

ment that cases such as *Perlmutter* would prevent recovery, in *Gottsdanker v. Cutter Laboratories*, 182 Cal.App.2d 602, 6 Cal. Rptr. 320 (1960), the live-polio vaccine case, the California Court stated:

"Clearly it is the patient, and not the doctor, who is the ultimate consumer of the vaccine. While a sale is essential to impose liability under the implied warranties, the initial sale to distributor or retailer of pharmaceuticals is sufficient to impose upon the manufacturer the responsibility of fulfilling the implied warranties which run to the benefit of the persons whom the manufacturer intended to be, and who in fact became the 'consumers'." *Id.* at 605, 6 Cal.Rptr. at 324.

[11] The *Cutter* rationale is a sound one. Moreover, the case at bar is distinguishable from *Perlmutter* (as was *Cutter*). Similarity would have been present if the physician who had administered the vaccine to Eric Tinnerholm had been sued for breach of warranty. See 3 Frumer & Friedman § 33.02[b]. Under the law as it existed at that time, plaintiffs would possibly have been denied any recovery. But the later decisions of the New York Court of Appeals in *Greenberg v. Lorenz*, *Randy Knitwear, Inc. v. American Cyanamid Co.*, and *Goldberg v. Kollsman Instrument Co.* would allow a direct recovery against the manufacturer, a result not inconsistent with *Perlmutter*. Accordingly, I find that even if the technical requirement of a sale is necessary, such requirement has been fulfilled under the *Cutter Laboratories* decision and *Perlmutter* presents no obstacle to recovery.

With these hurdles cleared, I turn to a consideration of the warranty causes of action.

Express Warranty

The package insert (Plaintiff's Exh. 1) which was apparently sent to the administering physician with his purchase of Quadrigen stated that:

When given in accordance with suggested methods, local and systemic reactions following the administration of Quadrigen are usually mild. The incidence is usually no greater than is normally experienced with trivalent vaccine. Local reactions and fever of short duration may occur, however, and parents should be cautioned not to apply local treatment, such as wet dressings or heat. Any child who shows a febrile reaction should be kept quiet, should be offered water repeatedly and may be given one or more doses of aspirin as indicated. Occasionally, a residual induration or circumscribed nodule may persist for a week or more.

In instances of more marked reaction, the immunization may be completed with monovalent antigens or other combinations of antigens.

Local reactions have been known to be more severe when the child is in the incubative stage of pertussis. Encephalitic symptoms occasionally occur with acute pertussis though rarely with the use of the prophylactic vaccine. Such severe symptoms of the central nervous system include convulsions and lethargy. They may be followed by mental or physical manifestations, sometimes permanent, or even by death; but fortunately such reactions are extremely rare.

Whether this statement establishes an express warranty and a breach thereof need not be reached herein, for it is clear, as will be hereinafter developed, that the defendant has breached a warranty implicit in the package insert. However, certain of the problems which need be considered in express warranty causes of action will be briefly discussed. Discussion of the sufficiency of the warning will be reserved for that portion of this opinion wherein the negligence issues are considered.

The unique characteristic of drug-product-liability litigation is that while the product is actually meant for the patient, the sales pitch is made to the physician in an attempt to get him to prescribe a particular product or course of treatment to the ultimate consumer. *Rheingold* at 976. Thus, advertising will take the form, among other things, of promotional literature to the physician, statements of "detail" men who solicit purchases by the physician, package inserts, labels and the like, and/or articles in medical journals. *Id.* at 965. Can liability of the manufacturer be sustained even though the consumer has not relied on any representation? One New York decision has held that the physician is an agent of the patient for the special purpose of receiving statements from the manufacturer. *Wechsler v. Hoffman-La Roche, Inc.*, 198 Misc. 540, 99 N.Y.S.2d 588 (Sup.Ct. 1950). A number of commentators have expressed the view that the representation need not be made directly to the injured consumer. See, e. g., 2