ Finally, the mer-

§§ 1261-73 (1964) (hereinafter cited as HSLA). For a recent article concerning this enactment, see Levine, *Statutory Liability: The Federal Hazardous Substances Labeling Act—Sword or Shield?*, 19 FOOD DRUG COSM. L.J. 412 (1964).

157. HSLA § 5, 74 Stat. 376 (1960), 15 U.S.C. § 1264 (1964), provides that "any person" who violates § 4 of the same act may be penalized, and HSLA § 4, 74 Stat. 375 (1960), 15 U.S.C. § 1263 (1964) essentially prohibits the introduction of a hazardous substance into interstate commerce. See generally text accompanying note 86 *supra*. Obviously, the burden of § 4 will fall most heavily upon manufacturers and distributors, for they are the parties most likely to put goods into the stream of interstate commerce.

158. HSLA § 2(p), 74 Stat. 372 (1960), 15 U.S.C. § 1261(p) (1964). The term "container" has been given a liberal construction by the FTC regulations. See 21 C.F.R. § 191.1(c) (1965).

159. A substance is toxic if it has the capacity to produce personal injury or illness to man if ingested or inhaled or if it is absorbed through any blood surface. HSLA § 2(g), 74 Stat. 372 (1960), 15 U.S.C. § 1261(g) (1964); see 21 C.F.R. § 191.1(f) (1965).

An "irritant" is any non-corrosive substance which on immediate, prolonged, or repeated contact with normal living tissue will induce a local inflammatory reaction. HSLA § 2(j), 74 Stat. 372 (1960), 15 U.S.C. § 1261(j) (1964); see 21 C.F.R. § 191.1(g) (1965).

A substance is a "strong sensitizer" if through an allergic or photodynamic process it will cause on normal living tissue a hypersensitivity which becomes evident on re-application of the same substance, provided that it has been designated a strong sensitizer by the Secretary of Health, Education, and Welfare. HSLA § 2(k), 74 Stat. 372 (1960), 15 U.S.C. § 1261(k) (1964); see 21 C.F.R. § 191.1(i) (1965), and the list of strong sensitizers in 21 C.F.R. § 191.6 (1965).

"A substance is hazardous because it 'generates pressure through decomposition, heat, or other means' [HSLA § 2(f)(1)(A)(vi), 74 Stat. 372 (1960), 15 U.S.C. § 1261(f)(1)(A)(vi) (1964)]: (1) If it explodes when subjected to an electrical spark, or to percussion, or to the flame of a burning paraffin candle for 5 seconds or less. (2) If it expels the closure of its container, or bursts its container, when held at or below 130 [degrees] F. for 2 days or less. (3) If it erupts from its open container at a temperature of 130 [degrees] F. or less, after having been held in the closed container at 130 [degrees] F. for 2 days. (4) If it comprises the contents of a self-pressurized container." 21 C.F.R. § 191.1(m) (1965).

A substance is "corrosive" if, when in contact with living tissue, it will cause destruction by chemical action. HSLA § 2(i), 74 Stat. 372 (1960), 15 U.S.C. § 1261(i)

chandise must be of a kind which may "cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children."¹⁶⁰ The third condition is likely to be the subject of frequent disputes because of the litigious quality of the terms "substantial" and "reasonably foreseeable."

The Hazardous Substances Labeling Act provides in essence that an unusually specific warning of the dangers associated with any particular product which meets the three-fold test of a "hazardous substance" must appear prominently on the label of that product.¹⁶¹ If the appropriate language and information are absent, the product is deemed to be misbranded.

In some instances the act has imposed upon manufacturers a duty to warn where none existed before. For example, there is no common-law duty to warn of an obvious danger, but the act is not rendered inapplicable simply because a product otherwise covered creates a readily apparent hazard.¹⁶² Furthermore, at least absent the availability of a per se approach, no negligence recovery is allowed where, at the time of injury, a product is not being used for a purpose for which it was designed.¹⁶³ For instance, when a five-year-old

(1964). According to FTC regulations, visible destruction of, or irreversible alteration in, the tissue at the site of contact is required. 21 C.F.R. § 191.1(h) (1965).

"The term 'extremely flammable' shall apply to any substance which has a flash point at or below twenty degrees Fahrenheit as determined by the Tagliabue Open Cup Tester, and the term 'flammable' shall apply to any substance which has a flash point of above twenty degrees to and including eighty degrees Fahrenheit, as determined by the Tagliabue Open Cup Tester; except that the flammability of solids and of the contents of self-pressurized containers shall be determined by methods found by the Secretary [of Health, Education, and Welfare] to be generally applicable to such materials or containers, respectively, and established by regulations issued by him, which regulations shall also define the terms 'flammable' and 'extremely flammable' in accord with such methods." HSLA § 2(l), 74 Stat. 372 (1960), 15 U.S.C. § 1261(l) (1964). See 21 C.F.R. §§ 191.1(j)-(l), 191.13-191.16 (1965), for a description of all the test procedures alluded to in the statute.

160. HSLA § 2(f)(1)(A), 74 Stat. 372 (1960), 15 U.S.C. § 1261(f)(1)(A) (1964). Substantial illness is defined as any illness or injury of a "significant nature." However, it need not be "severe" or "serious." 21 C.F.R. § 191.1(p) (1965).

"Reasonably foreseeable handling or use" is defined in the regulations to include reasonably foreseeable accidental handling or use, not only by a purchaser or an intended user, but by all others, especially children, in the household of a purchaser or an intended user. 21 C.F.R. § 191.1(r) (1965).

161. HSLA § 2(p)(1), 74 Stat. 372 (1960), 15 U.S.C. § 1261(p)(1) (1964). The required statement must be in the English language, prominently located on the label, and in conspicuous type which is in contrast—by typography, layout, or color—with other printed matter on the label. HSLA § 2(p)(2), 74 Stat. 372 (1960), 15 U.S.C. § 1261(p)(2) (1964). See generally 21 C.F.R. §§ 191.1(d), 191.101(a)-(d) (1965).

162. *Jamason v. Woodward & Lothrop*, 247 F.2d 23 (D.C. Cir. 1957); *accord*, *Blissenbach v. Yanko*, 90 Ohio App. 557, 107 N.E.2d 409 (1951).

163. *Lawson v. Benjamin Ansehl Co.*, 180 S.W.2d 751 (Mo. 1944); *accord*, *Marker v. Universal Oil Prods. Co.*, 250 F.2d 603 (10th Cir. 1957); *Pedroli v. Russell*, 157 Cal. App. 2d 281, 320 P.2d 873 (1958). *Contra*, *Petzold v. Roux Labs.*, 256 App. Div. 1096, 11 N.Y.S.2d 565 (1939) (memorandum decision).

boy splashed himself with the contents of a bottle of highly flammable fingernail polish and then touched a lighted match to his clothing, the court held that because the product had been safe for its intended use the distributor of the polish was not liable for the resulting injury, despite the fact that the bottle had not been marked to show the flammability of its contents.¹⁶⁴ On the other hand, a product may be covered by the Hazardous Substances Labeling Act if an injury could occur from a *reasonably foreseeable* use, whether or not it is the intended use; furthermore, an FTC regulation construing the term "reasonably foreseeable use" suggests that it includes even a "reasonably foreseeable *accidental* handling or use, not only by the purchaser or intended user of the product, but by all others in a household, *especially children*."¹⁶⁵ Thus, had the polish been a product subject to the act, the same fact situation would at least have raised a question of negligence for jury determination.

A manufacturer may also benefit from the act, for Congress has prescribed the precise content of the warning statements required by the legislation and has thereby provided a more definite standard to guide the manufacturer in his efforts to fulfill a possible common-law duty to warn.¹⁶⁶ Indeed, if experience with the labeling requirements of the Federal Food, Drug, and Cosmetic Act is any indication, most manufacturers will readily abide by the provisions of the new law in order that evidence of their compliance may serve as an indication that they used due care and, thus, as a shield against common-law liability.¹⁶⁷

IV. CONCLUSION

Without doubt, the negligence per se concept is today outshadowed by the warranty and strict tort liability theories, the two great repositories of product liability law. However, recent increased legislative concern with respect to consumer protection may alter this relationship to some extent. As more and more consumer protection laws are enacted, and lawyers search for ways in which to use the new legislation to their clients' advantages, their attention will be redirected to the negligence per se theory. This is not to say that the implied warranty and strict tort theories will lose their positions of pre-eminence, but rather that interest in the negligence per se

164. *Lawson v. Benjamin Ansehl Co.*, *supra* note 163.

165. See note 160 *supra* and accompanying text. (Emphasis added.)

166. For a discussion of the common-law duty to warn, see Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350, 1361 (1966).

167. With respect to a manufacturer's willingness to comply with the labelling requirements of the Federal Food, Drug, and Cosmetic Act, see note 143 *supra* and accompanying text. See note 76 *supra* and accompanying text regarding the proposition that a defendant's compliance with a statutory command constitutes evidence that he used due care.

concept will be rekindled to the extent that the doctrine will be employed more frequently, at least as an alternative ground for recovery.

Finally, an observation should be made regarding the relationship between the per se and the strict tort liability theories. Nominally, the per se concept gives rise to a negligence cause of action. However, most regulatory statutes involved in per se litigation impose criminal liability without fault, and the statutory purpose doctrine tends to sweep aside most negligence defenses; therefore, the liability imposed pursuant to the negligence per se theory is in effect strict liability. Furthermore, since the strict tort doctrine has by no means gained widespread acceptance,¹⁶⁸ the negligence per se theory may present the only opportunity for the proponents of strict liability unencumbered by the opportunities for disclaimer and limitation afforded by warranty law¹⁶⁹ to advance their cause in a conservative jurisdiction. The per se approach seems to achieve a happy medium between the demands of proponents and opponents of strict tort liability, for it allows courts to give some strict liability protection, but at the same time enables the judiciary to restrict the coverage of that protection to only those persons sustaining injuries resulting from transactions which legislatures, responding to pressure from consumer-oriented groups, have undertaken to regulate.

Joseph H. Ballway, Jr.

168. See Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350 (1966).

169. See Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430, 1452-61 (1966).