13, 1960, the Stromsodts sought the advice of a specialist in pediatrics and took Shane to Dr. Samuel L. Pettit in Grand Forks. The Doctor prescribed phenobarbital for the child and testified that he finally prescribed a conventional dosage of one-quarter grain phenobarbital three times a day for Shane, which amounts he continues to receive.

When trial of this case began Shane was nearly seven years old. The record show he walks unsteadily, lacks coordination, speaks but a few words has none of the basic childhood skills normally possessed by children of his age and can neither read nor write. Uncontroverted medical testimony disclosed that he has damage to the brain and central nervous system. Shane is definitely, permanently and irreversibly injured, and in all probability his parents shortly will be unable to give him the necessary care and the boy will have to be institutionalized.

[1] A careful weighing of all the credible medical testimony in this case leads this Court to the inescapable conclusion that the competent producing cause of Shane Stromsodt's condition was Quadrigen, and that chronologically and etiologically Shane's condition is traced directly to the Quadrigen administered to him October 1st, 1959.

Of the several theories under which the Plaintiff seeks to recover in this action, only two are sustainable and require discussion here. They are breach of an implied warranty and negligence.

BREACH OF IMPLIED WARRANTY

"The liability in negligence of a manufacturer or other supplier for damage caused by his product is based on the supplier's failure to exercise reasonable care. Hence, negligence is a tort concept based on fault.

"Although the courts are occasionally confused about the matter, warranty, on the other hand, is not a concept based on fault or on the failure to exercise reasonable care. But this does *not* mean that warranty is necessarily contractual or nontortuous in nature. Liability in warranty arises where damage is caused by the failure of a product to measure up to express or implied representations on the part of the manufacturer or other supplier. Accordingly, an injured person is not required to prove negligence in a warranty-products liability case.

"This has been concisely summarized as follows:

> " 'There seems to be some confusion in understanding the nature of implied warranty liability. In the first place, concepts of negligence and fault, as defined by negligence standards, have no place in warranty recovery cases. Proof of negligence is unnecessary to liability for breach of implied warranty and lack of it is immaterial to defense thereof. Since the warranty is *implied* [emphasis by court] either in fact or in law, no express representations or agreements by the manufacturer are needed. Implied warranty recovery is based upon two factors: (a) The product or article in question has been transferred from the manufacturer's possession while in a "defective" state, more specifically, the product fails to be "reasonably fit for the particular purpose intended" or of "merchantable quality," as these two terms, separate but often overlapping, are defined by the law; and (b) as a result of being "defective," the product causes personal injury or property damage.' " 2 Frumer & Friedman, Products Liability, Chapter 3, Sec. 16.01[1].

[2] None of the experts called by either party could or would state which particular ingredient in Quadrigen caused the damage to Shane Stromsodt Plaintiff's witness, Dr. Ronald Okun, testified that there was evidence to show that pertussis endotoxin made the other components of Quadrigen more liable to cause an anaphylactic sort of reaction in a patient. Other evidence indicated that the product was rendered defective by the instability of potency in the pertussis vaccine. The evidence justifies the conclusion that the Plaintiff's injuries and damages were caused by a defect in the Quadrigen, and that such defect constitutes a breach of the implied warranty of merchantability.

[3] The asserted lack of privity is not a defense in North Dakota to a claim based upon breach of an implied warranty. See Lang v. General Motors Corporation, 136 N.W.2d 805 (N.D.1965) Thi sapparently would be particularly true in actions by the ultimate consumer against a manufacturer for breach of implied warranties where "through advertising or other media of education and information defendant has convinced and persuaded the medical profession to prescribe its drug, since it is in the very competitive field of supplying drugs and medicines for the alleviation of human suffering as well as for its own pecuniary advantages." Bennett v. Richardson-Merrell, Inc., D.C., 231 F.Supp.150