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Strict Liability to the Consumer in California

By William L. Prosser*

THE problem of the liability of the seller of a product to the ultimate user first entered California in 1896, with the case of Lewis v. Terry. The upright end of a folding bed manufactured by the defendant fell in upon the plaintiff as she was about to retire for the night, and broke her arm. At that time there was a well established general rule, mistakenly derived from the old English case of Winterbottom v. Wright, that the seller of any chattel was not liable to the consumer even for negligence, unless there was privity of contract between them. To this rule, over half a century, two more or less generally recognized exceptions had developed in other jurisdictions. One was that if the seller knew that the chattel was dangerous, and failed to disclose it, he became liable in tort for “something like fraud” upon the consumer. The other was that if the chattel fell into a vaguely undefined category of “inherently” or “imminently” dangerous articles, which at least included drugs, food and drink, explosives and firearms, a tort duty arose toward the ultimate user to exercise reasonable care to protect him. In the Lewis case the first of these exceptions was sufficiently pleaded in the complaint, and the court approved and adopted it in reversing an order sustaining a demurrer. Subsequent cases agreed.

This was the progenitor of all of the law on liability to the consumer

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1 111 Cal. 39, 43 Pac. 398 (1896).

2 One of the important contributions of the late Professor Francis H. Bohlen was the laying of this ghost in Bohlen, The Basis of Affirmative Obligations in the Law of Tort, 44 Am. L. Rev. (N.S.) 209, 280-85, 289-310 (1905). See also Lord Atkin, in Donoghue v. Stevenson, [1932] A.C. 562, 588-89.


4 The earliest case, Langridge v. Levy, 2 M. & W. 519, 150 Eng. Rep. 863 (Ex. 1837), affirmed in 4 M. & W. 337, 150 Eng. Rep. 1458 (Ex. 1838), involved express misrepresentation as to the safety of a gun, and liability was rested on deceit. Later decisions, such as Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892), and Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir. 1903), found negligence in non-disclosure.

in California. The second exception, as to "inherent" or "imminent" danger, received acceptance in 1916, and a third, as to violation of a safety statute or regulation, was added at a considerably later date. But until well after 1930, it remained the definite California rule that unless the case could be brought within one of the exceptions, there was no liability without privity even for negligence.

In 1916 there came in New York the historic decision in *MacPherson v. Buick Motor Co.*, in which Cardozo enlarged the "inherent danger" exception to swallow up the general rule. If, he said, the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger, and the manufacturer is under a duty of reasonable care to make it safe. The effect of this, with later decisions, was to expand the class of goods as to which the duty was owed to include all products. Over a period of some forty years the case swept the country, and it is no longer seriously challenged anywhere. California, however, was not one of the early jurisdictions to follow it. Acceptance was foreshadowed in 1932, but the first case to declare definite approval of the new rule was *Kalash v. Los Angeles Ladder Co.* in 1934, where a workman was injured by the collapse of a defective rung of a ladder. Later cases in this state have put it beyond dispute that all sellers of all chattels are subject to negligence liability, to all those who may foreseeably be expected to suffer injury if the goods are dangerously defective.

The rule of strict liability, without privity and without negligence, began in other jurisdictions with cases of defective food and drink. It came as the aftermath of a prolonged and violent national agitation

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9 217 N.Y. 382, 111 N.E. 1050 (1916).
10 Indiana, about which there was really little doubt, falls definitely into line with J. I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964). Mississippi, apparently the last state to hold out, overthrew the requirement of privity in *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), and in the process went all the way to strict liability in tort.
12 1 Cal. 2d 229, 34 P.2d 481 (1934). The vacated opinion of the District Court of Appeal is in 22 P.2d 727 (Cal. App. 1933). The first opinion of the supreme court is in 28 P.2d 29 (Cal. 1934). This was withdrawn in favor of a reversal for error in instructions.
13 See text accompanying notes 97-101 infra.
14 The history is traced in brief outline in Prosser, *The Assault Upon the Citadel*, 69 Yale L.J. 1089, 1103-10 (1960).
over defective food, and the first decisions followed immediately upon the heels of the political overturn of 1912. There was considerable historical support for the idea that the seller of food incurred a more or less undefined special responsibility to the immediate purchaser, which nineteenth-century cases had called a special implied warranty. In extending this special responsibility to the consumer who was not in privity, the courts initially were a great deal more clear as to the result to be achieved than as to any theory which would support it; and for another fourteen years there was resort to a remarkable variety of highly ingenious, and equally unconvincing, notions of fictitious agencies, third-party beneficiary contract, and the like, plucked out of thin air as devices to get around the fact that there was no contract between the plaintiff and the defendant. Finally, in 1927 the Mississippi court came up with the idea of a “warranty” running with the goods from the manufacturer to the consumer, by analogy to a contract running with the land. For more than thirty years after that date, until Justice Traynor upset the apple cart in 1963, the strict liability continued to be identified with warranty, which was necessarily a warranty without a contract.

This was attended by numerous difficulties. “Warranty” had become so closely identified with contract in the minds of nearly all courts and lawyers that contract rules were assumed necessarily to apply to it. Traditionally it required that the plaintiff should act in reliance upon some express or implied representation or assurance, or some promise or undertaking, given him by the defendant; and this was quite often impossible to make out when the consumer did not even know the name of the maker. Warranties on the sale of goods were governed in most states by the Uniform Sales Act, which had been drawn in 1906 when there was no such thing as a warranty to a third person; and a good deal of its language spoke exclusively in terms of the immediate parties to the sale, with a specific provision that there

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15 Narrated in Regier, The Struggle for Federal Food and Drug Legislation, 1 LAW & CONTEMP. PROB. 3 (1933).
16 Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913); Parks v. C. C. Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Jackson Coca Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914).
17 See Dickerson, Products Liability and the Food Consumer 26 (1951); Melick, Sale of Food and Drink 10 (1936); Perkins, Unwholesome Food as a Source of Liability, 5 IOWA L. BULL. 6 (1919).
18 Gilham, Products Liability in a Nutshell, 37 ORE. L. REV. 119, 153-55 (1957), has collected no less than twenty-nine such devices, which in the aggregate present a truly fascinating picture of judges determined to arrive at a destination over any available route, no matter how impassable.
were no implied warranties of quality except as set forth in the Act. The buyer was required to give notice to the seller of the breach of warranty within a reasonable time after he knew or ought to have known of it. Furthermore, any liability founded upon a warranty was subject to disclaimer in advance by the seller. There were other minor obstacles, no longer worthy of mention.\textsuperscript{19} Altogether the non-contractual “warranty” in the food cases proved to be ill-adapted to the purpose, and called for a great deal of judicial ingenuity. This, however, did not prevent the gradual spread of the food rule, until by 1960 it had been accepted by a clear majority of the courts that had considered the question.\textsuperscript{20} What became reasonably clear in the process was that the “warranty” was not the one made on the original sale, and did not run with the goods, but was a new and independent one made directly to the consumer;\textsuperscript{21} that it did not arise out of or depend upon any contract, but was imposed by law, in tort, as a matter of policy;\textsuperscript{22} and that it was subject to rules of its own.

Although there were two earlier decisions\textsuperscript{23} in which the end was accomplished virtually without discussion, the California court first came to grips with the warranty of food to the consumer in \textit{Klein v. Duchess Sandwich Co.}\textsuperscript{24} in 1939. A ham and cheese sandwich, manu-

\textsuperscript{19} For fuller discussion, see Prosser, \textit{supra} note 14, at 1124-34.

\textsuperscript{20} These courts are listed in Prosser, \textit{supra} note 14, at 1106-10.


\textsuperscript{23} In Binion v. Sasaki, 5 Cal. App. 2d 15, 41 P.2d 585 (1935), the wife of the ultimate purchaser was denied recovery on a warranty. But in Gindraux v. Maurice Mercantile Co., 4 Cal. 2d 206, 47 P.2d 708 (1935), recovery was allowed in a similar case without discussion. And in Jensen v. Berris, 31 Cal. App. 2d 537, 88 P.2d 220 (1939), one of a party in a restaurant who did not himself buy the food was allowed to recover, with a refusal to discriminate between members of the group.

\textsuperscript{24} 14 Cal. 2d 272, 93 P.2d 789 (1939).
factured by the defendant, proved to be full of maggots. It was sold by an establishment inappropriately named the Happy Daze Buffet to a purchaser, who gave it to his wife. She swallowed a bite of it, discovered the source of the peculiar taste, and was understandably made quite ill. Justice Houser would have been quite willing to find an agency to buy for her, or even a third-party beneficiary contract; \(^{26}\) but he preferred, in the light of the food cases in other states, to construe away the language of the Uniform Sales Act. \(^{27}\) "Buyer," he declared, as used in the statute, did not require any privity of contract in food cases, and was not limited to the first purchaser, or even to a later one, but must be held to include any ultimate consumer. \(^{27}\) There can be little doubt that the original draftsmen of the Act would have been considerably startled, if not dismayed, by such an interpretation of their handiwork, and it can only be characterized as a piece of judicial legerdemain. The decision was followed in a series of later California cases involving food and drink, \(^{28}\) in all of which it was assumed that the strict liability was a matter of warranty, based upon and governed by the Sales Act.

The extension of this strict liability beyond food for human consumption began with animal food, \(^{29}\) and then with what might be called products for intimate bodily use but external application, such as hair dye, \(^{30}\) permanent wave solutions \(^{31}\) and cigarettes. \(^{32}\) For a good

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\(^{26}\) Id. at 284, 93 P.2d at 805.

\(^{27}\) "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose." 1 Uniform Laws Ann. § 15(1) (1950); Cal. Civ. Code § 1735(1). This provision is now replaced by § 2-315 of the Uniform Commercial Code.

\(^{27}\) "In adopting the statute here concerned as a part of the Uniform Sales Act, it was the clear intent of the legislature that, with respect to foodstuffs, the implied warranty provision therein contained should inure to the benefit of any ultimate purchaser or consumer of food; and that it was not intended that a strict 'privity of contract' would be essential for the bringing of an action by such ultimate consumer for an asserted breach of the implied warranty." 14 Cal. 2d at 283, 93 P.2d at 804.


\(^{29}\) McAfee v. Cargill, Inc., 121 F. Supp. 6 (S.D. Cal. 1954) (dog food); Midwest Game Co. v. M.F.A. Milling Co., 380 S.W.2d 547 (Mo. 1963) (fish food).


many years California,\textsuperscript{33} in company with other jurisdictions,\textsuperscript{34} refused to go beyond this. The real breakthrough\textsuperscript{35} came in Michigan in 1958, with \textit{Spence v. Three Rivers Builders \& Masonry Supply, Inc.},\textsuperscript{36} in which Justice Voelker found a warranty from the manufacturer to the user of cinder building blocks, which by no stretch of the imagination would be regarded as intended for any bodily use, or as “inherently dangerous.” This was immediately taken up by several other courts,\textsuperscript{37} and the restriction as to food went overboard. In 1960 there came in New Jersey the landmark decision in \textit{Henningsen v. Bloomfield Motors, Inc.},\textsuperscript{38} which entered into the first full discussion of the rule, and held the manufacturer and the retailer of an automobile to a warranty of safety to the ultimate driver. The citadel of privity fell. What followed was unquestionably the most sudden and spectacular overturn of a well-established rule of law in the entire history of the law of

\begin{thebibliography}{99}
\item 35 The first case, involving a grinding wheel, was Di Vello v. Gardner Mach. Co., 48 Ohio Op. 161, 103 N.E.2d 259 (Ct. C.P. 1951), which was overruled by Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953). Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956), talked implied warranty of an aluminum rocking chair, but apparently was disposed of on negligence.
\item 38 33 N.J. 358, 161 A.2d 69 (1960).
\end{thebibliography}
torts. The latest count of the jurisdictions finds strict liability from the manufacturer to the consumer the accepted rule, on one theory or another, as to all products in a heavy majority of the courts, with only eleven still insisting upon privity or negligence, and only two reiterating such a position in any decision since the avalanche started with the *Henningsen* case.


So rapid was the change that § 402 A of the Second Restatement of Torts, dealing with the strict liability, was drawn three times. As first submitted to and approved by the American Law Institute in 1961 (Tentative Draft No. 6), it was limited to food for human consumption. As again approved in 1962 (Tentative Draft No. 7), it was expanded to include any product intended for intimate bodily use. The final version, adopted in 1964 (Tentative Draft No. 10) extended to all products.

40 The jurisdictions are classified in Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791, 795-98 (1966). To avoid lengthy repetition, only the following summary of the state of the law as of January 1, 1967, will be given here, with citations not included in the Minnesota article:


In three jurisdictions federal courts, guessing at state law, have concluded that the liability will be accepted: Indiana, Kansas, Vermont.

One court has intimated, without holding, that it will accept it: Wisconsin.

In five states it has been adopted by statute: Alabama, Arkansas, Colorado, Virginia, Wyoming. A statute was adopted in Georgia, but it has been repealed.

In two states the development has not gone beyond products for intimate bodily use: Hawaii, Louisiana (both federal decisions).

In six it has not gone beyond food: Nebraska, Puerto Rico, Utah (see Schneider v. Suhrmann, 8 Utah 2d 35, 327 P.2d 822 (1958)). There are food statutes in Montana, South Carolina, and Rhode Island (R.I. Laws 1960, tit. 6A, § 2-315). The Texas Courts of Civil Appeals are in disagreement, but the supreme court has not yet gone beyond food, although federal decisions have done so.

41 Delaware, Georgia (statute repealed), Idaho, Maine, Maryland, Massachusetts, New Hampshire, New Mexico (by implication in *Phares v. Sandia Lumber Co.*), 62 N.M. 90, 305 P.2d 367 (1956), North Carolina, South Dakota, West Virginia (dictum).

No law has been found in Alaska.

Among the first rush of cases was *Peterson v. Lamb Rubber Co.* in California, which forecast pretty clearly the future law of the state. An employee of a corporation was injured by the bursting of a grinding wheel made by the defendant. The District Court of Appeal discarded privity as in the food cases, and allowed recovery on the basis of a warranty. The opinion was vacated when the supreme court granted a hearing, but this did not prevent a federal court in New York from relying upon it as established California law in finding a warranty from the manufacturer of an airplane to a passenger. The California supreme court was unwilling to go so far, and instead dealt with the particular case by resorting to the expedient of stretching "privity" to the breaking point, on the basis that the sale was made to a corporation, and so it must necessarily have been intended that the wheel would be used by some employee.

Shortly after 1960 there were important developments in the way of theory. Although the writer was perhaps the first to voice it, the suggestion had always been sufficiently obvious that the "warranty," which was not really a warranty at all, and never had been anything more than a transparent device to achieve the desired objective, was not only unnecessary but undesirable. No one denied that the "warranty" was a matter of strict liability. No one disputed that in the absence of any contract between the parties, the liability must lie in tort. Why not, then, jettison the contract word, and talk merely of strict liability in tort, declared in its own right—a concept familiar enough to all lawyers in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, respondeat superior, defamation, and even misrepresentation? The American Law Institute, considering a first draft of a new section to be added to the Second Restatement of Torts, accepted this proposal, and finally emerged with a section that stated the strict liability without making use of "warranty" at all:

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44 For the benefit of any readers outside of California, it should be explained again that under the peculiar procedure in this state, a hearing by the supreme court is on appeal de novo from the trial court. The opinion of the District Court of Appeals is vacated and stricken from the record. It is not officially published, and becomes as if never written. It is considered a breach of etiquette for counsel to cite such an opinion, at least without stating that it is vacated.


§ 402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

A comment was added to this section to make it clear that there was nothing in the rule stated to prevent any court from characterizing it as a matter of “warranty”; but that if so, it must be recognized that such a warranty was of a very different kind from those usually found in the sale of goods, and that it would not be subject to the various contract rules which had grown up to surround such sales.

The first case in the country to adopt this approach was Greenman v. Yuba Power Prods., Inc., in California in 1962. The plaintiff was injured when a combination power tool, which could be used as a saw, drill, or wood lathe, proved to be defective and let fly a piece of wood, which struck him in the head. He brought action against the manufacturer, from whom he had not bought the tool. In the way of his recovery stood not only the California refusal to extend the “warranty” without privity beyond food, but also the plaintiff’s failure to give timely notice of the breach as required by the Uniform Sales Act. Justice Traynor met these obstacles by saying that this was not really a matter of warranty at all, but of strict liability in tort. The prior talk

48 Restatement (Second), Torts § 402A, comment m (1965).
50 “But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.” 1A Uniform Laws Ann. § 49 (1950); Cal. Civ. Code § 1769. This has now been replaced by § 2-607 of the Uniform Commercial Code.
51 “Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the
of "warranty" in the food cases, and the application of the definitions in the Sales Act, were explained away as a matter of convenience of the court, in that the definitions had provided appropriate standards to be adopted under the particular circumstances. The requirement of notice was not an appropriate one, and it would not be applied. Warranty rules developed in commercial transactions were not to govern.

To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which the plaintiff was not aware that made the Shopsmith unsafe for its intended use.

The Greenman case has now been followed by several decisions in California, and it was promptly accepted by other courts as the solution of their difficulties. Strict liability in tort already appears to be

liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort." 59 Cal. 2d at 63, 27 Cal. Rptr. at 701, 377 P.2d at 901.

"It is true that in many of these situations the court has invoked the sales act definitions of warranties (Civ. Code §§ 1732, 1735) in defining the defendant's liability, but it has done so, not because the statutes so required, but because they provided appropriate standards for the court to adopt under the circumstances presented." Id. at 61, 27 Cal. Rptr. at 699-700, 377 P.2d at 899-900.

Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by its defective products unless those rules also serve the purpose for which such liability is imposed." Id. at 63, 27 Cal. Rptr. at 701, 377 P.2d at 901.


sweeping the country. There is no reason to doubt that this is destined to rank as the leading case in the final phase of the long development of products liability.

In support of the decision, Justice Traynor made brief reference to two justifications, which had been advanced for a number of years by legal writers. One was that by placing the machine on the market the maker had impliedly represented that it was safe for use, and the plaintiff had purchased and used it in reliance upon that representation. The other was the policy argument, which Justice Traynor himself had advocated before, and which he was later to repeat, that


58 "Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do." 59 Cal. 2d at 64, 27 Cal. Rptr. at 701, 377 P.2d at 901.

59 "Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer, and distributed among the people as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection." Traynor, J., concurring in Escola v. Coca Cola Bottling Co., 2d Cal. 2d 453, 462, 150 P.2d 436, 441 (1944).

"The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Traynor, J., in Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 63, 27 Cal. Rptr., 697, 701, 377 P.2d 897, 901 (1963).

60 "The rationale of that [Greenman] case does not rest on the analysis of the financial strength or bargaining power of the parties to the particular action. It rests, rather, on the proposition that "The cost of an injury and the loss of time or health may
the losses due to defective products should be placed upon the manufacturer, for the reason that he is in the better position to insure against the liability, and to distribute it to the public by adding the cost of such insurance to the price of his product. This “risk distribution” argument has received little mention in the decisions outside of California, probably because it embarks upon a broad theory of “enterprise liability” from which the courts thus far have tended to shy away. As the Oregon court has pointed out, the argument would be no less applicable to an injury inflicted without fault by the manufacturer’s delivery truck. However that may be, the two justifications obviously rest upon quite different grounds; and it appears inevitable that the California courts will be confronted with a choice between them.

It would be easy to overestimate the importance of the shift of theory in the Greenman case. It is warranty that has gone overboard, and with it all idea that the plaintiff’s recovery is founded on a contract, as well as the statutory provisions of the Sales Act and the Uniform Commercial Code. In particular it is the defenses, such as lack of notice to the seller and disclaimers, which are out of the window. The substance of the liability itself remains unchanged. The cases of war-

be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.” [Citing the concurring opinion in the Escola case.]” Traynor, C.J., in Seely v. White Motor Co., 63 Cal. 2d 9, 18, 45 Cal. Rptr. 17, 23, 403 P.2d 145, 151 (1965).

61 Judge Wisdom approved it in Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963), and it received a line in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

62 “The rationale of risk spreading and compensating the victim has no special relevancy to cases involving injuries resulting from the use of defective goods. The reasoning would seem to apply not only in cases involving personal injuries arising from the sale of defective goods, but equally to any case where an injury results from the risk creating conduct of the seller in any stage of the production and distribution of goods. Thus a manufacturer would be strictly liable even in the absence of fault for an injury to a person struck by one of the manufacturer’s trucks being used in transporting his goods to market. It seems to us that the enterprise liability rationale employed in the Escola case proves too much and that if adopted would compel us to apply the principle of strict liability in all future cases where the loss could be distributed.

“Although we believe that it is the function of the judiciary to modify the law of torts to fit the changing needs of society, we feel that the judicial extension of the theory of strict liability to all cases where it is convenient for those engaged in commerce to spread the risk would not be advisable. If enterprise liability is to be so extended, there is a strong argument for limiting the victim’s measure of recovery to some scheme of compensation similar to that employed in workmen’s compensation. The legislature alone has the power to set up such a compensation scheme. The court cannot put a limit upon the jury’s verdict.” O’Connell, J., in Wights v. Staff Jennings, Inc., 241 Ore. 301, 309-10, 405 P.2d 624, 628-29 (1965).

63 See text accompanying note 135 infra.
ranty, whether on a direct sale between the parties or to the consumer without privity, are still important precedents in determining what it is that the seller has undertaken to deliver. 64

With warranty laid to rest, what remains in California for the consumer who is not in privity of contract with the defendant is the strict liability in tort, together with the old MacPherson liability for negligence. The latter may quite possibly support recovery in a few occasional cases 65 to which the strict liability does not extend. Because of the many uncertainties surrounding unfamiliar law, negligence is still commonly pleaded as an alternative basis for recovery, and so may be expected to appear in the decisions for a good many years to come; but there will obviously be few instances in which it will accomplish anything that the strict liability does not.

The rest of this discussion will consist of a review of the California decisions as to both negligence and strict liability, with some speculation as to what the court may do about questions with which it has not yet been faced. 66

What Products?

The negligent seller of any product is clearly liable for any foreseeable harm it may do to the ultimate user. Any idea of a possible limitation to products which, even if negligently made, are "inherently" or "imminently" dangerous disappeared in the nineteen-forties. 67 The recovery in a number of cases 68 of damage to property makes it clear that it is no longer required, if indeed it ever was, that the product be

64 "Although the rules of warranty frustrate rational compensation for physical injury, they function well in a commercial setting. . . . These rules determine the quality of the product the manufacturer promises and thereby determine the quality he must deliver." Traynor, C.J., in Seely v. White Motor Co., 63 Cal. 2d 9, 16, 45 Cal. Rptr. 17, 22, 403 P.2d 145, 150 (1965).

65 Perhaps, for example, as to products unavoidably dangerous (see text accompanying notes 78-96 infra), and injuries to bystanders (text accompanying notes 135-142 infra).

66 There is unavoidable duplication of much that is said in Prosser, The Fall of the Citadel, 50 Minn. L. Rev. 791 (1966).


foreseeably dangerous to human safety. The liability clearly extends
to the negligent design of a product, 69 and to failure to give a proper
warning of known dangers attendant upon its anticipated use. 70

So far as strict liability is concerned, there can be no doubt that it
applies to all kinds of products, 71 and that whatever restrictions there
may have been in the past as to food and drink, intimate bodily use, or
a high degree of danger, are now of purely historical interest. The later
decisions 72 apparently have given final interment to the rather meta-
physical distinction between the product sold and its container, which
formerly appeared as an element of confusion in the food cases. 73 There
are, however, two problems with which the California courts may yet
have difficulty.

One of these concerns products which are expected to be processed,
or otherwise altered, after they have left the seller and before they
reach the consumer. Because of the dearth of cases, the Restatement
has left the question open in a caveat. 74 By way of comment, it has
suggested that the problem is one of whether the responsibility for
discovery and remedy of the danger is shifted to the intermediate
handler, which will turn in part at least upon the reasonable expecta-
tion that he will take care of it. 75 The seller of raw pork, which is ex-
pected to be cooked before it is made into sausage, is certainly not to
be held liable when it is packed half raw into the casings. 76 On the
other hand, if raw coffee beans are sold to a buyer who is to do no
more than roast, grind and pack them, it cannot be supposed that the

who makes a product to the buyer's design is not liable to another when the product is
properly made and the injury is due to the design. Krentz v. Union Carbide Corp., 365
F.2d 113 (6th Cir. 1966).

National Indus., Inc., 92 Cal. App. 2d 542, 207 P.2d 110 (1949); Gall v. Union Ice Co.,

71 See cases cited note 56 supra.

72 Faucette v. Lucky Stores, Inc., 219 Cal. App. 2d 196, 33 Cal. Rptr. 215 (1963);
Vallis v. Canada Dry Ginger Ale, Inc., 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (1961);
Compare, as to direct sales, Vassallo v. Sabatte Land Co., 212 Cal. App. 2d 11, 27 Cal.
Rptr. 814 (1963); Lai Wun Chin Mock v. Belfast Beverages, Inc., 193 Cal. App. 2d

73 Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); Gordon

74 RESTATEMENT (SECOND), TORTS § 402A, caveat (2) (1965).

75 RESTATEMENT (SECOND), TORTS § 402A, comment p.

seller will escape the liability when they are contaminated with arsenic or some other poison. The nature of the defect and the degree of danger are no doubt important, and so is the relation of the parties; and undoubtedly there are some defects as to which the responsibility cannot be shifted. The maker of an automobile with a defective steering gear, or a leak in the hydraulic brake line, can have no hope of relief from his responsibility by reason of the fact that the car is sold to a dealer who is expected to service it, adjust the brakes, mount the tires, and the like, before it is ready for use.\(^7\)

The second, and more important, question concerns products that are in themselves unavoidably dangerous. Whiskey is such a product. It causes a variety of calamities, from cirrhosis of the liver to drunken driving, and its widely publicized evils were the foundation of a political party that is still in existence. Butter, according to the latest medical theory, is such a product; it deposits cholesterol in the arteries and brings on heart attacks. The whole pharmacopoeia is full of drugs, such as rabies vaccine,\(^8\) which are not safe and, in the present state of expert knowledge, cannot be made safe, no matter how carefully they are manufactured and administered. New and valuable ones are flooding continuously upon the market, whose dangers, as was the case with penicillin and cortisone, cannot be known until experience has demonstrated them. Where only negligence is in question, the answer as to such products is a simple one. The utility and social value of the thing sold clearly outweighs the known, and all the more so the unknown risk, and there is no negligence in marketing the product. But what is to be the rule as to strict liability? Does the maker of whiskey, butter, the drug, or even an automobile, become automatically responsible for all the harm that such things do in the world? It was undoubtedly to forestall such a possibility that the Restatement\(^9\) limited its new section to products “in a defective condition unreasonably dangerous to the user or consumer.”

It is here that the warranty cases, whether upon a direct sale to the user or without privity, furnish something of a guide. There are

\[\text{\footnotesize\[7\text{See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964), and text infra, at notes 174-78.}\]}

\[\text{\footnotesize\[8\text{In Carmen v. Eli Lilly & Co., 109 Ind. App. 76, 32 N.E.2d 729 (1941), recovery was denied because the plaintiff was informed of the risk and assumed it. As to the drug problem generally, see Rheingold, \textit{Products Liability—The Ethical Drug Manufacturer's Liability}, 18 Rutgers L. Rev. 947 (1964); Spangenberg, \textit{Aspects of Warranties Relating to Defective Prescription Drugs}, 37 U. Colo. L. Rev. 194 (1965); Notes, 63 \textit{Colum. L. Rev.} 515 (1963); 13 \textit{Stan. L. Rev.} 645 (1961); 65 \textit{Yale L.J.} 263 (1955).}\]}

\[\text{\footnotesize\[9\text{Restatement (Second), \textit{Torts} \textsection 402A (1965).}\]}

first of all the cases of defects regarded as "natural" to the product, or
as it is sometimes put, reasonably to be expected to be found in it, such
as a fishbone in fish served in a restaurant, or a cherry pit in a piece of
cherry pie, 80 for which all the courts consistently have refused to find
strict liability. There are other cases that have come to a similar con-
clusion as to such things as cement, with its unavoidable danger of
injury if it comes in contact with the person. 81 There are also numerous
cases dealing with allergies, in which the rule has been worked out
that if the product is reasonably safe for the normal user the seller
does not become liable for the harm to the abnormal one. 82 If he is, or

80 Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 59 P.2d 144 (1936) (chicken bone
in chicken pie); Silva v. F. W. Woolworth Co., 28 Cal. App. 2d 649, 83 P.2d 76 (1938)
turkey bone in roast turkey); Shapiro v. Hotel Statler Corp., 132 F. Supp. 891 (S.D.
421, 198 N.E.2d 309 (1964) (fishbone in fish chowder); Wieland v. C. A. Swanson
& Sons, 223 F.2d 26 (2d Cir. 1955) (chicken bone in chicken fricassee); Norris v. Pig 'N
in meat sandwich); Goodwin v. Country Club, 323 Ill. App. 1, 54 N.E.2d 612 (1944)
bone in creamed chicken); Brown v. Nebiker, 229 Iowa 1223, 294 N.W. 365 (1941)
(silver of bone in pork chops); Courter v. Dilbert Bros., 19 Misc. 2d 335, 186 N.Y.S.2d
334 (Sup. Ct. 1955) (piece of prune pit in prune butter); Adams v. The Great Atl.
& Pac. Tea Co., 251 N.C. 565, 112 S.E.2d 92 (1960) (crystallized grain of corn in corn
flakes); Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960) (small bit of shell
in fried oysters); Musso v. Picadilly Cafeterias, Inc., 178 So. 2d 421 (La. App. 1965)
(cherry pit in cherry pie); Hunt v. Ferguson-Paulus Enterprises, 415 P.2d 13 (Ore.
1966) (same).

Otherwise when the defect is not reasonably to be expected in the product sold.
Arnaud's Restaurant v. Cotter, 212 F.2d 883 (5th Cir. 1954) (piece of crab shell in
pompano en papillote); Paolinelli v. Dainty Foods Mfrs., Inc., 322 III. App. 586, 54
N.E.2d 759 (1944) (bone in noodle soup mix); Lore v. De Simone Bros., 12 Misc. 2d
174, 172 N.Y.S.2d 829 (Sup. Ct. 1958) (bone in sausage); Bonenberger v. Pittsburgh
Mercantile Co., 345 Pa. 559, 28 A.2d 913 (1942) (large piece of shell in oysters);
soup); Betelia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960) (chicken
bone in chicken sandwich).

81 Simmons v. Rhodes & Jamieson, Ltd., 46 Cal. 2d 190, 303 P.2d 26 (1955); Katz
v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1959); Baker v. Stewart
Sand & Material Co., 353 S.W.2d 108 (Mo. App. 1961); Imperial v. Central Concrete,
Inc., 1 App. Div. 2d 671, 146 N.Y.S.2d 307 (1955), aff'd mem. 2 N.Y.2d 939, 142
N.E.2d 209 (1957); Dalton v. Pioneer Sand & Gravel Co., 37 Wash. 2d 946, 227 P.2d

82 Zager v. F. W. Woolworth Co., 30 Cal. App. 2d 324, 86 P.2d 389 (1939);
Stanton v. Sears Roebuck & Co., 312 Ill. App. 496, 38 N.E.2d 601 (1943); Ross v.
Porteous, Mitchell & Braun Co., 136 Me. 118, 3 A.2d 650 (1939); Casagrande v. F. W.
Woolworth Co., 340 Mass. 552, 165 N.E.2d 109 (1960); Jacquot v. Wm. Filene's Sons
690, 67 N.E.2d 404 (1946); Barrett v. S. S. Kresge Co., 144 Pa. Super. 516, 19 A.2d
1940); Bennett v. Pilot Fods. Co., 120 Utah 474, 235 P.2d 525 (1951); see Hanrahan
should be, aware that a substantial number of the prospective consumers will be allergic to the ingredients, even though they represent only a small percentage of the total population, he is required to give due warning of the danger; and no doubt if the warning is not given the product is to be considered unsafe and there will be strict liability. But if it is given the defendant does not become liable merely because he has sold the thing at all.

The cases of hepatitis resulting from blood transfusions all have held that the supplier of the blood is not strictly liable on a warranty, usually on the rather shaky ground that the transfusion itself is not a sale but a "service." There are, however, a few cases of remote suppliers that have refused to find strict liability; and the stress laid in all of the decisions upon the unavoidability of the risk appears definitely to suggest that this is the real reason for the conclusion. There are even two or three late cases that have rejected strict liability as


85 It may be suggested that the hospital normally bills the blood as a separate item, and there is no more difficulty in finding a sale than in the case of food prepared in its kitchen.


88 See Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363, 367-68 (1965). In Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. App. 1966), the court found a sale of the blood, but refused to impose strict liability because the defect was unavoidable.


The drug in question was known as MER-29, the formula nowhere stated. It had
to one new and largely experimental drug, which proved to have such disastrous side-effects that it had to be withdrawn from the market.

The conclusion would be clearly indicated that, provided that the product, so far as is known at the time of the sale, is reasonably safe for its intended use, there is no liability for unavoidable dangers—if it were not for the state of confusion surrounding the question of lung cancer from smoking cigarettes. There are two federal decisions that have denied strict liability on the part of the manufacturer, on the ground that at the time of sale the danger could not have been known. There is one which, by a two-to-one vote, found not only an express warranty, but also an “implied warranty” to the consumer, that all cigarettes were safe to smoke. There is still another in which the Fifth Circuit first put the wrong question to the supreme court of Florida, and then, assuming what apparently has turned out to be the wrong answer to the right one, left the issue to a jury, which

been developed experimentally, and found effective in the reduction of cholesterol in the blood; but after it was marketed the reports were that it was causing eye cataracts, and it was withdrawn from the market. According to the A.T.L.A. News Letter for April, 1966, p. 101, more than 350 cases involving this drug were pending in New York City alone.

In accord, as to another drug is Cockran v. Brooke, 409 P.2d 904 (Ore. 1966). See, however, Stromsodt v. Parke-Davis & Co., 257 F. Supp. 991 (D.N.D. 1966), where the facts as to knowledge are not clear.

90 Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963) (Louisiana law); Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964) (Missouri law).

91 Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (Pennsylvania law). On a second trial the jury found for the defendant, and this was again reversed, for error in instructing on assumption of risk, when there was no evidence that plaintiff was aware of the risk. Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965).

92 Goodrich, J., concurred specially as to express warranty, but refused to go along with the implied warranty, and asked about other products, such as whiskey.

93 It was first held that a verdict for the defendant must be sustained, on the basis of a special answer of the jury, that at the time of sale the defendant could not reasonably have known that the cigarettes would cause cancer. Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962). Counsel then persuaded the court to put to the supreme court of Florida, the question whether the fact that the defendant could not have known the product was dangerous would prevent an implied warranty under Florida law.

“We conclude also that the question thus framed does not present for our consideration the issue of whether the cigarettes which caused a cancer in this particular instance were as a matter of law unmerchantable in Florida under the stated conditions, nor does it request a statement of the scope of warranty implied in the circumstances of this case.” Green v. American Tobacco Co., 154 So. 2d 169, 170 ( Fla. 1963). In a footnote the Florida court referred to “the problem of individual reactions to ordinarily harmless substances, discussion of which we deem unwarranted here because of the lack of Florida precedent and the limited issue posed in this nonadversary proceeding.” Id. at 170 n.2.


95 “The defendant argues, however, that even under that [Florida] definition, it
disposed of it by finding for the defendant. There the matter rests. It may be unfortunate that these cases dealt at this time with an issue about which there has been so much popular outcry as lung cancer from smoking; and one may at least question whether the last two decisions would have gone the same way if another product, such as whiskey or ether, had been involved.

What Defendants?

The negligence liability in California has been extended not only to the manufacturer of the whole product, but also to the maker of a component part and to an assembler of parts supplied by others. It has been applied to dealers, whether at retail or at wholesale, although it is obvious that due care will not require as much of the dealer as of the manufacturer. The liability has gone beyond sellers, and has been applied to one who merely does repair work on the

was entitled to a directed verdict because there was no evidence that Lucky Strike cigarettes were not "reasonably fit and wholesome." To products intended for human consumption, and the use of which may cause injury or death, the jury may properly apply a very strict standard of reasonableness." Green v. American Tobacco Co., 325 F.2d 673, 676 (5th Cir. 1963).


Thus the dealer is under no duty to inspect or test a product sold in a sealed container, or apparently safe. Gobin v. Avenue Food Mart, 178 Cal. App. 2d 345, 2 Cal. Rptr. 522 (1960); Toure v. Horton Mfg. Co., 108 Cal. App. 22, 219 Pac. 919 (1930); Sears Roebuck & Co. v. Marhenke, 121 F.2d 598 (9th Cir. 1941). He is, however, required to make a reasonable inspection of such a product as an automobile. Benton v. Sloss, 38 Cal. 2d 399, 240 P.2d 575 (1952).
chattel, or turns it over under a contract to have work done on it, and even to the builder of a building who sells it. A bailor for hire, or otherwise for his own benefit, is held to the full duty of reasonable care, including inspection to discover unknown defects. This state, however, appears to agree with numerous others, that a gratuitous lender or donor is not required to inspect, and is liable only for a failure to disclose dangers of which he is aware.

So far as strict liability is concerned, no case has been found in any jurisdiction which has imposed it upon anyone who was not engaged in the business of supplying goods of the particular kind. The Restatement of Torts has so limited the liability. When a housewife, on one occasion, sells a jar of jam to her neighbor, or the owner of an automobile trades it in to a dealer, the undertaking to the public and the justified reliance upon that undertaking on the part of the ultimate purchaser are conspicuously lacking.

Elsewhere warranty to the consumer has been imposed upon the maker of a component part, unchanged when assembled, and upon

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109 RESTATEMENT (SECOND), TORTS § 402A, and comment f (1965).

110 McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965); Putnam v. Erie
an assembler of parts,\textsuperscript{111} and it may certainly be anticipated that California will agree. In this state the warranty has been applied to dealers, whether at retail\textsuperscript{112} or at wholesale,\textsuperscript{113} and the reluctance to burden such sellers which has troubled a very few other courts\textsuperscript{114} has not been manifested. The strict liability in tort of the \textit{Greenman} case\textsuperscript{115} has been applied to a direct sale from the dealer to the plaintiff,\textsuperscript{116} and so, as to physical harm,\textsuperscript{117} has superseded the direct warranty. There are no California cases as yet as to non-sellers. In New Jersey the strict liability without privity has been imposed upon a lessor,\textsuperscript{118} and upon a defendant who constructed a building and sold it.\textsuperscript{119} It appears quite probable that these decisions will be accepted in California. The repairman has not yet put in an appearance anywhere, and there can only be speculation as to whether the line is to be drawn at one who has transferred some interest in the thing itself in the course of his business.


\textsuperscript{111} Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964); Ford Motor Co. v. Mathis, 322 F.2d 267 (5th Cir. 1963); King v. Douglas Aircraft Co., 159 So. 2d 105 (Fla. App. 1963). In Schwartz v. Macrose Lumber & Trim Co., 270 N.Y.S.2d 875 (Sup. Ct. 1966), one who initiated the manufacture of nails and supplied specifications and a container marked with his trade name was held liable on an implied warranty.


\textsuperscript{114} See, for example, Carter v. Hector Supply Co., 128 So. 2d 390 (Fla. 1961); Elmore v. Grenada Grocery Co., 189 Miss. 370, 197 So. 761 (1940); De Gouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (1930).

\textsuperscript{115} 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).


\textsuperscript{117} But apparently not as to pecuniary loss. See Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

\textsuperscript{118} Cintron v. Hertz Truck Leasing & Rental Serv., 45 N.J. 494, 212 A.2d 769 (1965). In Martinez v. Nichols Conveyor & Eng'r Co., 243 A.C.A. 1002, 52 Cal. Rptr. 842 (1966), it was assumed, without deciding, that this case would be followed.

What Plaintiffs?

The negligence liability clearly extends to any lawful user of the thing supplied; and on the basis of the unreasonable risk created it has been extended to all those who, as the Restatement now puts it, should be "expected to be endangered by its probable use," including a mere bystander, or a pedestrian in the path of a car. In short, to any foreseeable plaintiff.

The strict liability also applies in favor of any lawful user or consumer, in the broadest sense of the term, including the employees of the ultimate purchaser, the members of his family, his guests, and on the basis of the unreasonable risk created it has been extended to all those who, as the Restatement now puts it, should be "expected to be endangered by its probable use," including a mere bystander, or a pedestrian in the path of a car. In short, to any foreseeable plaintiff.

120 There has been no decision anywhere as yet as to an unlawful user, such as a thief or a trespasser. It appears unlikely that the liability would be found.


122 Restatement (Second), Torts § 395 (1965).


and his donee. A passenger in an airplane or an automobile has been held to be such a user; and so have a customer in a beauty shop to whose hair a dye was applied, a child injected with poliomyelitis vaccine, a shopper about to buy in a self-service market, a wife cooking rabbits for her husband’s dinner with no intention of eating them herself, and even a filling station mechanic doing work on a car.

This is clear enough. But bystanders and other non-users of the product present a more difficult problem, which raises a fundamental question as to the basis of the strict liability. If it rests upon a policy of risk distribution, which imposes upon the seller liability without fault for any harm done by a defective product, because he is in the better position to insure against it and to pass on the cost, then there is no reason whatever to distinguish between the pedestrian hit by an airplane passenger, a beauty shop customer, a child injected with poliomyelitis vaccine, a shopper about to buy in a self-service market, a wife cooking rabbits for her husband’s dinner with no intention of eating them herself, and even a filling station mechanic doing work on a car.


In Gutierrez v. Superior Court, 52 Cal. Rptr. 592 (Cal. App. 1966), it was alleged that plaintiff came in contact with a glass door in a passageway. The court assumed, on the basis of the Restatement, that he was required to be a “user or consumer,” but held that the allegation was insufficient to “shadow forth the semblance of a cause of action,” since it was “susceptible of the inference that plaintiff was using such doors.” Id. at 604.

135 See text accompanying notes 59-62 supra.
automobile and its driver—not is there any good reason to distinguish the man hit by the seller's delivery truck, or one injured on his premises. If, on the other hand, the theory is one of an implied representation of safety, made by placing the goods on the market, and of reliance upon such assurance, or on the created appearance of safety, then it is obvious that the pedestrian is not the man the seller has sought to reach, that no assurance has been given to him, and that he has relied upon nothing. All that he has done is to be there when the accident occurs; and in this he does not differ from any other plaintiff. Both justifications were stated in the Greenman case; and it would appear that a choice must be made between them.

In other jurisdictions it is the second of these theories that has, in general, been adopted; and the strict liability has thus far been rejected as to the non-user by most of the decisions. Last year, however, the Michigan court kicked over the traces, and found strict liability when a shotgun exploded and injured a bystander. This was followed by one case in a lower court in Connecticut, which is contradicted by another such court. More recently, the Fifth Circuit, which purported to apply Florida law, joined Michigan when a cabin cruiser blew up and set fire to other boats moored in the vicinity. It may still be too early to say whether these decisions represent a new breakthrough to the ultimate triumph of the “risk distribution” theory, or


138 Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (1965). There is also Webb v. Zern, 220 A.2d 853, 422 Pa. 215 (1966), where a bystander who was the brother of the purchaser was allowed to recover without discussion of his status. He had shortly before tapped the keg of beer which exploded, which may perhaps have made him a user; and in view of the Pennsylvania reliance on the Uniform Commercial Code as to “members of the household” in Miller v. Freitz, 422 Pa. 333, 221 A.2d 320 (1966), and Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963), it is not at all clear that any other bystander would recover.


140 Trojan Boat Co. v. Lutz, 358 F.2d 289 (5th Cir. 1966).
whether they are ultimately to be regarded only as isolated and sporadic departures. The only decision in California,\textsuperscript{141} where the plaintiff's road grader was hit by a defective automobile, went off on the clearly erroneous ground, which has been rejected by the supreme court,\textsuperscript{142} that there could be no strict liability for damage to property. This is certainly the major problem among the issues not yet determined in this state.

**What Damages?**

There can be no doubt that the negligence liability covers any kind of physical harm, including damage to the defective chattel itself, as where an automobile is wrecked by reason of its own bad brakes,\textsuperscript{143} as well as damage to any other property in the vicinity.\textsuperscript{144}

Personal injury has long dominated the strict liability cases, if only because it is the obvious consequence of bad food. The elimination of "warranty" in California has laid to rest any lingering doubt\textsuperscript{145} there might have been as to whether there could be recovery for wrongful death resulting from a breach of warranty.\textsuperscript{146} With the extension of

\textsuperscript{141}Brewer v. Reliable Automotive Co., 240 A.C.A. 175, 49 Cal. Rptr. 498 (1966). The only other California case remotely bearing on the question is Gutierrez v. Superior Court, 52 Cal. Rptr. 592 (Cal. App. 1966).

\textsuperscript{142}"Plaintiff contends that, even though the law of warranties governs the economic relations between the parties, the doctrine of strict liability in tort should be extended to govern physical injury to plaintiff's property, as well as personal injury. We agree with this contention. Physical injury to property is so akin to personal injury that there is no reason to distinguish them." Traynor, C.J., in Seely v. White Motor Co., 63 Cal. 2d 9, 19, 45 Cal. Rptr. 17, 24, 403 P.2d 145, 152 (1965).


\textsuperscript{145}Some courts formerly denied recovery, as in Sterling Aluminum Prods., Inc. v. Shell Oil Co., 140 F.2d 801 (8th Cir. 1944); S. H. Kress & Co. v. Lindsey, 262 Fed. 331 (5th Cir. 1919); Whiteley v. Webb's City, Inc., 55 So. 2d 730 (Fla. 1951); Goodwin v. Místicos, 207 Miss. 361, 42 So. 2d 397 (1949); Wadleigh v. Howson, 88 N.H. 365, 189 Atl. 865 (1937).

the rule to products other than food, physical harm to property entered the picture; and recovery has generally been allowed both for damage to the defective chattel itself and for harm to other property, as where a building is wrecked by the explosion of a gasoline stove. A late dictum of the California supreme court appears to make it quite clear that both lines of cases will be followed.

Pecuniary loss, mere pocketbook damage, offers greater difficulties. There is nothing inherent in the character of such loss to prevent its compensation with or without negligence; and the very first case in which the Washington court declared the strict liability as to food allowed recovery for loss of goodwill when a restaurant served bad meat to its customers. Strict liability has been found without any reluctance when the defective product is made into something else, so that there is an indirect kind of physical harm to other property. The Illinois court has found it by way of indemnity when the driver of a defective car incurred liability to others in a collision with a bus.

The troublesome question concerns the manufacturer's liability for mere loss on the bargain—which is to say that the thing the plain-


See note 142 supra. This appears to overrule Brewer v. Reliable Automotive Co., 240 A.C.A. 175, 49 Cal. Rptr. 498 (1966).


riff has purchased has less value than it was supposed to have. The difficulty is that the existence, and the extent, of any loss on the bargain must depend upon what the bargain is; and the bargain is made with the dealer from whom the plaintiff buys, and not with the manufacturer. The loss turns not only on the value of the thing received, but also upon the price paid and the dealer's undertaking. If he overprices the goods, or sells Grade 2 as Grade 1, there will be a loss on the bargain even if the product is not defective at all, and of course all the more so if it is—but how much of that loss is to be attributed to the manufacturer? What if the plaintiff trades in his old automobile on a new one, and is given an inadequate allowance? If the goods are sold "as is," there will be no loss on the bargain at all; and if the dealer misrepresents their quality, or adds a warranty of his own, such a loss may arise where it would not otherwise exist.

These arguments might be persuasive to the effect that a mere loss on the bargain, as distinguished perhaps from other and more consequential pecuniary loss, is a matter to be determined in the first instance between the plaintiff and the dealer; and that if the manufacturer is to be liable, it should be to the dealer, and in an amount which may be less, or conceivably even more, than the dealer's own liability. They undoubtedly underlie the refusal, in all of the decided cases, to allow recovery against the manufacturer for a loss on the bargain resulting from his negligence. There are not many cases dealing with strict liability, and "warranty," as might be expected, has introduced a note of confusion. Outside of California, four courts:

153 See Note, 19 Rutgers L. Rev. 715 (1965). A subsidiary question, of which no discussion has been found anywhere, is whether the damages would be determined by the tort, or "out-of-pocket" measure of the difference between the price paid and the value received, or the contract, or "benefit-of-the-bargain" measure of the difference between the value promised and the value received.

154 Some of this, at least, is said by Traynor, C.J., in Seely v. White Motor Co., 63 Cal. 2d 9, 17-18, 45 Cal. Rptr. 17, 23, 403 P.2d 145, 151 (1965).


156 Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965); see Smith v. Platt Motors, Inc.,
have found the strict liability, without much discussion, and four have refused to find it.

The question arose in California in Seely v. White Motor Co., where a truck made by the defendant and purchased by the plaintiff from a dealer proved to be defective and of inferior value. Chief Justice Traynor found liability on an express warranty made to the consumer, but on the basis of some of the arguments outlined above was unwilling to extend the strict liability in tort to the loss on the bargain. Justice Peters alone voiced vigorous disagreement, contending that the policy underlying the strict liability called for the inclusion of pecuniary loss as well as physical harm, that there was no basic difference in the nature of the damages, and that a "defective" product should be regarded as the same thing as an "unmerchantable" one. Although there are commentators who have agreed with this, the issue appears to have been settled in California as to loss on the bargain. It is, however, by no means clear, notwithstanding the broad language of Chief Justice Traynor as to "economic loss," that the question has been determined as to other forms of pecuniary damage of a consequential character.

Abnormal Use

The negligence cases have made it clear that the seller is entitled to expect a normal use of his product, and is not to be held re-

158 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).
159 See note 203 infra.
sponsible for injuries resulting from an abnormal one. Since the question is one of an unreasonably dangerous product, there is no reason to doubt that the same conclusion will be carried over to the strict liability. It has been held in California that there is no such liability when a portable elevator is altered by the plaintiff’s employer, or when a drug sold to be administered under the directions of a physician is used without them. The warning and instructions accompanying the product are important; and when a hair dye is used without a patch test in disregard of such instructions, there is no strict liability.

There are similar cases in other jurisdictions.

At the same time there are some relatively unusual uses of a prod-

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uct, such as standing on a chair, which the seller is required to anticipate, and against which he is required at least to give warning; and when such warning is not given, it has been held that the product is unsafe, and in a real sense defective, and that there is strict liability. It appears very probable, for example, that if a poisonous cleaning fluid is supplied for household use, a failure to give warning of its character, with instructions to keep it away from children, will result in strict liability.

**Intervening Negligence**

In the negligence cases the rule has developed that the failure of an intervening party, such as a dealer or an employer, to discover and remedy the defect in the product, or indeed any other foreseeable negligence, such as improper driving of an automobile with bad

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brakes,\textsuperscript{170} will not relieve the seller of liability. Sometimes this has been put as a matter of duty, sometimes as "proximate cause." At the same time it has been held in several cases\textsuperscript{171} that when the intermediate handler in fact discovers the danger, and nevertheless deliberately passes on the product without a warning, the responsibility is usually shifted to him, and the seller's liability is superseded. This in turn must be qualified by the holdings in a few other cases,\textsuperscript{172} that there are some products so highly dangerous, and so utterly unsuited for their intended use, that even such discovery of the danger and deliberate failure to disclose will not relieve the seller.

There is every reason to expect that the same conclusions, in general, will be reached when strict liability is in question.\textsuperscript{173} At this point, however, there enters the most extreme of all the decisions thus far handed down on strict liability, \textit{Vandermark v. Ford Motor Co.},\textsuperscript{174} in California in 1964. The case held that the obligation of the manufacturer of an automobile to the ultimate user was such that it could not delegate to its dealer responsibility for the final inspections, corrections and adjustments necessary to make the car ready for use, and that it could not escape the strict liability on the ground that the defect in

\begin{itemize}
\item \textsuperscript{170} Benton v. Sloss, 38 Cal. 2d 399, 240 P.2d 575. See generally, as to foreseeable intervening causes, Mosley v. Arden Farms Co., 26 Cal. 2d 213, 157 P.2d 372 (1945).
\item \textsuperscript{174} 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).
\end{itemize}
the delivered car was caused by something that the dealer "did or failed to do."\textsuperscript{175}

The implications of the decision are as yet a bit uncertain. Any idea that it might be concerned only with the somewhat peculiar relation between automobile manufacturers and their dealers disappears in the light of a subsequent decision of a District Court of Appeal,\textsuperscript{176} which applied the same rule to a concrete cutting machine in a case where no vestige of an agency relation could be found. Probably the decisions bear only upon the final "servicing" of products\textsuperscript{177} and do not apply, for example, to further processing by another manufacturer,\textsuperscript{178} or to the corner grocer who discovers that a can of meat is leaking and deliberately sells it. But as to such servicing, the rule apparently laid down is that the maker is to be held to the strict liability even where the dealer discovers the danger and fails to correct it, and perhaps even where it is his active negligence that creates it in the first instance.

\textbf{Express Representations}

The strict liability without privity may be enlarged by express representations made by the seller to the consumer. This idea originated in 1932 with the Washington case of \textit{Baxter v. Ford Motor Co.}, where literature distributed by the maker of an automobile stated that the glass in its cars was "shatter-proof," and the plaintiff was injured when a stone struck his windshield and shattered it. In its first opinion\textsuperscript{179} the court called the strict liability an express "warranty," but on a second appeal it shifted its ground to one of innocent misrepresentation,\textsuperscript{180} which is a form of "fraud" recognized by a considerable

\textsuperscript{175} "It appears in the present case that Ford delegates the final steps in that process to its authorized dealers. It does not deliver cars to its dealers that are ready to be driven away by the ultimate purchasers but relies on its dealers to make the final inspections, corrections, and adjustments necessary to make the cars ready for use. Since Ford, as the manufacturer of the completed product, cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects, it cannot escape liability on the ground that the defect in Vandermark's car may have been caused by something one of its authorized dealers did or failed to do." \textit{Id.} at 261, 37 Cal. Rptr. at 899, 391 P.2d at 171 (1964).


\textsuperscript{177} As to what this may include, see Milling, \textit{Henningssen and the Pre-Delivery Inspection and Conditioning Schedule}, 16 \textit{Rutgers L. Rev.} 559 (1962).


\textsuperscript{180} "Since it was the duty of appellant to know that the representation made to
The case has been followed in a good many other jurisdictions, and apparently is no longer questioned anywhere. Most of the other courts have gone upon the basis of express warranty; but very lately the Tennessee court, unwilling to overrule a decision that had refused to find a "warranty" as to loss on the bargain, reverted to the ground of misrepresentation. This seems clearly to be the preferable basis, since "warranty" without a contract has been no more of a blessing in cases of express language than where it is implied.

There are several California decisions, in which the strict liability has been found as to statements made in advertising, labels, or purchasers were true: otherwise, it should not have made them. If a person states as true material facts susceptible of knowledge to one who relies and acts thereon to his injury, if the representations are false, it is immaterial that he did not know they were false, or that he believed them to be true. . . . The court charged the jury that 'there is no proof of fraud in this case.' It has become almost axiomatic that false representations including a sale or contract constitute fraud in law." Baxter v. Ford Motor Co., 179 Wash. 123, 128, 35 P.2d 1090, 1092 (1934).


Two early decisions rejecting the Baxter case, Rakhlin v. Libby-Owens-Ford Glass Co., 96 F.2d 597 (2d Cir. 1938), and Channin v. Chevrolet Motor Co., 89 F.2d 889 (7th Cir. 1937), are now out of line with state law.


Maecherlein v. Sealy Mattress Co., supra note 186; Lane v. C. A. Swanson &...
and of course in a document supplied to a dealer to be passed on to the consumer. All of them have talked express warranty; and even the Greenman and Seely cases, which discarded the implied warranty in favor of strict liability in tort, continued to put the liability for express language on a warranty basis.

The limitations upon the rule seem to be fairly clear. The statement must be one of fact, and more than mere sales talk or "puffing," although such general assertions as that a detergent is "kind to the hands," or that a product is "Number 1" and "first class" have been found to carry implications of fact. It must be brought home to the defendant; and a dealer, merely by passing on the manufacturer's literature, does not necessarily adopt it as his own. It must be directed to the public, or at least intended to reach a class of persons which includes the plaintiff, and a representation made to one per-
son with no reason to expect that he will pass it on to another is not enough. The plaintiff must have relied on the assertion, not necessarily in making his purchase, but at least in making use of the product, and in the absence of such reliance the representation cannot be found to be a cause of his injury. Since the basis of the recovery is not that the defendant has sold the product, but that he has voluntarily assumed responsibility for his assertion about it, and he may obviously undertake responsibility for more than the safety of the product, the cases in other jurisdictions have held rather consistently that it extends to pecuniary loss, including loss on the bargain; and with this the Seely case in California has agreed.

in Corporation of Presiding Bishop v. Cavanaugh, 217 Cal. App. 2d 492, 32 Cal. Rptr. 144 (1963), a warranty to a building contractor was held to inure to the owner of the building. In Hayman v. Shoemake, 203 Cal. App. 2d 140, 21 Cal. Rptr. 519 (1962), and Southern California Enterprises v. D. N. & E. Walter & Co., 78 Cal. App. 2d 750, 178 P.2d 785 (1947), a warranty to a plaintiff who bought from another was held to be effective.


198 Cf. Connolly v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963), and Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946), where the plaintiff was not a purchaser at all.


Notice to the Seller

The requirement of the Uniform Sales Act,204 retained in a modified form by the Uniform Commercial Code,205 that the buyer must give notice to the seller of any breach of warranty within a reasonable time after he knows or ought to know of it, has clearly been intended to protect the seller against unduly delayed claims for damages.206 As applied to commercial transactions, it has been a sound rule, and buyers usually have been quite competent to protect themselves, and have given prompt notice as a matter of course. Where there is personal injury, and there is a remote seller, it has proved to be something of a booby-trap for the unwary. The injured consumer is seldom “steeped in the business practice which justifies the rule,”207 and at least until he has had legal advice it will not occur to him to give notice to one with whom he has had no dealings.208

When “warranty” was extended beyond direct sales, it was at first assumed that the notice requirement, along with the rest of the Sales Act, must apply. It was treated as effective in California, although there were only two decisions209 in which it prevented recovery. There was a marked attempt, however, to protect the injured consumer by holding that under the circumstances long delayed notice could be found to be timely;210 and in one federal case purporting to apply California law it was held that notice given even after suit was brought


205 Uniform Commercial Code § 2-607 (3).


207 James, Products Liability, 34 Tex. L. Rev. 44, 192, 197 (1955).


209 In Arata v. Tonegato, 152 Cal. App. 2d 837, 314 P.2d 130 (1957), and Title Ins. &Trust Co. v. Affiliated Gas Equip., Inc., 191 Cal. App. 2d 318, 12 Cal. Rptr. 729 (1961), it was held that the notice must be pleaded. In Jones v. Burgermeister Brewing Corp., 190 Cal. App. 2d 198, 18 Cal. Rptr. 311 (1961); Fauchet v. Lucky Stores, Inc., 219 Cal. App. 2d 196, 33 Cal. Rptr. 215 (1963); and Mchelefele v. Sealy Mattress Co., 145 Cal. App. 2d 275, 302 P.2d 331 (1956), it was assumed that notice was required, but timely notice was found to have been given.

could be found to be within a reasonable time.\textsuperscript{211} As early as 1923, however, an attack began in New York upon the notice requirement itself, with decisions holding that it was not intended to apply to personal injuries, and that it was against public policy so to apply it.\textsuperscript{212} In 1957 the Washington court, which has been in the vanguard of all this more than once, met the issue head-on by holding that the Sales Act did not require that notice be given to one with whom the plaintiff has had no dealings.\textsuperscript{213} With this several other courts have now agreed.\textsuperscript{214}

In the \textit{Greenman} case\textsuperscript{215} the issue was finally determined in California. Justice Traynor threw the requirement of notice out of the window, both as to express warranties in the defendant's brochure and as to strict liability in tort, saying that it was "not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt."\textsuperscript{216} A District Court of Appeal has applied this to a claim for pecuniary loss against a remote party on an express warranty.\textsuperscript{217} In the \textit{Vandermark} case\textsuperscript{218} the supreme court went even further, and held that there need not be notice of personal injury to the retail dealer from whom the plaintiff had bought his automobile, because the basis of the liability was not warranty, but strict liability in tort. The question remains open as to notice to the immediate seller of a claim for pecuniary loss, which remains in this state a matter of express warranty, and does not involve strict liability


in tort.\textsuperscript{219} If the courts of this state are to do away with the notice requirement of the Commercial Code, they may be hard put to find an explanation as to why it does not apply to the warranty,\textsuperscript{220} and some rather remarkable gymnastics may be called for. It would, however, be a venturesome matter to hazard any prediction that this will not occur.

**Disclaimers**

The Uniform Sales Act\textsuperscript{221} provided that any warranty, express or implied, could be disclaimed by the seller at the time of the sale; and this has been retained in a somewhat modified form in the Uniform Commercial Code.\textsuperscript{222} Commercially a disclaimer may not be at all an unreasonable thing, particularly where the seller does not know the quality of what he is selling, and the buyer is willing to take his chances. "As is" sales are common and reasonable enough. Even so a rather dangerous power of abuse is placed in the hands of the seller, which the courts have done what they could to obviate, either by construing away the disclaimer,\textsuperscript{223} or by finding that it was not brought

\textsuperscript{219} Seely v. White Motor Co., 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

\textsuperscript{220} The only possibility which occurs to the writer would be to hold, in accord with Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966), that the express "warranty" is in reality a matter of strict liability for innocent misrepresentation.


\textsuperscript{222} Uniform Commercial Code § 2-316.

home to the buyer, or in an extreme case by refusing to enforce it as a matter of "natural justice and good morals."

It is another matter to say that a consumer who buys at retail is to be bound by a disclaimer which he has never seen, and to which he could certainly not have agreed if he had known of it, but which defeats a duty imposed by the policy of the law for his protection. And when the disclaimer is handed to him with the product, all reality of consent to accede to it is lacking. Obviously if the opportunity is to remain open to the seller to frustrate that policy completely by adding such words as "Not Warranted in Any Way" to the label on the package, it may be anticipated that there will be those who take advantage of it.

It was to be expected that this would not be tolerated. In the leading Henningsen case the New Jersey court invalidated the standard automobile "warranty," in itself a disclaimer of almost all liability of any consequence, as a contract of adhesion not in reality involving any bargaining or freedom of consent, as unfair to the consumer, and as against the policy of the law in promoting human safety. Other courts have since agreed. The elimination of "warranty," and the recognition of outright strict liability in tort provided a way

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226 Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, (1960). Actually this was not the first such decision. In Jolly v. C. E. Blackwell & Co., 122 Wash. 620, 624, 211 Pac. 748, 750 (1922), it had been held that "since a specific warranty as to personal property cannot run with the thing itself, we see no reason why a disclaimer of warranty should run with the thing." Cf. Sokoloski v. Splann, 311 Mass. 203, 40 N.E.2d 874 (1942). In Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959), an automobile manufacturer's disclaimer was rejected without discussion.


around the statutes, and afforded an additional justification for refusing to enforce the manufacturer’s disclaimer. In the Vandermark case\textsuperscript{230} the California court applied this even to a claim for personal injury on a direct sale from a dealer to the plaintiff. Again the question remains open as to pecuniary loss,\textsuperscript{231} which in this state is still a matter of warranty, and not strict liability in tort. There is language in the Seely case\textsuperscript{232} which indicates that where physical safety is not involved a sale “as is,” for example of a used automobile, will still be effective. On the basis of nothing more than an opinion that it should be, and that no overriding policy should prevent a seller from refusing to accept responsibility for the value of what he sells, it might be predicted that this will be the conclusion.

\textbf{Contributory Negligence}

The language of the courts is in a state of flat contradiction as to whether contributory negligence is a defense to strict liability for a defective product. Nearly all of the decisions have involved warranty, either upon a direct sale or without privity. It has been said many times that contributory negligence is never a defense to an action for breach of warranty. It has been said more often that it is always a defense. The confusion, however, is a superficial one of words and definition only, and is merely part of the general murk that has surrounded “warranty.” If the substance of the cases is looked to, rather than their language, they fall into an entirely consistent pattern.

If the plaintiff’s negligence consists only in a failure to discover the danger involved in the product,\textsuperscript{233} or to take precautions against the

\begin{footnotes}
\footnote{231}{See text accompanying notes 158-160 supra.}
\footnote{232}{“It was only because the defendant in that case [Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965)] marketed the rug as Grade \#1 that the court was justified in holding that the rug was defective. Had the manufacturer not so described the rug, but sold it ‘as is,’ or sold it disclaiming any guarantee of quality, there would have been no basis for recovery in that case. Only if someone had been injured because the rug was unsafe for use would there have been any basis for strict liability in tort.” Seely v. White Motor Co., 63 Cal. 2d 9, 17-18, 45 Cal. Rptr. 17, 23, 403 P.2d 145, 151 (1965).}
\end{footnotes}
possibility of its existence, as in the case of negligent driving on a defective tire.\textsuperscript{234} It is clearly no defense to the strict liability. Thus if the plaintiff drinks a beverage without discovering that it is full of broken glass,\textsuperscript{236} his failure to exercise due care in doing so does not relieve the defendant. On the other hand, the kind of negligence which consists of proceeding voluntarily to encounter a known unreasonable danger, and which overlaps the defense of assumption of risk, will relieve the defendant on either ground.\textsuperscript{236} If the plaintiff continues to operate a washing machine after discovery that the wringer is danger-

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\textsuperscript{236} Barefield v. LaSalle Coca-Cola Bottling Co., 370 Mich. 1, 120 N.W.2d 786 (1963).

ously defective,\textsuperscript{237} or negligently drives on a tire that he knows to be unsafe,\textsuperscript{238} he cannot recover. These rules are quite consistent with those worked out as to other strict liability for animals and for abnormally dangerous activities.\textsuperscript{239}

The few California cases support this distinction, denying the recovery where the plaintiff was aware of the danger,\textsuperscript{240} and allowing it where he was not.\textsuperscript{241} There is nothing in the outright strict liability in tort to call for any change in the rules as to warranty.\textsuperscript{242} It is always possible, however, that the plaintiff's negligence may amount to an abnormal use of the product, and so relieves the defendant, not on the basis of contributory negligence, but on that of proximate cause.\textsuperscript{243}

\textbf{Proof}

The proof of strict liability for a defective product does not appear to differ in any significant respect from the proof of negligence.\textsuperscript{244} In a negligence case the plaintiff has the initial burden of establishing three things. The first is that he has been injured by the product. This is no less true of strict liability. It is not enough to show that the plaintiff ate the defendant's food and became ill, so long as he ate other things, and

\begin{footnotesize}
\begin{enumerate}
\item Youtz v. Thompson Tire Co., 46 Cal. App. 2d 672, 116 P.2d 636 (1941).
\item See Paossen, Torts § 78, at 539-40 (3d ed. 1964).
\item Crane v. Sears Roebuck & Co., supra note 241.
\item A good case on this is Swain v. Boeing Airplane Co., 337 F.2d 940 (2d Cir. 1964), where defendant withdrew the defense of contributory negligence because it could not prove which decedent was flying the plane. It was held, nevertheless, that the plaintiff must sustain his burden of showing that the crash was due to a defect in the plane rather than to negligent flying. A similar case is Preston v. Up-Right, Inc., 52 Cal. Rptr. 679 (Cal. App. 1966). See also Dallison v. Sears Roebuck & Co., 313 F.2d 343 (10th Cir. 1963) (smoking in bed); Rasmus v. A. O. Smith Corp., 158 F. Supp. 70 (N.D. Iowa 1958) (plaintiff's storage of high-moisture content corn in a bin held to be the proximate cause of damage to the corn); Fredendall v. Abraham & Straus, Inc., 279 N.Y. 146, 18 N.E.2d 11 (1938) (carbon tetrachloride used in enclosed space); Gardner v. Coca-Cola Bottling Co., 267 Minn. 505, 127 N.W.2d 557 (1964) (opening bottle in wrong manner).
\item Particularly helpful on this are Keeton, Products Liability—Proof of the Manufacturer's Negligence, 49 Va. L. Rev. 675 (1963); Keeton, Products Liability—Problems Pertaining to Proof of Negligence, 19 Sw. L.J. 26 (1965).
\end{enumerate}
\end{footnotesize}
others who ate the food were not made ill. The second is that the injury occurred because the product was defective; and this also is no less true of strict liability. Proof that an airplane has crashed does not make out a case against the manufacturer, where there is no evidence to show that it was not due to negligent flying. The third is that the defect existed when the product left the hands of the defendant; and this again is no less true of strict liability. When meat has been exposed to the air for a considerable time by a dealer, and might have spoiled in the process, the burden of proof against the original supplier of the meat is not sustained. The elimination of negligence as the basis of recovery does not relieve the plaintiff of the necessity of making out his case as to all of these three elements.

Once the plaintiff has proved all three, all trial lawyers know that the plaintiff usually recovers against the manufacturer for negligence. This is because the doctrine of res ipsa loquitur ordinarily allows the case to go to the jury, and the jury is permitted to, and usually does, infer that some negligence of the defendant was responsible for the defect. There have been, it is true, occasional cases in which the court has refused to permit the inference to be drawn, or the defendant's

proof of due care has been found to be so conclusive as to call for a directed verdict,\textsuperscript{250} and even instances in which the jury has found that there is no negligence.\textsuperscript{251} Strict liability eliminates such cases; but they represent such a minor fraction of the total number that the alarm voiced by a good many manufacturers over the prospect of a vast increase in liability appears to be quite unfounded.

The difficult problems are those of proof by circumstantial evidence, particularly as to the last two elements. Strictly speaking, and since proof of negligence is not in issue, res ipsa loquitur has no application to strict liability; but the inferences which are the core of the doctrine remain, and are no less applicable.\textsuperscript{252} The plaintiff is not required to exclude all other possibilities, and so prove his case beyond a reasonable doubt. As on other issues in civil cases, it is enough that he makes out a preponderance of probability. It is enough that the court cannot say that reasonable men on the jury could not find it more likely than not that the fact is true.\textsuperscript{253}

The mere fact of an accident, as where an automobile goes into the ditch, does not make out a case that the product was defective;\textsuperscript{254} nor

\textsuperscript{250} See, for example, Nichols v. Continental Baking Co., 34 F.2d 141 (3d Cir. 1929); Swenson v. Purity Baking Co., 183 Minn. 289, 236 N.W. 310 (1931); Smith v. Salem Coca-Cola Bottling Co., 92 N.H. 97, 25 A.2d 125 (1942).

\textsuperscript{251} See, for example, Weggeman v. Seven-Up Bottling Co., 5 Wis. 2d 503, 93 N.W.2d 467 (1959).


does the fact that it is found in a defective condition after the event, when it appears equally likely that it was caused by the accident itself. The addition of other facts, tending to show that the defect existed before the accident, may make out a case, and so may expert testimony. So likewise may proof that other similar products made by the defendant met with similar misfortunes, or the elimination of other causes by satisfactory evidence. In addition, there are some


accidents, as where a beverage bottle explodes or even breaks while it is being handled normally, as to which there is human experience that they do not ordinarily occur without a defect. As in the cases of res ipsa loquitur, the experience will give rise to the inference, and it may be sufficient to sustain the plaintiff’s burden of proof.

Tracing the defect in the product into the hands of the defendant confronts the plaintiff with greater difficulties. There is first of all the question of lapse of time and long continued use. This in itself will never prevent recovery where there is satisfactory proof of an original defect; but when there is no such definite evidence, and it is only a matter of inference from the fact that something broke or gave way, the continued use usually prevents the inference that more probably than not the product was defective when it was sold. The seller certainly does not undertake to provide a product that will never wear out. In common with a few other jurisdictions, California


262 Hale v. Depsoli, 33 Cal. 2d 228, 201 P.2d 1 (1948); Pryor v. Lee C. Moore Corp., 262 F.2d 673 (10th Cir. 1958) (fifteen years); International Derrick & Equip. Co. v. Croix, 241 F.2d 216 (5th Cir. 1957) (seven years); Fredericks v. American Export Lines, 237 F.2d 450 (2d Cir. 1955) (3½ years); Reed & Barton Corp. v. Maas, 73 F.2d 359 (1st Cir. 1934) (seven years); Hartleib v. General Motors Corp., 10 F.R.D. 380 (N.D. Ohio 1950) (two or three years); Darling v. Caterpillar Tractor Co., 171 Cal. App. 2d 713, 341 F.2d 23 (1959) (three years); Okker v. Chrome Furniture Mfg. Corp., 26 N.J. Super. 285, 97 A.2d 699 (1953) (three years).


has drawn a distinction between moving and stationary parts, which are not so likely to fail with wear, and has permitted the inference in the case of the latter.\textsuperscript{266}

With continued use eliminated as an obstacle, the plaintiff must further eliminate his own improper conduct as an equally probable cause of his injury.\textsuperscript{267} When he has done this, and has accounted for other possible causes, he has made out a sufficient case of strict liability for the defect against the dealer who has last sold the product. But the very presence of the latter in the picture means that he too must be eliminated before the case is established against the manufacturer. When on the evidence it appears equally probable that the defect has developed in the hands of the dealer, the plaintiff has not made out a case of strict liability, or even negligence, against any prior party.\textsuperscript{268}

This has meant, in a good many cases, that when a beverage bottle breaks or explodes the case against the manufacturer is not established until the intermediate handling has been accounted for.\textsuperscript{269} There need not be conclusive proof, and only enough is required to permit a finding of the greater probability.\textsuperscript{270} Since the plaintiff nearly always finds it difficult to obtain evidence as to what has happened to the bottle along the way, the courts have been quite lenient in finding the evidence sufficient. He is not required to do the impossible by accounting for every moment of the bottle's existence since it left the bottling plant;\textsuperscript{271} and it is enough that he produces sufficient evidence of careful

\textsuperscript{266}Darling v. Caterpillar Tractor Co., 171 Cal. App. 2d 713, 341 P.2d 23 (1959) (inspection cover on deck plate of bulldozer broke after three years).

\textsuperscript{267}Honea v. City Dairy, Inc., 22 Cal. 2d 614, 140 P.2d 369 (1943).


\textsuperscript{271}Macon Coca-Cola Bottling Co. v. Chancey, 101 Ga. App. 166, 112 S.E.2d 811, aff'd, 216 Ga. 61, 114 S.E.2d 517 (1960); Zarling v. La Salle Coca Cola Bottling Co., 2 Wis. 2d 596, 87 N.W.2d 263 (1958).
handling in general, and of the absence of unusual incidents, to permit reasonable men to draw the conclusion.\textsuperscript{272}

If the product reaches the plaintiff in a sealed container, with the defect on the inside, the inference against the manufacturer is much more easily drawn, and may even be conclusive.\textsuperscript{273} The foreign object in the bottled beverage is the typical case.\textsuperscript{274} Negligence on the part of any intermediate handler is almost necessarily ruled out. There may still be the possibility of intentional tampering; and there are decisions which have held that the plaintiff must still disprove it,\textsuperscript{275} particularly where the bottle has been exposed to meddling by irresponsible persons,\textsuperscript{276} or a charged beverage is found to be "flat" when it is opened.\textsuperscript{277} But in the absence of any such special reason to look for it, the considerable majority of the later cases have held that intentional tampering is so unusual, and so unlikely, that the probabilities are against it, and the plaintiff is not required to eliminate the possibility.\textsuperscript{273}


\textsuperscript{275} Ashland Coca-Cola Bottling Co. v. Byrne, 258 S.W.2d 475 (Ky. 1953); Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S.W.2d 721 (1942); Jordan v. Coca-Cola Bottling Co., 117 Utah 573, 218 P.2d 660 (1950).


\textsuperscript{278} Coca-Cola Bottling Co. v. Negron Torres, 255 F.2d 149 (1st Cir. 1958); Miami Coca-Cola Bottling Co. v. Todd, 101 So. 2d 34 (Fla. 1958); Le Blanc v. Louisiana Coca-Cola Bottling Co., 221 La. 191, 60 So. 2d 873 (1952); Keller v. Coca-Cola Bottling Co., 214 Ore. 654, 330 P.2d 346 (1958); see Tafoya v. Las Cruces Coca-Cola Bottling
There have been sporadic attempts to aid the plaintiff in his difficulty of proof in cases where multiple defendants were joined. As to both negligence and warranty, the Kansas court\(^{279}\) has shifted the burden of proof as to tracing the defect to the shoulders of the dealer and the manufacturer; and Pennsylvania has done the same as to negligence.\(^{280}\) The reasoning in these cases as to the meaning of "exclusive control," where it is obviously not exclusive as to either party, is not very convincing. They are quite evidently deliberate decisions of policy, seeking to compensate the plaintiff first, and to leave the defendants to fight out the question of responsibility among themselves. The same is to be said of a federal case out of Texas,\(^{281}\) where the burden was shifted to the maker of dynamite and the maker of the cap attached to it, on the ground that they were cooperating to make a combination product; and one from New York\(^{282}\) where the same thing was done as to the maker of an altimeter and the manufacturer of a plane in which it was installed.

So far as appears, this is not yet the law of California. Neither the decision in *Summers v. Tice*,\(^{283}\) where the burden of proof as to causation was shifted to two defendants after both of them had been proved to be negligent in shooting in the direction of the plaintiff, nor *Ybarra v. Spangard*,\(^{284}\) where the burden was placed upon the multiple members of the medical profession engaged in a surgical operation, on the ground of the special responsibility assumed toward the unconscious plaintiff,\(^{285}\) is authority for anything more than the proposition that there are negligence cases in which, for special reasons of policy, two or more defendants may be required to exonerate themselves. In the only products liability decision\(^{286}\) in California, involving a manu-

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\(^{283}\) 33 Cal. 2d 80, 199 P.2d 983 (1949).

\(^{284}\) 25 Cal. 2d 466, 154 P.2d 877 (1944). The outcome was judgment against all of the defendants because they were unable, or unwilling, to explain the event. 93 Cal. App. 2d 43, 203 P.2d 445 (1949).


manufacturer, a wholesaler and a retailer, the court refused to apply the Ybarra case on the ground that the special responsibility was lacking, and left the burden of proof upon the plaintiff.

Also of obvious importance in this connection is the decision in the Vandermark case,\textsuperscript{287} holding that the manufacturer cannot delegate to the dealer the responsibility for the final "servicing" of his product. Where this is applied, and any negligence of the dealer in such "servicing" is to be charged to the manufacturer, the plaintiff's proof against the latter is obviously greatly facilitated. Except in this respect, there appears to be nothing in any of the strict liability cases to indicate that the problems of proof will be dealt with in any different manner than in those involving only negligence.