

chloride. It has been demonstrated that benzethonium chloride partially disappears from the solution during storage, coming down from twenty-five parts per million to only seven parts per million. Benzethonium chloride is a quaternary ammonium compound and has a positive charge, whereas the bacterial cell wall has a negative charge. By attraction, the benzethonium chloride is adsorbed to the cell. Such adsorption on the bacterial cell wall may cause its denaturation and favors the leaching of the toxin from the bacterial cell, resulting in the leakage of the contents of the organism. Certainly, it is reasonable to conclude that the effect of the use of benzethonium chloride was to release the endotoxin from the bacteria cell into the fluid that was injected. One such endotoxin, the lipopolysaccharide, causes fever, and fever can produce convulsions and brain damage. Indeed, fever is one of the recognized etiologies or causes of post-pertussis vaccine encephalopathies.

[1, 2] It is reasonable to conclude, as I do, with reasonable medical certainty or probability that the release of the endotoxin into the fluid injected into the infant plaintiff was the cause of the unusually high fever which, in turn, caused the severe and permanent brain damage. I find defendant's suggestion that the cause of such damage was a viral encephalitis caused by some unspecified virus, a sepsis or meningitis, or an allergic reaction, totally unconvincing. It is not plaintiffs' burden to disprove every possible ground of causation suggested by defendant, nor must the findings of the Court meet the standards of the laboratorian. Plaintiffs' experts have furnished impressive evidence to support the conclusions reached herein, evidence which has clearly withstood the attack of defendant's experts. Having found Quadrigen to have been the causative factor, I turn now to the question of warranty, express and implied, and the further question of negligence.

Warranty Generally.

[3, 4] Liability for breach of warranty arises where persons or property are damaged because of a product's failure to live up to an express or implied representation by the manufacturer or other supplier. It is distinguished from negligence liability in that it is not based upon fault or upon the failure of such manufacturer or supplier to exercise reasonable care. 2. Frumer & Friedman, *Products Liability* § 16.01[1] (1967) (hereinafter referred to as "Frumer & Friedman"); cf. Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability*, 18 Rutgers L.Rev. 947, 977 (1964) (hereinafter referred to as "Rheingold").

[5-8] An express warranty will arise where a manufacturer, supplier or other seller positively represents a fact concerning the goods he sells. 2 Frumer & Friedman § 16.02; cf. Uniform Commercial Code § 2-313. In the instant case, plaintiffs allege that defendant warranted Quadrigen as "safe, effective and free from harmful side effects * * *." Amended Compl. ¶ 20.⁸ An implied warranty, on the other hand, is imposed by operation of law. 2 Frumer & Friedman § 116.02. *The implied warranties allegedly breached in the case at bar are the warranties of merchantability and fitness for a particular purpose.* Amended Compl. ¶ 28. The warranty of merchantability is that "the thing sold is reasonably fit for the general purpose for which it is manufactured and sold." *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960); 2 Frumer & Friedman § 16.04[2][d]; see *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 268 P.2d 1041 (1954); *Twombly v. Fuller Brush Co.*, 221 Md. 476, 158 A.2d 110 (1960); *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339 (1931); *Rheingold* at 978 (reasonable fitness for ordinary purpose for which sold). The implied warranty of fitness for a particular purpose is virtually self-explanatory, the major distinction from the merchantability warranty being reliance on the particular seller's skill and judgment. 2 Frumer & Friedman § 16.04[2][d]; see *Henningsen v. Blomfield Motors, Inc.*, *supra*.

Privity and Related Problems.

a. Privity.

The last decade has seen a vigorous frontal assault on the previously near-impenetrable "citadel of privity" so that in many states the insulation of the man-

⁸In paragraph 20 of the amended complaint, plaintiffs also claim that defendant expressly warranted that Quadrigen "was fit for the use as an immunizing agent against various ailments and was of good merchantable quality." These are normally considered to be implied warranties and do not appear to be expressly warranted in the Quadrigen package insert or advertisements to the medical profession. Indeed, in paragraph 28 of the complaint, plaintiffs make these same allegations in their cause of action for breach of implied warranty.