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The Fall of the Citadel
(Strict Liability to the Consumer)

Continuing his study of the law of products liability, the author details the recent explosion in the field.

William L. Prosser*

The fall of a citadel is a dramatic moment. The stronghold has long been invested; the siege has endured for months. Parallels have been dug and gun emplacements mounted; and a grim cannonade has made breaches in the great wall, behind which the defenders have erected demilunes, so that the struggle goes on. There is a final heavy bombardment; the assault goes forward against the main breach, and the storming party ascends over the corpses of the slain. There is a desperate hour of hand-to-hand combat, and then the moment when the defense falters. The line wavers; the break becomes a retreat, the retreat a rout. The rest is the story of sack and slaughter, of riot, rape and rapine, that has added an evil luster to the names of Magdeburg and Badajoz, along with ancient Troy.

In the field of products liability, the date of the fall of the citadel of privity can be fixed with some certainty. It was May 9, 1960, when the Supreme Court of New Jersey announced the decision in *Henningsen v. Bloomfield Motors, Inc.*1 The leaguer had been an epic one of more than fifty years. The sister fortress of negligence liability had fallen, after an equally prolonged defense, in 1916.2 Much sapping and mining had finally carried a whole south wing of the strict liability citadel, involving food and drink; and further inroads had been made into an adjoining area of products for what might be called intimate bodily use, such as hair dye and cosmetics.3 Heavy artillery had made no less

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than eight major breaches in the main wall, all of them still stoutly defended.\footnote{4}

Then came the \textit{Henningsen} case. Chrysler made an automobile and sold it to the dealer Bloomfield. Bloomfield resold it to Hen-

\footnote{4. Of all the decisions against manufacturers which attack privity and appear to take the step from food to mechanical products, none has the untainted basis of \textit{Henningsen}. The most frequently cited precursor of \textit{Henningsen}, \textit{Di Vello v. Gardner Machine Co.}, [46 Ohio Op. 161, 102 N.E.2d 289 (C.P. 1951)] \ldots may well have been overruled. [\textit{Wood v. General Electric Co.}, 159 Ohio St. 273, 112 N.E.2d 8 (1953)]. \textit{Spence v. Three Rivers Builders & Masonry Supply} [353 Mich. 120, 89 N.W.2d 873 (1958)] held a manufacturer of defective cinder blocks strictly liable to their ultimate user, but conveniently found that the proofs also showed the manufacturer to have been negligent. In \textit{Continental Copper & Steel Indus. v. "Red" Cornelius} [104 So. 2d 40 (Fla. App. 1958)], \textit{B. F. Goodrich Co. v. Hammond} [269 F.2d 501 (10th Cir. 1959)] and \textit{Jarnot v. Ford Motor Co.}, [191 Pa. Super. 422, 156 A.2d 568 (1959)], the plaintiffs, respective purchasers of electric cable, tires and an automobile, all recovered against the distant manufacturer on a warranty theory, but though no privity was present, they, unlike Mrs. Henningsen, stood firmly within the chain of title. The salutary result in the \textit{Jarnot} case was probably an accident, the court having patentely misconstrued the cases on which it relied. \textit{Beck v. Spindler} [256 Minn. 548, 99 N.W.2d 670 (1959)] permitted the purchaser of a poorly constructed house trailer to recover against the manufacturer but, in an unusual set of facts, seemed to regard the manufacturer a party to the sale and further found that an express, as well as an implied, warranty had been breached. The pre-\textit{Henningsen} picture is completed with the strange turn of events in \textit{Peterson v. Lamb Rubber Co.} [54 Cal. 2d 339, 558 P.2d 575, 5 Cal. Rptr. 868 (1960)] and \textit{Hinton v. Republic Aviation Corp.} [180 F. Supp. 31 (S.D.N.Y. 1959)]. The former case, at the intermediate appellate level [343 P.2d 261 (Cal. Dist. Ct. App. 1959)], discarded the privity requirement as against the manufacturer of a defective grinding wheel. However, the decision was promptly vacated by the California Supreme Court, the case to be heard by them de novo. Under somewhat unusual California procedure, the vacated opinion of the District Court of Appeals becomes as if never written, is not officially reported and may not thereafter be referred to without a material breach of California legal etiquette. These proscriptions surrounding the vacated opinion, however, did not deter a United States District Court in the \textit{Hinton} case, some months later, from allowing recovery in warranty without privity from an aircraft manufacturer. The Southern District of New York, applying California law, relied on the vacated \textit{Peterson} decision. Suffice it to say that, subsequent to \textit{Hinton}, the California Supreme Court in \textit{Peterson} found privity to exist on its facts and apparently restored the privity requirement to California law in cases involving mechanical products.}
ningsen. While Henningsen's wife was driving it, "something went wrong" with the steering gear, and the car turned sharply to the right into a wall. Mrs. Henningsen was injured and brought action against both Chrysler and Bloomfield. In a long and thorough opinion, much the best theretofore written on the subject, the court held both defendants liable, without any showing of negligence and without privity of contract. The decision was buttressed with a good many words about modern mass marketing and demands created through advertising media, and the necessity of protecting the consumer by a rule that

the burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur. . . . According-ly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate pur-chaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.

The citadel fell. The method of storming it was not unlike that of Cardozo in *MacPherson v. Buick Motor Co.* long since, where the negligence exception as to "inherently" or "imminently" dangerous products was expanded to swallow up the rules as to all products. Now the special rule as to food and drink was expanded to engulf the rest.

We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.

What has followed has been the most rapid and altogether

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5. 32 N.J. at 379, 161 A.2d at 81.
6. Id. at 384, 161 A.2d at 84.
8. 32 N.J. at 388, 161 A.2d at 83.
9. The speed of transition is indicated by the fact that § 402A of the second Restatement of Torts was adopted by the American Law Institute three times. As originally drawn (Tent. Draft No. 6, 1961), it was limited to "food for human consumption." Development progressed so rapidly that a revised section (Tent. Draft No. 7, 1962) was adopted, which included other products "for intimate bodily use." Two years later the Institute approved the again revised section (Tent. Draft No. 10, 1964), applying to "any product."

The only comparable rapid overturn has been the change in the law as to prenatal injuries, following Bonbrest v. Kotz, 65 F. Supp. 188 (D.D.C. 1946). See Prosser, *Torts* § 56 (3d ed. 1964). The products liability change
spectacular overturn of an established rule in the entire history of the law of torts. Other courts, in steadily increasing numbers, fell into line. Six years after the *Henningsen* decision, the state of the law in the various jurisdictions may be summarized as follows: Eighteen of them accept the strict liability, without negligence and without privity, as to the manufacturers of all types of products: Arizona, California, Connecticut, the District of Columbia, Florida, Illinois, Iowa, Kentucky, is obviously of much greater social significance.


Michigan, 18 Minnesota, 19 Missouri, 20 New Jersey, 21 New York, 22 North Dakota, 23 Ohio, 24 Oregon, 25 Tennessee, 26 and Washington. 27


17. Dealers Transp. Co. v. Battery Distrib. Co., CCH Product Liab. Rptr. ¶ 5406 (Ky. June 4, 1965) (acetylene tank). For reasons unknown to the writer, the case has not been otherwise reported for several months.


Six more have adopted it by statute: Alabama, Arkansas, Colorado, Georgia, Virginia, and Wyoming. In four others, federal courts, guessing at state law, have concluded that the rule would be accepted: Indiana, Kansas, Texas, and Vermont. Two


more have intimated, in cases decided on other grounds, that a change in their law is imminent: Nevada and Wisconsin. Pennsylvania has accepted the rule with a limitation as to the plaintiffs it protects. In two states the decisions have not yet gone beyond products for intimate bodily use: Hawaii and Louisiana. In six they have not yet gone beyond food and drink: Mississippi, Montana, Nebraska, Oklahoma, Puerto Rico, and South Carolina.

In ten states there are decisions, not yet overruled, which have rejected all strict liability without privity of contract: Dele-

43. See Biedenharn Candy Co. v. Moore, 184 Miss. 721, 186 So. 628 (1939); Curtiss Candy Co. v. Johnson, 168 Miss. 426, 141 So. 762 (1933); cf. Coca Cola Bottling Works v. Simpson, 158 Miss. 390, 130 So. 479 (1930); Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 805 (1927).
ware.\textsuperscript{49} Idaho,\textsuperscript{50} Maine,\textsuperscript{51} Maryland,\textsuperscript{52} Massachusetts,\textsuperscript{53} New Hampshire,\textsuperscript{54} North Carolina,\textsuperscript{55} Rhode Island,\textsuperscript{56} South Dakota,\textsuperscript{57} and West Virginia.\textsuperscript{58} No new state has joined this group since 1935; and except for federal decisions bound by then existing state law,\textsuperscript{59} only North Carolina and Rhode Island have reiterated their position since the \textit{Henningsen} case. To complete the list, no law has been found in Alaska, New Mexico, or Utah. In evaluating this last pocket of resistance holding out within the recesses of the citadel, note must be taken of the fact that most of these states\textsuperscript{60} have now adopted the Uniform Commercial Code, which provides in section 2-318 that

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a

\textsuperscript{49} See Barni v. Kutner, 45 Del. 550, 76 A.2d 801 (1950).  
\textsuperscript{50} See Abercrombie v. Union Portland Cement Co., 35 Idaho 231, 205 Pac. 1118 (1922).  
\textsuperscript{51} Pelletier v. Dupont, 124 Me. 269, 128 Atl. 186 (1925).  
\textsuperscript{58} Only a dictum has been found. See Burgess v. Sanitary Meat Mkt., 121 W. Va. 605, 5 S.E.2d 785, 6 S.E.2d 254 (1939).  
guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

This at least loosens the shackles of privity to some small extent. The comment on the section expressly declares it to be neutral, and not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. It has been construed not to prevent the expansion; and it is only in Pennsylvania that it has had any limiting effect.

The reasons offered for this explosion of the present law have been those carried over from the food cases. The public interest in human safety requires the maximum possible protection for the user of the product, and those best able to afford it are the suppliers of the chattel. By placing their goods upon the market, the suppliers represent to the public that they are suitable and safe for use; and by packaging, advertising and otherwise they do everything they can to induce that belief. The middleman is no more than a conduit, a mere mechanical device, through which the thing is to reach the ultimate user. The supplier has invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he made no contract with the consumer, or that he used all reasonable care. It is already possible to enforce strict liability by a series of warranty actions, by the consumer against the retailer, who recovers from the distributor, and so on back to the manufacturer; but this is an expensive, time consuming and wasteful process. What is needed is a shortcut which makes any supplier in

61. Comment 3:
   This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.


the chain liable directly to the user. The "risk distributing" theory—the supplier should be held liable because he is in a position to insure against liability and add the cost to the price of his product—has been an almost universal favorite with the professors; but it has received little mention in the cases, and still appears to play only the part of a makeweight argument.

WARRANTY AND STRICT LIABILITY

The concept initially carried over from the food cases to other products was that of strict liability upon a warranty. This originated in Mississippi in 1927, in the form of a warranty running with the goods, by analogy to a covenant running with the land, as a substitute for an infinite variety of highly ingenious and equally fictitious theories of third party beneficiary contract, agencies of the dealer, and the like, by which the courts had attempted to support the liability without a contract. It had the superficial justification that warranty, a freak hybrid born of the illicit intercourse of tort and contract, had always been recognized as bearing to some extent the aspects of a tort. In time the idea of running with the goods was discarded, and the


65. 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.


(1958).
warranty was considered to be made directly to the consumer. Until 1962 warranty had held the field, and no court proceeded on any other basis, although a good many of them had realized that this was a new and different kind of "warranty," not arising out of or dependent upon any contract, but imposed by law, in tort, as a matter of policy.

There were, however, difficulties. "Warranty" had become so closely identified to the legal profession with a contract between the plaintiff and the defendant, that it was attended by contract rules. Traditionally it has always required some reliance by the plaintiff upon an express or implied assertion; and this was often lacking on the part of the user. The Sales Act limited warranties expressly to "buyer" and "seller," and limited their scope. It required notice of the breach of the warranty within a reasonable time after the buyer knew, or ought to have known, of the breach. It also made the warranty subject to disclaimer by the seller. There were other minor problems, as to the recoverable damages, a possible election of remedies, and the like.

Whether, given enough time—say another decade—the sales law of warranties might have worked out a method of dealing effectively with these problems, or whether, for example, the Uniform Commercial Code might have been amended generally as it has been in four states, must always be a matter of speculation. But in the desperate hours of the fall of the citadel, there was no such time.


70. See Prosser, The Assault Upon the Citadel, 69 YALE L.J. 1089, 1124-34 (1960).

71. See notes 28, 30, 32, and 33 supra.

72. See Shanker, Strict Tort Theory of Products Liability and the Uniform Commercial Code, 17 W. RES. L. Rev. 5 (1965), lamenting that the solution was not left to the sales law of warranty to work out. Contra, Mc-Curdy, Warranty Privity in Sales of Goods, 1 HOUSTON L. Rev. 201 (1964), applauding the jettison of warranty.
Although the writer was perhaps the first to voice it, the suggestion was sufficiently obvious that all of the trouble lay with the one word "warranty," which had been from the outset only a rather transparent device to accomplish the desired result of strict liability. No one disputed that the "warranty" was a matter of strict liability. No one denied that where there was no privity, liability to the consumer could not sound in contract and must be a matter of tort. Why not, then, talk of the strict liability in tort, a thing familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation, libel, misrepresentation, and respondeat superior, and discard the word "warranty" with all its contract implications? The American Law Institute approved the proposal, and adopted, in the second Restatement of Torts, a new section, which states the strict liability without using "warranty":

§ 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 makes it clear that the rule stated is purely one

73. Prosser, supra note 70, at 1134.
74. RESTATEMENT (SECOND) TORTS § 402A, comment m at 355-56 (1965):

The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption. The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the
of strict liability in tort; and that while there is nothing in the section which would prevent any court from giving it the name of "warranty," it must be understood that such a warranty is a very different thing from those usually found in the direct sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

The first case to consider this approach was a 1962 California case, *Greenman v. Yuba Power Prods., Inc.* Justice Traynorr's opinion is obviously destined to be, along with the *Henningsen* case, one of the twin landmarks among these decisions. The plaintiff was injured when a combination power tool, which could be used as a saw, a drill, or a wood lathe, proved to be defective and let fly a piece of wood. He sued the manufacturer, who defended on the ground that notice of the breach of warranty had not been given to him as required by the Uniform Sales Act. The California court had long been committed to "warranty" in the food cases, and had on occasion performed some remarkable gymnastics to get around the contract rules. It had sometimes even invoked the Sales Act definitions of warranties. Justice Traynor explained that it had done so, not because the statutes so required, but because they provided appropriate standards for the court to adopt under the circumstances presented. Here warranty was not appropriate, and must be discarded; and along with it the requirement of notice to the defendant. The liability was simply a strict one in tort. The plaintiff made out his case

person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

77. It is true that in many of these situations the court had invoked the Uniform Sales Act definitions of warranties (CAL. 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.
79. 59 Cal. 2d at 61, 377 P.2d at 899-900, 27 Cal. Rptr. at 699-700.
78. Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manu-
by proving merely that he was injured while using the tool "in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use."\textsuperscript{19}

The effect of this decision was immediate. Other courts at once agreed that the proper theory was not one of warranty at all, but simply of strict liability in tort divorced from any contract rules.\textsuperscript{80} The number of them is already sufficient to make it reasonably certain that this is the law of the immediate and the distant future. There are still courts which have continued to talk the language of "warranty"; but the forty-year reign of the word is ending, and it is passing quietly down the drain.

It would be easy, however, to overestimate the significance of the change, which is more one of theory than of substance. It is only the rules of contract which have been jettisoned, where there is no contract. The substance of the seller's undertaking facturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the 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. Accordingly, rules defining the 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 purposes for which such liability is imposed.

\textit{Id.} at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

\textit{79. Id.} at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

remains unaffected; and as Chief Justice Traynor himself has agreed, the precedents of the “warranty” cases will still determine what he must deliver. They will determine also the extent of his liability, except in so far as limitations derived from the law of contract have been applied. No case has been overthrown unless it has applied such a contract limitation.

"Until recently courts and commentators have concentrated on eliminating bars to recovery imposed by the law of sales. Now they confront the central question: When should the manufacturer be responsible to those injured by his products?" With all the food cases, which are still no less important than those extending the rule to other products, there are by this time nearly two hundred cases in which the strict liability has been applied on one theory or the other. They permit some determination of a great many questions that have arisen, and some reasonable speculation as to others not yet settled.

WHAT PRODUCTS?

All types of products are obviously to be included. The list has ranged from automobiles and airplanes to cinder building blocks, glass doors, and paper cups. There is virtually no indication of any limitation to things that are extremely or inherently dangerous in themselves, in spite of all precautions. It is enough that the product, if defective, will be recognizably dangerous to the user or to his property. The tide of decisions is apparently

81. “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.” Seely v. White Motor Co., 403 P.2d 145, 150, 45 Cal. Rptr. 17, 22 (1965).


83. Partially set forth in notes 10-37 supra.

84. In Brewer v. Oriard Powder Co., 401 P.2d 844 (Wash. 1965), stress was laid on this as to dynamite.

sweeping to oblivion the highly metaphysical distinction between the product and the container in which it is sold, which used to perplex some courts in the food cases. The two are sold as an integrated whole, and it is inconceivable that anyone would buy one without the other. When a bottle of beer explodes and puts out the eye of the man about to drink it, surely nothing should be less material than whether the explosion is due to a flaw in the glass of the bottle or to overcharged contents.

There remain, however, two somewhat difficult questions, on which the final word has not yet been spoken. One concerns products that are expected to be further processed, or otherwise altered before they reach the hands of the consumer. If raw pork is sold to a sausage maker who is expected to cook it properly before the sausages are sold, it is quite clear that the seller of the pork should not be liable to a consumer when the pork is not properly cooked. On the other hand, if coffee beans are sold to a processor who is expected only to roast them and pack them in vacuum tins, one may surmise that the seller will not escape liability if the beans are poisoned with arsenic. Likewise the maker of an automobile with a defective steering gear, or a leak in the hydraulic brake line, can scarcely expect to be relieved of 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. On the other hand, the manufacturer of ordinary pig iron, which is suitable for a good many uses, is not at all likely to be held to strict liability when it turns out to be unsafe for the child's tricycle into which it is finally made by a remote buyer. The question is essentially one of whether the responsibility for discovery and prevention of the dangerous quality can be shifted to the intermediate party who is to make the changes. Since decisions are lacking on all this, the second Restatement of Torts has taken refuge in a caveat.

A broader and a more vital problem concerns the host of products which, in the present state of human skill and knowledge, are necessarily and unavoidably dangerous to the user. Few, if any products, of course, are absolutely safe. Any knife will cut, any hammer wielded unskillfully will mash a thumb, any food can cause indigestion; and no one supposes that the producer of such things is to be held liable when someone is hurt. But there are other products which must be recognized by any informed person as involving a much higher degree of danger. Take whiskey. It is really dreadful stuff. It causes a variety of unpleasant consequences, ranging from delirium tremens and cirrhosis of the liver to drunken driving; and you really should not drink as much of it as you do. Is the maker of good whiskey—as distinguished from whiskey full of fusel oil, strychnine or old cigar stubs—to be held liable, without negligence and without privity of contract, for all the harm that may result from its consumption? In other words, is the maker who has supplied a popular demand to be held responsible for the drinking habits of the American public? And is the manufacturer of an automobile to be held liable for the way people drive it?


91. It also becomes involved with questions of "proximate cause," as to intervening negligence and discovery. See text accompanying notes 186-99 infra.

92. 2 RESTATEMENT (SECOND), TORTS § 402A, Caveat (1965): "The Institute expresses no opinion as to whether the rules stated in this Section may not apply ... (2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer. ..." This is discussed in Comment p, from which a part of the text has been taken.

Sugar is deadly poison to diabetics; butter, if one may credit the current medical doctrine, brings on heart attacks by depositing cholesterol in the arteries; castor oil found use as an instrument of torture under Mussolini. The whole pharmacopoeia is filled with drugs that are not safe, even when they are properly made and properly used. A striking example is rabies vaccine, which frequently causes intense suffering when it is administered, and occasionally paralysis and death, but since the alternative to its use is probably the most dreadful death known to man, it is a valued and essential remedy. Is the maker who has done what can be done to make these things safe to be held liable when they go wrong? No doubt he must give what warning he can when the dangers are not likely to be known; no doubt a product sold without such a warning is to be regarded as defective and will subject him to strict liability; but if he gives such warning, is he to be held strictly liable for selling the product at all?

94. See Rheingold, Products Liability—The Ethical Drug Manufacturer's Liability, 18 Rutgers L. Rev. 946 (1964); Spangenberg, Aspects of Warranties Relating to Defective Prescription Drugs, 37 U. Colo. L. Rev. 194 (1965); Note, 63 Colum. L. Rev. 515 (1963); Note, 13 Stan. L. Rev. 645 (1961); Note, 65 Yale L.J. 262 (1956).
95. 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.
96. Canifax v. Hercules Powder Co., 46 Cal. Rptr. 559 (Dist. Ct. App. 1965) (dynamite with inadequate warning). Except as to contributory negligence (see text accompanying notes 249-54 infra), it would appear to make no difference whether the action is for negligence in not giving the warning, or on the basis of strict liability for an unsafe product. Cf. Gielski v. State, 3 Misc. 2d 578, 155 N.Y.S.2d 863 (Ct. Cl. 1956) (tetanus antitoxin).
97. In Cudmore v. Richardson-Merrell, Inc., 398 S.W.2d 640 (Tex. Civ. App. 1965), plaintiff used a drug made by the defendant under the trade name of MER-29, the formula not stated. After using it, the plaintiff suffered cataracts on his eyes, flaking skin, and loss of hair. The drug, sold to be taken after a heart attack, had been developed experimentally by the defendant, and found efficacious in the reduction of cholesterol, without evil consequences to animals. After it was marketed the reports were that it was causing cataracts, and it was withdrawn from the market. The jury found, on a special verdict, that in the exercise of ordinary care the defendant could not have anticipated that the drug would cause cataracts, and that the state of medical knowledge was then such that the "abreaction" resulting from unusual susceptibility could not have been expected. Recognizing that the Texas law of strict liability included drugs, the court held that it did not apply unless such a result ought reasonably to have been foreseen by a person of ordinary care in an appreciable number of persons. Judgment on the verdict for the defendant was affirmed. For a very complete dis-
PRODUCTS LIABILITY

Where negligence is in question, the answer has been simple. The utility of the product outweighs the risk, assuming that it is not known, and should not be known, to be unduly great. Does the strict liability make any change? It is here that the old law of direct sales warranties enters the picture again. There are a number of cases that have held that the warranty of merchantable quality does not extend to defects and dangers which are "natural" to the product, and may be expected to be found in it, such as a fishbone in a fish served in a restaurant, or a bit of turkey bone in roast turkey. On the other hand, when the foreign object is one not usually found in the particular product, so that the consumer could not reasonably be expected to anticipate it, it has been held that it is not "natural" to the product, and a cause of action for breach of warranty has been found. "Merchantable quality" does not mean a perfect product; it means only one free from serious and unusual defects. And

cussion of other drug cases, involving either negligence or breach of direct warranty, see Rheingold, supra note 94.

The same product was involved in Lewis v. Baker, 413 P.2d 400 (Ore. 1966), which held that it was reasonably safe. Also in Bennett v. Richardson-Merrell, Inc., 231 F. Supp. 150 (E.D. Ill. 1964), which involved only pleading.


no breach of the warranty is found when the buyer is given what he asks for and expects to get, even though the whole product is not free from qualities that cause him loss or damage.\textsuperscript{102}

There are quite a few cases involving a product such as cement, useful and reasonably harmless for proper purposes, but capable of causing serious harm when the user kneels in it and burns his skin; and in all of them it has been held that there was no liability, whether for negligence or for breach of warranty.\textsuperscript{103} Allergies have filled quite a few pages of the legal literature,\textsuperscript{104} and

318, 1 N.E. 278 (1885) (piano with slightly checked finish). A case which is something of a sad commentary on the products we buy is Adams v. Peter Tramontin Motor Sales, Inc., 42 N.J. Super. 313, 126 A.2d 358 (Super. Ct. 1956):

The Pontiac here involved met the test of merchantability. It was reasonably suitable for ordinary use, and was in fact used to meet plaintiff’s daily needs. It possessed no remarkable defect . . . it was the average new car which one has come to expect in a mass-production year capable of producing over seven million automobiles a year. It was a car that required the usual “shakedown” period and relatively minor adjustments to put it in good working order. The motor had to be adjusted, loose elements tightened, the locks corrected, the dome light fixed, and a rumbling noise eliminated. All this was done. The record shows, as noted, that whatever repairs and adjustments had to be made were admittedly taken care of by defendant willingly and promptly. Whatever plaintiff’s dissatisfaction with her new Pontiac (she describes it as a “non-vegetative member of the citrus family”—euphemistic longhand for what the trade bluntly calls a “lemon”), there is nothing in the record which spells out a breach of the implied warranty of merchantability.

\textit{Id.} at 325, 126 A.2d at 364.

\textsuperscript{102} McNeil & Higgins Co. v. Czarnikow-Rionda Co., 274 Fed. 397 (S.D.N.Y. 1921) (Federal brand of sugar ordered, not merchantable as Eastern cane sugar); Outhwaite v. A. B. Knowlson Co., 259 Mich. 224, 245 N.W. 895 (1932) (“Elastica” brand of stucco asked for; the whole brand was defective and inferior, but was held to be “merchantable” under the name).


See also Cavanagh v. F. W. Woolworth Co., 308 Mass. 823, 32 N.E.2d 256 (1941) (rubber stopper of bottle of charged water blew out when temperature changed and bottle agitated).

\textsuperscript{104} See Barasch, \textit{Allergies and the Law}, 10 BROOKLYN L. REV. 363 (1941); Dillard & Hart, \textit{Product Liability: Directions for Use and Duty To Warn}, 41 VA. L. REV. 145 (1955); Freedman, \textit{Allergy and Products Liability Today}, 24 OHIO ST. L.J. 479 (1963); Horowitz, \textit{Allergy of the Plaintiff as a Defense to Actions Based Upon Breach of Implied Warranty of Quality}, 24 SO. CAL. L. REV. 221 (1951); Noel, \textit{The Duty To Warn Allergic Users of
the rule which has emerged is that, if the product is safe for the normal user, there is no liability when it injures the rare abnormal one.\(^{106}\) When the manufacturer knows or should know that there is danger to a substantial number of persons, even though they constitute only a small percentage of the population, he is under a duty to give warning;\(^{106}\) but if he gives it, he does not become liable merely because he has sold the product.

Finally, there are the cases of hepatitis resulting from blood transfusions, which medical science until very recently knew no effective way to prevent. Most of them have denied the strict liability on the rather shaky ground that the transaction is a service, and not a sale of the blood,\(^{107}\) but the cases in which the defendant was a remote supplier,\(^{108}\) together with the stress laid


It may be suggested that since the hospital ordinarily bills the blood as a separate item, it is not at all impossible to make out a price, a transfer, and a sale. It is no more difficult than in the case of food served by the hospital kitchen.

in all of the others upon the unavoidability of the danger, seem to leave little room for doubt that the real objection to recovery is the inherently unsafe character of the thing supplied. All this leads rather irresistibly to the conclusion that there is no strict liability when the product is fit to be sold and reasonably safe for use, but it has inherent dangers that no human skill or knowledge has yet been able to eliminate. Some uncertainty is cast upon this conclusion, however, by the present confused state of the law as to lung cancer resulting from cigarettes. 109

There are four cases dealing with this problem; 110 and in each there was expert testimony which would permit the jury to find that the cancer was in fact caused by the product. Pritchard v. Liggett & Myers Tobacco Co. 111 led off in 1961 by finding not only an express warranty by advertising, but also an implied warranty that the cigarettes were safe to smoke. This was pointed up by the concurring opinion of Judge Goodrich, who refused to go along with the implied warranty, and asked about other products such as whiskey. The decision was contradicted by Lartigue v. R. J. Reynolds Tobacco Co., 112 in 1963, and Ross v. Philip Morris & Co., 113 in 1964, both of which held for the defendant on the ground that strict liability did not extend to dangers which no skill or knowledge thus far existing could avoid.

Then came Green v. American Tobacco Co., 114 to throw a flood of darkness upon the whole problem. The Fifth Circuit began by sustaining a verdict for the defendant, 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 can-

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111. 295 F. 2d 292 (3d Cir. 1961). 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 the plaintiff was aware of the risk. Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (5d Cir. 1965).

112. 317 F.2d 19 (5th Cir. 1963).

113. 323 F.2d 3 (8th Cir. 1964).

114. 304 F.2d 70 (5th Cir. 1962).
cer of the lung. Counsel then persuaded the court that the applicable Florida law was not clear, and induced it to withdraw the opinion and take advantage of an unusual procedure which permitted it to put questions to the Supreme Court of Florida. The question was put—did the Florida law imply a warranty when the defendant could not have known that the product was dangerous? The sixty-four dollar question was not put, whether there was a breach of warranty when a product in common use had inherent dangers which could not be eliminated. The Florida court\textsuperscript{115} answered that knowledge of the danger was not required for a warranty; but it was careful to say\textsuperscript{116} that it had not been asked the other question, and did not express any opinion on it. The Florida law therefore remains uncertain. The Fifth Circuit,\textsuperscript{117} on the basis of the answer, skipped blithely over the unanswered question, and left it to the jury.\textsuperscript{118} The second jury appears to have put an end to the matter by returning a verdict for the defendant.\textsuperscript{119} There the problem rests.

It is perhaps unfortunate that these cases have arisen in connection with a product about which there has been so much

\textsuperscript{115} Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963).
\textsuperscript{116} 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. Id. at 170. In a footnote the 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.

Subsequently, in McLeod v. W. S. Merrell Co., 174 So. 2d 736 (Fla. 1965), it was held that a drug which was unavoidably unsafe was not for that reason unmerchantable. Accord, Russell v. Community Blood Bank, Inc., 185 So. 2d 749 (Fla. App. 1966).

\textsuperscript{117} 325 F.2d 673 (5th Cir. 1963). In both federal decisions Judge Cameron wanted the issue decided as a matter of law for the plaintiff.
\textsuperscript{118} The defendant argues, however, that, even under that [Florida] definition, it 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.

Id. at 676.
popular outcry. One may question whether the Pritchard and Green cases would have been decided the same way if the product had been butter, and the ailment a coronary thrombosis on the part of a fat Milwaukee burgess who had indulged in it for years. It was undoubtedly to head off such possibilities that the second Restatement of Torts required that the product be "in a defective condition," in the sense of having dangerous qualities not inherent in goods reasonably suitable for sale and use.

WHAT DEFENDANTS?

In all of the cases in which strict liability has been accepted and applied, the defendant has been engaged in the business of supplying goods of the particular kind. So far as can be discovered, the question has not even arisen as to whether the rule might apply to one who is not so engaged. One may predict with some assurance that it will not. The housewife who sells a jar of jam to her neighbor, or the man who trades in a used car on the purchase of a new one, will obviously stand on a very different footing so far as the justifiable reliance of third persons is concerned. It is also very probable that the rule will not apply to sales outside of the usual course of business, such as execution sales, or the bulk sale of an entire stock of goods for what they will bring after bankruptcy or a fire.

The manufacturer who is engaged in such a business is clearly liable. So is an assembler of parts and, except as to airplanes in New York, the maker of a component part of the final product which does not undergo change. Where the question has been

120. See text accompanying note 74 supra. See Comments g to k under that section.

121. It should be noted that the implied warranty of merchantable quality in Uniform Sales Act § 15 is limited to one who deals in goods of that description, and that in Uniform Commercial Code § 2-314 it is limited to a "merchant."

122. See § 2 Restatement (Second), Torts § 402A and Comment f (1965).


125. McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965); Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964); Taylerson v. Ameri-
PRODUCTS LIABILITY

considered, most of the courts have applied the same strict liability without privity to the retail dealer. There are, however, a few courts which have carried over their old rule that a retailer does not warrant the goods directly to the consumer, at least where they are sold in sealed containers, and there are others which perhaps may do so.


Florida holds the retailer to strict liability without privity as to food and drugs. Food Fair Stores, Inc. v. Macurda, 90 So. 2d 860 (Fla. 1957); Spencer v. Carl's Markets, Inc., 45 So. 2d 671 (Fla. 1950), but not as to other products, Foley v. Weaver Drugs, Inc., 177 So. 2d 221 (Fla. 1965); Carter v. Hector Supply Co., 128 So. 2d 390 (Fla. 1961). See also Smith v. Platt Motors, Inc., 177 So. 2d 239 (Fla. Dist. Ct. App. 1963) (dealer only an agent). An exception is made where the plaintiff is a known and intended user. McBurnette v. Playground Equip. Corp., 137 So. 2d 583 (Fla. 1962).


again there has been a little disagreement.130

Surely all of the valid arguments supporting the strict liability—the public interest in the utmost safety of products, the demand for the maximum protection of the consumer, the implied assurance in placing the goods on the market for use, the consumer’s reliance on the apparent safety of the product, the fact that the consumer is the seller’s ultimate objective, the desirability of avoiding circuity of action and allowing direct recovery against earlier sellers—all of these apply with no less force against the dealer. There are enough cases in which the manufacturer is beyond the jurisdiction,131 or the injured plaintiff does not even know his identity,132 to justify requiring the dealer to assume the responsibility, and argue out with the manufacturer any questions as to their respective liability. One may suspect that the courts which relieve the dealer have had in mind the little corner grocery store. But in these days the dealer is more likely to be Safeway Stores, or some other nation-wide enterprise which is the prime mover in marketing the goods, and the manufacturer only a small concern which feeds it to order.

That this does not exhaust the list of defendants, and the doors are not yet closed, is indicated by two New Jersey decisions that have applied the strict liability to the lessor of a self-drive truck133


131. See 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 (1936); Bowman Biscuit Co. v. Hines, 151 Tex. 370, 251 S.W.2d 153 (1952). The last named was a 5-4 decision, one judge having reversed his position on rehearing. See 32 Texas L. Rev. 557, 566-68 (1954); 31 Texas L. Rev. 594 (1953); 10 Wash. & Lee L. Rev. 255 (1953); 1953 Wash. U.L.Q. 327.

In Price v. Gatlin, 405 P.2d 502 (Ore. 1965), the strict liability of the wholesaler was denied, on the ground that the case involved loss of the bargain. See note 168 infra. In Jax Beer Co. v. Schaeffer, 173 S.W.2d 285 (Tex. Civ. App. 1943), the ground for finding no liability was that the food warranty did not extend to the bottle.

131. E.g., Burkhardt v. Armour & Co., 115 Conn. 249, 161 Atl. 385 (1932), where the actual packer of corned beef was in Argentina, the first buyer a subsidiary corporation in Argentina, the primary distributor who put his name on the can in Illinois, and the retailer, the purchaser, and the consumer in Connecticut.


and the builder of a house who sold it. The repair man, who previously has been held liable without privity for negligence, has not yet appeared as a defendant in a strict liability case.

WHAT PLAINTIFFS?

Any user or consumer of the product, in the broadest sense of the terms, is protected by the strict liability rule. This includes not only the final purchaser, but also members of his family, his guests, his employees, his lessee, and his donee. Penn-
sylvania stands alone\(^{141}\) in drawing on the Uniform Commercial Code\(^{142}\) to support a limitation to purchasers, members of their households, and their guests. The former statute in Georgia was limited to purchasers.\(^{143}\) Passengers in automobiles\(^{144}\) and airplanes\(^{145}\) have been held to be users within the rule, and so has a customer treated with the product in a beauty shop,\(^{146}\) a child


In Hart v. Goodyear Tire & Rubber Co., 214 F. Supp. 817 (N.D. Ind. 1963), and Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960), this was accomplished by the device of extending "privity" to include the employee of a corporation.


142. See text accompanying note 60, supra.


injected with vaccine, a patient in a hospital supplied with a paper cup, and a member of the armed forces injured in a Navy dirigible. A wife cooking rabbits for her husband's dinner, with no intention of eating them herself, has also been included; and even a gasoline filling station attendant making repairs on an automobile and prospective purchasers trying out the product before buying it have recovered. It is not necessary that the plaintiff acquire any interest in the chattel, other than the right to make a lawful use of it, although it may be conjectured that an unlawful user, such as the thief of a car, will not be protected.

Bystanders, and other nonusers in the vicinity of the expected use, present a fundamental question of policy. If the philosophy of the strict liability is that all injured plaintiffs are to be compensated by holding the suppliers of products to strict liability for all the harm they do in the world, and expecting them to insure against the liability and pass the cost on to society by adding it to the price, then there is no reason whatever to distinguish the pedestrian hit by an automobile with bad brakes from the injured driver of the car. If the supplier is to be held liable because of his representation of safety in marketing the goods, then the pedestrian stands on quite a different footing. He is not the man the supplier has sought to reach, and no implied representation has been made to him that the product is safe for use; nor has he relied upon any assurance of safety whatever. He has only been there when the accident happened; and in this he differs from no other plaintiff. Thus far, with the emotional drive and the public concern and demand centering on the consumer, it has been the second theory that has prevailed; and those who have no connection with the product except as victims have been

152. See Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964) (trying out fork-lift truck); Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956) (trying out rocking chair in store). But see Loch v. Confair, 361 Pa. 168, 63 A.2d 24 (1949), where a shopper in a self-service store was denied recovery because of the Pennsylvania limitation to purchasers.
153. See Note, 64 Columbia L. Rev. 916 (1964).
denied the strict liability,\textsuperscript{154} and left to negligence.\textsuperscript{155} In 1965, however, the Michigan court kicked over the traces in Piercefield v. Remington Arms Co.,\textsuperscript{160} and found strict liability to a bystander injured when a shotgun exploded. One case in a Connecticut superior court,\textsuperscript{157} which is disputed by another such court,\textsuperscript{158} has followed the Michigan decision. It is still too new to permit any conclusion as to whether it represents a further breakthrough, or whether it will end only as a more or less isolated departure from the rest of the law.

\section*{WHAT DAMAGES?}

Personal injury has been so obvious a consequence of bad food, and indeed of most other defective products, that it has dominated the field of damages. The cases doing away with privity, with their shift of emphasis to tort rather than contract, have apparently snowed under those which formerly denied recovery for

\begin{itemize}
  \item In Brewer v. Reliable Automotive Co., 49 Cal. Rptr. 498 (Dist. Ct. App. 1966), where a road grader was hit by a truck, recovery was denied on the wrong ground that property damage was not recoverable. In Courtois v. General Motors Corp., 37 N.J. 525, 182 A.2d 545 (1962), where the plaintiff was hit by a wheel that came off a truck, the question was left open and the case decided on other grounds. See also, in a jurisdiction not recognizing strict liability without privity, Alexander Funeral Home, Inc. v. Pride, 261 N.C. 723, 136 S.E.2d 120 (1964) (plaintiff's building run into by a car). Restatement (Second), Torts § 402A, caveat (1) (1965), expresses no opinion.
  \item However, recovery frequently has been allowed on the basis of negligence. Ford Motor Co. v. Zahn, 265 F.2d 729 (9th Cir. 1959); Carpin v. Pittsburgh & Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954); Greyhound Corp. v. Brown, 269 Ala. 520, 113 So. 2d 916 (1959); Gaidry Motors, Inc. v. Brannon, 268 S.W.2d 627 (Ky. 1954); Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N.Y. Supp. 637 (1933); Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928). \textsuperscript{156}
  \item 375 Mich. 85, 133 N.W.2d 129 (1965).
\end{itemize}
wrongful death resulting from breach of warranty;\(^{159}\) and except as particular statutes may still be construed to prevent it,\(^{160}\) the recovery has been allowed.\(^{161}\) Physical harm to property entered the picture when the strict liability was first extended to animal food.\(^{162}\) There seems to be general agreement that the plaintiff can recover not only for damage to the purchased chattel itself,\(^{163}\) as where an automobile is wrecked by reason of its own bad brakes, but also for damage to his other property, as where a defective stove sets fire to his house.\(^{164}\)

Pecuniary loss, mere pocketbook damage, offers more difficulties. There is nothing inherent in the nature of the harm to prevent its compensation; and the very first case which threw overboard the bar of privity allowed recovery to the owner of

\(^{159}\) See Sterling Aluminum Prods., Inc. v. Shell Oil Co., 140 F.2d 801 (8th Cir. 1944); S. H. Kress & Co. v. Lindsey, 263 Fed. 381 (5th Cir. 1919); Whiteley v. Webb's City, Inc., 55 So. 2d 730 (Fla. 1951); Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397 (1949); Wadleigh v. Howson, 88 N.H. 365, 189 Atl. 855 (1937).

\(^{160}\) See, e.g., Latimer v. Sears, Roebuck & Co., 285 F.2d 152 (5th Cir. 1960) (Florida law).


a restaurant for his loss of business when he served bad food to his customers. It has been allowed where the product is manufactured into something else, so that there is a kind of indirect physical harm to other property. It has also been allowed, either on the basis of a direct warranty to the plaintiff or without privity by way of indemnity when he has incurred liability to someone else.

The difficulty concerns mere loss on the bargain, which is to say that the product which the plaintiff has received is only worth less than the price he has paid for it. Here a small majority of the courts have denied the strict liability, but there are three that have permitted the recovery. The denial would appear to be


the sounder rule. Such pecuniary loss is a matter, not only of what the plaintiff has received, but also of what he has paid for it. Loss on the bargain must depend upon what the bargain is; and when the purchaser of a new car trades in his old one to the dealer, whether he suffers any pecuniary loss, and if so what is its extent, must necessarily depend upon the allowance made by the dealer on the trade. It must also be affected by the dealer's undertaking to the plaintiff, and whatever representations or warranties he has made.\footnote{171} If the dealer overprices the goods, or if he sells grade 2 as grade 1, there will be a loss on the bargain even if they are in no way defective, and of course all the more if they are; but how much of the loss is to be attributed to the manufacturer? This appears to be clearly, in the first instance, a matter properly between the purchaser and the dealer; and if the manufacturer is to be liable, it should be to the dealer, and for damages which may be quite a different sum from the dealer's own liability. It is for this reason, undoubtedly, that the recovery for loss on the bargain has been denied even where negligence on the part of the manufacturer has been established.\footnote{172}

\footnote{171}{In Seely v. White Motor Co., 403 P.2d 145, 45 Cal. Rptr. 17 (1965), Chief Justice Traynor stated: \textit{We are of the opinion, however, that it was inappropriate to impose liability on that basis in the Santor case [note 169 supra], for it would result in imposing liability without regard to what representations of quality the manufacturer made. It was only because the defendant in that case 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 imposing strict liability in tort.} Id. at 151, 47 Cal. Rptr. at 23.}

ABNORMAL USE

There appears to be no reason to doubt that strict liability has made no change in the rule, well settled in the negligence cases, that the seller of the product is not to be held liable when the consumer makes an abnormal use of it. Sometimes this has been put on the ground that the manufacturer has assumed responsibility only for normal uses; sometimes it has gone off on "proximate cause." On either basis, directions and instructions for use which accompany the product take on a good deal of importance; and even where a direct warranty from the seller to his immediate buyer is in question, a violation of such instructions may make the use an abnormal one for which there is no liability. This has been carried over to the cases of strict liability without privity, as for example where a physician failed


to follow the manufacturer's directions in administering a drug, even without
such directions, the use may be clearly an abnormal one, as where an
antineptic deodorant is used as a mouthwash or a plane is negligently flown,
or aspirin is taken in excessive quantities over a period of twenty-two years. All such departures will defeat strict liability.

At the same time the rule is apparently also carried over from
the negligence cases that there are some relatively unusual uses of a
product such as standing on a chair, eating coffee, wearing a cocktail robe in proximity to the flame of a kitchen stove, or cooking pork to an inadequate extent which the consumer believes to be sufficient, which the seller is required to anticipate and take precautions against, at least by a proper warning.


Thus when an inflammable hair spray is used, without warning, near a candle, the seller has been held to strict liability; and the same is true when dynamite explodes while it is being handled. The product is to be regarded as defective if it is not safe for such a use that can be expected to be made of it, and no warning is given. It is quite probable that if an otherwise reasonably safe cleaning fluid is drunk by a child, the seller will be held to strict liability unless it bears a sufficient warning that it is poisonous.

INTERVENING CONDUCT

There appears likewise to be no doubt that the rule will be carried over from the negligence cases that the failure of the dealer, or some other intermediate party, to discover the defect on the product, or any other negligent conduct on his part, indeed on the part of anyone else, which is found reasonably


to be anticipated, will not relieve the earlier supplier of liability. The manufacturer has been held to strict liability notwithstanding the fact that the dealer should have discovered that the automobile sold was defective and remedied the defect;\(^{190}\) and the fact that the driver of the car is negligent in being on the highway with defective brakes has been held not to relieve the maker from indemnity to him when he ran into a bus and settled with the occupants.\(^{191}\)

On the other hand, where the intermediate party is notified of the danger,\(^{192}\) or discovers it for himself,\(^{193}\) and proceeds deliberately to ignore it and to pass on the product without a warning, most of the negligence cases have denied recovery, either on the basis of "proximate cause," or on the absence of any duty to protect the consumer against such intentional conduct. In one case\(^{194}\) this has been applied to strict liability. There are, however, negligence cases in which the product has been so highly dangerous to the user, and so utterly unfit for its intended use, that it has been held that the manufacturer is not relieved even by the dealer's actual knowledge of the danger before resale.\(^{195}\) This too, no doubt, is likely to be carried over.

At this point there enters the most extreme decision of all

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those applying the strict liability to date, \textit{Vandermark v. Ford Motor Co.},\textsuperscript{196} in California in 1964. In that case it was held that the obligation of the manufacturer to supply the ultimate purchaser with an automobile safe for his use was such that it could not be delegated to the dealer, and that it could not escape liability for an unsafe product on the ground that the defect in the brakes might have been caused by something the dealer “did or failed to do” in servicing the car before final delivery.\textsuperscript{197} It might perhaps be possible to explain the case on the basis of the rather peculiar relation between automobile makers and their authorized dealers;\textsuperscript{198} but it has been followed below in the case\textsuperscript{199} involving a concrete cutting machine, where everything in the way of an agency was specifically rejected. The limits of the \textit{Vandermark} decision, if it is to be accepted, are not yet clear. It appears to apply only to the delegation of “servicing,” or other work completing the product; and it can scarcely be supposed that the manufacturer would be liable, where, for example, a bottle of beer is cracked by the dealer while it is being handled. But even as to such servicing, whether the decision would be the same if the dealer discovered the danger and sold the car deliberately with no attempt to remedy it, is not yet determined. It at least eliminates any intervening negligence, whether of act or of omission, in preparing the product for final sale.\textsuperscript{200}

\textsuperscript{196} 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
\textsuperscript{197} 197.
These rules focus responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product, and they apply regardless of what part of the manufacturing process the manufacturer chooses to delegate to third parties. 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, 391 P.2d at 170-71, 37 Cal. Rptr. at 898-99.
\textsuperscript{198} 198. Cf. General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960), where the dealer was held to be the manufacturer’s agent to pass on an express warranty and, by inference, also an implied one.
\textsuperscript{200} 200. As to what this may include, see Milling, \textit{Henningsen and the Pre-Delivery Inspection and Conditioning Schedule}, 16 Rutgers L. Rev. 559
NOTICE TO THE SELLER

The Uniform Sales Act\(^{201}\) requires notice to the seller of any breach of warranty within a reasonable time after the buyer knows, or ought to know, of the breach; and the requirement has been retained by the Uniform Commercial Code.\(^{202}\) Commercially this is a sound rule designed to protect the seller against unduly delayed claims;\(^{203}\) and as between those engaged in commercial dealings the notice may be expected to be given as a matter of course. The requirement is still quite commonly preserved as to a direct warranty from the last seller to his purchaser.\(^{204}\) But as applied to personal injuries to a consumer, and notice to 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,"\(^{205}\) and at least until he has legal advice it will not occur to him to give notice to one with whom he has had no dealings. This has given the strict liability courts a good deal of trouble.

Some courts have assumed, without discussion, that the statutory provision as to notice applies to warranties without privy.\(^{206}\) Actually, however, there appears to be no such case in which the seller has succeeded in avoiding the strict liability on the ground of lack of timely notice. The first palliative resorted to, to get around the Sales Act section, was to hold that where there is personal injury, and the plaintiff has had no dealings with the defendant, long delay in giving notice is excused, or at least the jury may find that it is excused, and the notice is given within a "reasonable time" under the circumstances.\(^{207}\) A federal

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\(^{201}\) UNIFORM SALES ACT § 49.

\(^{202}\) UNIFORM COMMERCIAL CODE § 2-607 (3).

\(^{203}\) See American Mfg. Co. v. United States Shipping Board Emergency Fleet Corp., 7 F.2d 555, 556 (2d Cir. 1928) (opinion of L. Hand, J.).


\(^{205}\) James, Products Liability, 34 Texas L. Rev. 44, 192, 197 (1956).


applying California law even held that notice given after the suit had begun came within a reasonable time. The complete overthrow of notice began in 1957, when the Washington court, in a food case, held that the Sales Act provision applied only as between “buyer” and “seller” and had no application where there was a noncontractual “warranty” and the parties were not in privity. This has now been followed by several other cases. Justice Traynor, in the Greenman case, made use of the strict tort liability to get rid of notice, simply on the ground that no “warranty” was involved at all. This too already has found support.

In the Vandemark case the California court developed this further by holding that even on a direct sale from a retail dealer to his immediate buyer the notice was not required, since even this was a noncontractual matter of strict liability in tort, and there was no warranty in the case. This has been followed as yet only by an intermediate California court.

The conclusion would appear to be evident that the manufacturer can place no reliance at all upon the defense that he has not been given notice, either because it is held not to be


required from one with whom he has not dealt, or because long delay in giving it will be found to be excused. Even as to the direct sale from the retail dealer to the plaintiff, the *Vandermark* case casts quite a shadow of doubt upon the defense, and the frequency with which delayed notice has been excused goes far to destroy all confidence in it in any case.

**DISCLAIMERS**

The Uniform Sales Act\textsuperscript{215} permits the seller to disclaim any warranty, and the Uniform Commercial Code\textsuperscript{216} has continued the rule, although in a much more restricted form. Commercially a disclaimer may not be at all an unreasonable thing, particularly where the seller is not sure of the quality of what he is selling and unwilling to assume the responsibility for it, and the buyer is willing to take his chances. Many goods are quite reasonably sold “as is.” Even in such transactions, the power thus placed in the hands of the seller can be a dangerous one; and the courts have struggled to obviate injustice by finding that the disclaimer was not brought home to the buyer,\textsuperscript{217} or by construing it away as inapplicable to the facts.\textsuperscript{218} It is quite another thing, however,

\begin{footnotesize}
\begin{enumerate}
\item[215.] Uniform Sales Act § 71.
\item[216.] Uniform Commercial Code § 2-316.
\item[217.] Not effective when made after contract made: Edgar v. Joseph Breck & Sons Corp., 172 Mass. 581, 52 N.E. 1038 (1899); Ward v. Valker, 44 N.D. 598, 176 N.W. 129 (1920); see Amzi Godden Seed Co. v. Smith, 185 Ala. 296, 64 So. 100 (1913).
\item[218.]Not applicable to “breach of contract” or “failure of consideration”: Rocky Mountain Seed Co. v. Knorr, 92 Colo. 320, 20 P.2d 304 (1933); Myers v. Land, 314 Ky. 514, 235 S.W.2d 988 (1951); Black v. B. B. Kirkland Seed Co., 158 S.C. 112, 155 S.E. 268 (1930).
\end{enumerate}
\end{footnotesize}
to say that the user of a product is bound by a disclaimer which he has never seen; and it is another thing also to say that the consumer who buys at retail is bound by a manufacturer's disclaimer which is handed to him with the product, and to which he has done nothing whatever to accede other than to receive it. In such a case all reality of assent is lacking; and if sellers, in disregard of their sales appeal, are to be permitted to escape liability by adding to the label on the package such words as "Not Warranted in Any Way," the developing law could obviously be frustrated. It might have been predicted that this would not be tolerated. It had already been held that the manufacturer could not disclaim liability for his negligence; and there was a New York trial court decision rejecting a disclaimer on a direct sale of food as opposed to "natural justice and good morals."

With the elimination of privity, the tort character of the warranty provided the way out. If the statutes did not apply because there was no privity, and the warranty was not a matter of contract, a contract disclaimer should have no effect. The Henningsen

(1906); Liquid Carbonic Co. v. Coclin, 161 S.C. 40, 159 S.E. 461 (1931).


case\textsuperscript{222} refused to uphold the standard automobile warranty, in itself a disclaimer of nearly all liability, as a defense to the manufacturer. This has been followed by several other courts,\textsuperscript{223} although Florida,\textsuperscript{224} is apparently holding out to the contrary. The theory of strict liability in tort, which discards the "warranty" entirely, has of course done nothing to aid the disclaimer.\textsuperscript{225} It has still persisted, in most of the decisions, as a possible defense to the retail dealer on a direct sale to the plaintiff;\textsuperscript{226} but the Vandermark case,\textsuperscript{227} as well as a decision in Michigan,\textsuperscript{228} have struck it down as contrary to the policy of the law even as to such defendants where the product is dangerous to human safety.

The conclusion is evident that, so far as strict liability of the manufacturer is concerned, no reliance whatever can be placed upon any disclaimer; that even as to dealers it is beginning to

\textsuperscript{222} Henning 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 Jarnet v. Ford Motor Co., 191 Pa. Super. 422, 156 A.2d 568 (1959), an automobile manufacturer's disclaimer was rejected without discussion.


\textsuperscript{224} Rozen v. Chrysler Corp., 142 So. 2d 735 (Fla. Dist. Ct. App. 1962); accord, American Can Co. v. Horlamus Corp., 341 F.2d 730 (5th Cir. 1965).

\textsuperscript{225} Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964), rejected the disclaimer on this basis.


Apparently the disclaimer may still be effective as to pecuniary loss. See Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

\textsuperscript{228} Browne v. Fenestra, Inc., 375 Mich. 566, 134 N.W.2d 730 (1965).
be rejected; and that in any case there are too many loopholes available for the defense to be at all reliable.

**EXPRESS REPRESENTATIONS**

All of the foregoing has concerned "implied warranty" to the consumer, or the strict liability in tort which is replacing it. But the seller's strict liability may be enlarged by his express representations. In 1932, in *Baxter v. Ford Motor Co.*, the Washington court imposed strict liability upon the manufacturer, without privity, upon the basis of statements in its distributed literature, which the consumer read and upon which he testified that he relied, that the glass in the windshield of an automobile was "shatterproof." The theory first adopted was that of an express warranty to the plaintiff; but on a second appeal the court shifted its ground to one of strict liability, in the nature of deceit, for innocent misrepresentation. This last has been by no means unknown in cases of direct transactions of sale, but this was its first appearance without privity of contract. The other courts, in general, have followed the first opinion and talked express warranty, but this year the Tennessee court, not wishing to overturn a decision denying strict liability on an implied warranty as to pecuniary loss, reverted to the theory of misrepresentation. This seems clearly to be the preferable justi-

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230. Since it was the duty of appellant to know that the representations made to 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 inducing a sale or contract constitute fraud in law.


232. Even in *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), where the "implied warranty" was discarded in favor of strict liability in tort, the court continued to talk of express warranty as to representations made in literature.


fication, since “warranty” has been no more of a blessing where there is express language than there is not.

The Baxter case has been generally followed.\(^\text{235}\) The seller has been held to strict liability to the user for statements that prove to be false, when they are made to the public in labels on the goods themselves,\(^\text{236}\) or in advertising,\(^\text{237}\) or in disseminated literature,\(^\text{238}\) and it can be found that the plaintiff relied upon such

\(^{235}\) Two early decisions rejecting the Baxter case, Rachlin v. Libby-Owens-Ford Glass Co., 96 F.2d 97 (2d Cir. 1938), and Chamin v. Chevrolet Motor Co., 89 F.2d 889 (7th Cir. 1937), are now out of line with state law.


This had been held even before the Baxter case. Graham v. John R. Watts & Son, 238 Ky. 98, 36 S.W.2d 859 (1931) (seed); Conestoga Cigar Co. v. Finke, 144 Pa. St. 158, 36 S.W.2d 859 (1931) (tobacco tag).


statements in his use of the product. Since the basis of the liability does not turn on the character of the goods, but upon the representation, it was from the beginning not confined to food, and has ranged over a wide variety of other products, from cosmetics and detergents to automobiles, scrap metal, wire rope, and a mattress. The representation may obviously undertake responsibility for more than the safety of the product, and all damages are recoverable to which it fairly extends. Where the question has arisen, nearly all of the courts have held that the seller's liability extends to pecuniary loss, including loss of the bargain.239

The limitations upon the rule appear to be fairly certain. It seems clear that there must be a representation of fact, and more than mere "puffing" or sales talk.240 On the other hand, broad appeal, 179 Wash. 123, 35 P.2d 1090 (1934) (automobile, literature); see Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946) (wire rope, manual). See also Ein v. Goodyear Tire & Rubber Co., 173 F. Supp. 497 (N.D. Ind. 1959) (tire, method not specified). In Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (fabrics), there were labels on the goods, advertising, and distributed literature.

This is all the more clear when the dealer is supplied with an express guarantee to be passed on to the consumer. Timberland v. Climax Mfg. Co., 61 F.2d 391 (3d Cir. 1932) (locomotive, "guarantee"); Studebaker Corp. v. Nail, 82 Ga. App. 779, 62 S.E.2d 198 (1950) ("service policy" on automobile); Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959) ("insurance policy" on house trailer); General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960) (automobile warranty).


Thus in Newhall v. Ward Baking Co., 240 Mass. 434, 134 N.E. 625 (1922), "pure and nutritious" was held not to warrant that there was no nail in a loaf of bread. In Murphy v. Plymouth Motor Corp., 3 Wash. 2d
general assertions of quality, and particularly those of safety, as for example that a power tool is "rugged,"241 a detergent is "kind to the hands,"242 or that cigarettes are "harmless" and "safe to smoke,"243 may be found by the jury to include a representation that there is nothing to make the product unsafe. The representation must be made by the defendant, or chargeable to him, and a dealer, merely by passing it on, does not adopt the manufacturer's representation.244 It must be made with the intention, or at least the expectation, that it will reach the plaintiff,245 or a class of persons which includes him; and when there is no such intention or expectation the general rule246 that liability for misrepresentation does not extend to unexpected third parties applies to bar the recovery.247 Finally, the plaintiff must

180, 100 P.2d 30 (1940), a picture of an automobile being turned over at sixty miles an hour, and one of a freight car resting on top of it, were held to convey nothing that was actually false. Cf. Lambert v. Sistrunk, 58 So. 2d 434 (Fla. 1952); Bertram v. Reed Auto. Co., 49 S.W.2d 517 (Tex. Civ. App. 1933).


244. Cochran v. McDonald, 23 Wash. 2d 348, 161 P.2d 305 (1945).

245. Cf. Lindroth v. Walgreen Co., 329 Ill. App. 105, 67 N.E.2d 595 (vaporizer); Jeffery v. Hanson, 39 Wash. 2d 855, 259 P.2d 946 (1953) (tractor). In Corporation of Presiding Bishop v. Cavanaugh, 217 Cal. App. 2d 492, 32 Cal. Rptr. 144 (1963), representations made to a contractor were held to inure to the owner of the building on which he worked.


rely upon the representation, not necessarily in making his purchase, but at least in using the product.

CONTRIBUTORY FAULT

Superficially the warranty cases, whether on direct sale to the user or without privity, are in a state of complete contradiction and confusion as to the defense of contributory negligence. It has been said in a good many of them that such negligence is always a defense to an action for breach of warranty. It has been said in almost as many that it is never a defense. This is no more than a part of the general murk that has surrounded “warranty,” and is one more indication that this unfelicitous word is a source of trouble in the field. Actually, however, the disagreement is solely a matter of language; and if the cases are examined as to their substance, they fall into a very consistent pattern.

Where the negligence of the plaintiff consists only in failure to discover the danger in the product, or to take precautions against its possible existence, it has uniformly been held that it is not a bar to an action for breach of warranty. Thus if he


249. In Connolly v. Hagi, 24 Com. Supp. 198, 188 A.2d 884 (1963), the plaintiff was not a purchaser at all, but a filling station attendant doing work on an automobile.

250. In Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965), an omitted period in the Pennsylvania version of the Sales Act was held (the writer would say erroneously) to eliminate the requirement of reliance on the warranty. One judge dissented.

eats a wormy candy bar,251 or drives negligently on a defective tire,252 without being aware of the defect, his recovery is not barred, even though he ought to have discovered it. This is entirely consistent with the rule applied to other strict liability involving animals, or abnormally dangerous activities.253 But if he discovers the defect, or knows the danger arising from it, and proceeds nevertheless deliberately to encounter it by making use of the product, his conduct is the kind of contributory negligence which overlaps assumption of risk; and on either theory his recovery is barred.254 This too is consistent with the law as to other


254. Dallison v. Sears, Roebuck & Co., 313 F.2d 343 (10th Cir. 1962) (smoking in bed); Hitchcock v. Hunt, 28 Conn. 343 (1859) (using barrels known to be leaking); Tomita v. Johnson, 49 Idaho 643, 290 Pac. 395 (1930) (planting seeds known to be the wrong kind); Cedar Rapids & I.C. Ry. & Light Co. v. Sprague Elec. Co., 203 Ill. App. 424, aff'd, 290 Ill. 586, 117 N.E. 461 (1917) (use of electric shovel after discovery of defect);

Frier v. Proctor [sic] & Gamble Distrib. Co., 173 Kan. 733, 252 P.2d 850 (1958) (use of detergent with knowledge it was injuring hands); Topeka Mill & Elevator Co. v. Triplett, 168 Kan. 428, 213 P.2d 964 (1950) (feeding chickens with knowledge feed was injuring them); Baresfield v. La Salle Coca-Cola Bottling Co., 570 Mich. 1, 130 N.W.2d 786 (1963) (drinking beverage known to be full of broken glass); Gardner v. Coca-Cola Bottling Co., 267 Minn. 505, 127 N.W.2d 557 (1964) (opening bottle in wrong manner);

strict liability. There has been as yet no case involving the strict liability in tort which discards warranty, but it appears quite certain that the same rules will apply.

It is always possible that the plaintiff's negligence may consist of an abnormal use of the product, and whether there is discovery of the danger or not, the recovery may be barred on that ground.

PROOF

Strict liability eliminates both privity and negligence; but it still does not prove the plaintiff's case. He still has the burden of establishing that the particular defendant has sold a product which he should not have sold, and that it has caused his injury. This means that he must prove, first of all, not only that he has been injured, but that he has been injured by the product. The mere possibility that this may have occurred is not enough, and there must be evidence from which the jury may reasonably conclude that it is more probable than not. Thus it is not enough to show that the plaintiff became ill after eating the defendant's tinned salmon, where there is no proof of what else he ate, and others who ate the salmon were not made ill.

The plaintiff must prove also that he was injured because the product was defective, or otherwise unsafe for his use. The fact that a plane has crashed does not establish that it was defective,
until the possibility of negligent flying has been eliminated. An oxygen tank is not shown to be defective merely because an explosion has occurred in a regulator which the plaintiff has attached to it, and an unusual method of opening a bottle may prevent any conclusion that there was anything wrong with it. The bare fact that the plaintiff became ill after exposure to the defendant's insecticide does not prove that it was unreasonably dangerous to human beings. On both of these issues, however, expert opinion may be sufficient to sustain the plaintiff's case.

Further, the plaintiff must prove that the defect was in the product when it was sold by the particular defendant.

on the evidence it is equally likely that it developed after the product left his hands, as where food has been opened and exposed for a considerable time by the dealer, no liability is established on the part of any previous seller.

When the plaintiff has proved this much, all trial lawyers know that he usually recovers in a negligence action against the manufacturer. There have been occasional cases in which the defect has been such that res ipsa loquitur has not been applied to aid the plaintiff in his proof of negligence, and there have been a few in which the defendant’s evidence of his own due care has been held to be so conclusive as to entitle him to a directed verdict, and fewer still in which the jury has found that there is no negligence. These cases are obviously to be changed. But by and large, when the proof reaches this point, the jury is permitted to, and does, find for the plaintiff. The alarm of the manufacturers over the prospect of a great increase in liability under the new rule is not in reality justified. As to the dealer, against whom there is frequently no proof of negligence at all, it will certainly result in some occasional increase.

The difficult questions, as to the last two stages of proof, are those of circumstantial evidence and inferences from the facts. There is no indication that these are to be dealt with in any different manner from the negligence cases. Res ipsa loquitur, strictly speaking, is not an applicable principle when there is no question of inferring any negligence; but the inferences from circumstantial evidence which are the core of the doctrine are no less applicable to the strict liability.

Tennebaum v. Pendergast, 89 N.E.2d 490 (Ohio C.P. 1948) (intermediate handling of bottle after it left manufacturer).


268. See, e.g., Weggeman v. Seven-Up Bottling Co., 5 Wis. 2d 503, 93 N.W.2d 467, mandate amended on denial of rehearing, 94 N.W.2d 645 (1959).


The bare fact that an accident happens to a product, that an automobile goes into the ditch,271 is usually not sufficient proof that it was in any way defective. Even the fact that it is found afterward to be in a condition that could have been the cause is not enough, if it is no less likely that the condition was brought about by the accident itself.272 On the other hand, the addition of very little more in the way of other facts, as for example that a new car veered suddenly and sharply from the road without the fault of the driver,273 that the defect had given trouble before the accident,274 that other similar products made by the de-

101, 137 S.E.2d 674 (1964), it was said merely that res ipsa loquitur had no application under the Georgia statute.


The defendant had met with similar misfortunes, or the elimination of other causes, or the aid of expert opinion, may be enough to support the inference. 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 is not enough, even when it has extended over a good many years, to defeat the recovery where there is satisfactory proof of an original defect; but when there is no definite evidence, and it is only a matter of inference from the fact that something broke or gave way, the continued use usually prevents

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278. See cases cited note 85 supra.


280. Pryor v. Lee C. Moore Corp., 262 F.2d 673 (10th Cir. 1958) (oil well drilling outfit collapsed after fifteen years of use; expert testimony that a proper weld would have had the same life as the derrick); International Derrick & Equip. Co. v. Croix, 241 F.2d 216 (5th Cir. 1957) (defective weld on oil well derrick gave way after seven years); Fredericks v. American Export Lines, Inc., 227 F.2d 450 (2d Cir. 1955) (break in stevedore’s skid after 2½ years use); Reed & Barton Corp. v. Maas, 73 F.2d 350 (1st Cir. 1934) (coffee urn tipped over after seven years of use); Hartleib v. General Motors Corp., 10 F.R.D. 380 (N.D. Ohio 1950) (flywheel of truck disintegrated after two or three years); Darling v. Caterpillar Tractor Co., 171 Cal. App. 2d 713, 341 P.2d 23 (1959) (inspection cover on deck plate of bulldozer broke off after three years); Okker v. Chrome Furniture Mfg. Corp., 26 N.J. Super. 295, 97 A.2d 699 (1953) (stool collapsed after three years).
the inference that the thing was more probably than not defective when it was sold.\textsuperscript{281} It has been said a good many times that the seller does not undertake to provide a product that will not wear out.\textsuperscript{282} There are other cases in which long use has been given weight, along with other evidence, in the conclusion that no original defect was shown.\textsuperscript{283} In a few cases a distinction has been made as to stationary parts, which are not so likely to fail with wear, and an original defect has been found.\textsuperscript{284}

Once past the hurdle of use, the plaintiff must eliminate his own improper conduct as an equally probable cause of his injury.\textsuperscript{285} When he has done this, and has accounted for any intermediate handling, he has of course made out a sufficient case of strict liability for the defect against the dealer who has last sold the product. The very presence of the latter in the picture, however, means that he must be eliminated before the manufacturer can be held. When on the evidence it appears equally likely that the defect has developed in the hands of the dealer, the plaintiff has not made out his case against anyone else.\textsuperscript{286}


\textsuperscript{286} Tiffin v. Great Atl. & Pac. Tea Co., 131 Ill. 2d 48, 162 N.E.2d 406 (1959) (opened meat); Sharpe v. Danville Coca-Cola Bottling Co., 9 Ill. App. 2d 175, 192 N.E.2d 442 (1956) (bottle); Williams v Paducah Coca-
This has meant, in a good many cases, that when a beverage bottle explodes or breaks the case against the manufacturer is not established until the handling by intermediate parties has been accounted for.287 There need not be conclusive proof, and only enough is required to permit a finding as to the greater probability.288 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;289 and it is enough that he produces sufficient evidence of careful handling in general, and of the absence of unusual incidents, to permit reasonable men to draw the conclusion.290

If the product reaches the consumer in a sealed container, with the defect on the inside, the inference against the manufacturer is much more easily drawn. The foreign object in the


bottled beverage is the typical case.\textsuperscript{291} There have been decisions that have held that the plaintiff must still disprove tampering with the bottle,\textsuperscript{292} particularly where there is evidence that it has been exposed to the mercies of irresponsible persons,\textsuperscript{293} or a charged beverage is found to be "flat" when it is opened.\textsuperscript{294} 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 plaintiff is not required to eliminate the possibility.\textsuperscript{295}

There have been sporadic attempts to aid the plaintiff's difficulties of proof in cases where multiple defendants were joined. As to both negligence and warranty, the Kansas court\textsuperscript{296} has shifted the burden of proof as to tracing the defect to the shoulders of the dealers and the manufacturer; and Pennsylvania has done the same as to negligence.\textsuperscript{297} The reasoning in these cases as to the meaning of "exclusive control" is not very convincing; and they are quite evidently deliberate decisions of policy, seek-


\textsuperscript{292} 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 578, 218 P.2d 660 (1950).


ing to compensate the plaintiff and to require the defendants to fight out the question of responsibility among themselves. The same is to be said of a federal case out of Texas\textsuperscript{298} 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\textsuperscript{299} where the same thing was done as to the maker of an altimeter and the manufacturer of a plane in which it was installed. Also of obvious importance in this connection is the Vandermark decision\textsuperscript{300} in California, holding that the manufacturer cannot delegate to the dealer the responsibility for the final "servicing" of the product.

Except perhaps in this last respect, it seems quite apparent that there is 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.

\textsuperscript{298} Dement v. Olin Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960).
\textsuperscript{300} Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). See text accompanying notes 196-200 \textsuperscript{supra}.