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Strict Tort Liability of Manufacturers

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I. INTRODUCTION

THE history of a manufacturer’s liability for negligence is a story of the gradual elimination of the requirement of privity of contract. Beginning with Winterbottom v. Wright in 1842, in which the court found the requirement necessary in order to avoid the “most absurd and outrageous consequences, to which [it could] . . . see no limit,”1 and running through a series of gradually increasing and widening exceptions to MacPherson v. Buick Motor Co.2 in 1916, in which the exceptions were found to have consumed the rule, the law has now progressed to the point at which every American jurisdiction has eliminated the privity requirement in a negligence action.3 But in these cases it still is necessary to prove negligence of the defendant either in the manufacture of the product or in the failure to discover and correct its dangerous condition.

This Article concerns strict liability—liability imposed on a manufacturer of a chattel because of an injury caused to plaintiff or his property by the condition of the chattel, without regard to the presence or absence of his negligence. This, too, is a story of the gradual elimination of the requirement of privity. Although this development started later and has by no means yet become unanimous, it is now proceeding at a pace so rapid as to be almost without precedent. It seems safe to predict that strict liability for products will soon be the established law in this country. There are several developing lines.

II. BREACH OF WARRANTY

It is generally agreed that the action for breach of warranty originally was tortious in nature, similar to deceit.4 With the development of the action of assumpsit, providing a remedy for breach

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2 217 N.Y. 382, 111 N.E. 1050 (1916).
3 A very unlikely exception is Mississippi, which has yet expressly to adopt the modern rule. See Cox v. Laws, 244 Miss. 696, 145 So. 2d 703 (1962).
4 See 1 Williston, Sales § 195 (rev. ed. 1948); Ames, The History of Assumpsit, 2 Harv. L. Rev. 1, 8 (1888).
of contract, an express warranty came to be regarded as a part of the contract of sale and was enforceable on that basis. Still later a sale by description was held to be the equivalent of an express warranty, being treated as a warranty implied factually from the intent of the parties. Eventually implied warranties were imposed regardless of the intent of the parties—they were created by law. The two types of implied warranty significant in this connection are the warranty of merchantability and the warranty of fitness for a particular purpose.  

The typical case not only grew out of the contract but was actually on the contract; it was a suit for the economic loss sustained by the buyer because the article was not up to standard and thus was not what he expected to purchase. The action being on the contract—to put the party in the position he would have been in if the contract had been carried out—privity of contract was naturally required. But in certain factual situations other suits of a different nature also were brought. These were the actions for physical injury, arising as consequential damages. True, they grew out of the contract of sale, but they were not necessarily based on that contract in the same sense. They were more nearly analogous to the action for negligence, which also grows out of the contract of sale but which no longer requires privity because the obligation is imposed by the law, regardless of the intent of the parties.  

But, even treating the cause of action as based on contract and therefore requiring privity, many courts have permitted a warranty action by the ultimate purchaser against the manufacturer by stretching various legal concepts out of shape in order to find privity present. Thus, they sometimes have treated the retailer as an agent of either the manufacturer or the purchaser; they have spoken of assignment of the interest; or they have treated the purchaser as a third-party beneficiary of another contract. More frequently they have spoken of the warranty as running with the chattel, much as a covenant runs with the land. This, while contrary to the previous  

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9 Perhaps an additional analogy can be drawn to quasi-contracts, or so-called contracts implied in law. The courts came to realize that the obligation here was imposed by the law and did not depend upon the intent of the parties, so that privity of contract was not required.  
7 See, e.g., Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 Pac. 1050 (1929).  
6 E.g., Madouros v. Kansas City Coca-Cola Bottling Co., 230 Mo. App. 275, 90 S.W.2d 445 (1936).  
10 This idea first was presented in Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).
law on the subject, is not necessarily fictitious, because a warranty can run with the chattel if the courts change the law to make it do so.

Other courts, more forthright, have recalled that the warranty action was originally tortious in nature, so that contractual privity is not a necessary element of the cause of action, or have said that public policy demands the elimination of the privity requirement. By one of these means or another, a considerable number of states have eliminated or restricted the requirement of privity in an action for physical injury which purports to be for breach of an implied warranty.

Relaxation of the requirement of privity, if it is not complete, may be affected by the persons or the type of product involved. Thus, in the treatment of the persons involved, some courts found it easier to mitigate the requirement gradually and to allow an action for injuries to members of the family of the purchaser or to his employees. This was usually only a step toward complete elimination. In the other side of the chain, there was no similar gradual process of going from the retailer to the wholesaler to the manufacturer.

As for the products involved, the first cases all involved foodstuffs and were expressly limited to them. During recent years, there has been an expansion to include articles involving intimate bodily use and then to include all types of products. Some states made the

11 The best early presentation of this is to be found in Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942). A number of recent cases have taken this position.
13 See, e.g., Greenberg v. Lorenz, 9 N.Y.2d 195, 173 N.E.2d 773 (1961). And see Uniform Commercial Code § 2-318 to the effect that a warranty extends to a "person who is in the family or household" of a buyer, or "a guest in his home."
16 The present status of the law regarding foodstuffs, with a classification of the various jurisdictions, may be found in 1 Frumer & Friedman, Products Liability § 23.01 (1964); Prosser, Torts 674-76 (3d ed. 1964). Dean Prosser classifies 17 jurisdictions as eliminating the requirement of privity for food and drink, and he adds 6 more as likely from general holdings. Twelve jurisdictions have not changed from the old rule. "No new state has rejected the strict liability as to food since 1935, and since that year sixteen have accepted it." Id. at 676.
17 This is dramatically illustrated by the experience of the American Law Institute with the Restatement of Torts (Second). As originally submitted by the Reporter (William L. Prosser), it contained a new section which provided for strict liability of sellers of "food for human consumption," with a caveat for other products. Restatement (Second), Torts § 402A (Tent. Draft No. 6, 1961). Developments had progressed so rapidly, however, that it was decided to include also "products for intimate bodily use," and this was approved by the Institute in 1962. See id. (Tent. Draft No. 7, 1962). Two years later, however, developments had proceeded so far that the Reporter offered and the Institute approved a new version applying to "any product." See id. (Tent. Draft No. 10, 1964).
transition step by step, while others went the whole way all at once. In the earliest cases indicating that the no-privity rule would apply to products generally, the opinions showed some confusion between the action for negligence and the action for breach of warranty, but since the decision in the leading case of *Henningsen v. Bloomfield Motors, Inc.*, in 1960, there has been a sudden flood of cases, clearly demonstrating a strong trend.

In the meantime another line of cases has developed, presenting an action on what is sometimes called an express warranty. In these cases the manufacturer has advertised to the public, making representations regarding the quality and condition of his product. When a purchaser relies on the representation and receives physical damage as a result of its falsity, a substantial majority of the courts have allowed recovery. The representation, they say, was made directly to the purchaser, and the retailer, if he played any part, was merely a conduit.

III. THE NEGLIGENCE ACTION AS IMPOSING STRICT LIABILITY

While the law of warranty was developing in actions for physical injury and expanding to apply in the absence of privity, at least two developments were occurring in the law of negligence to bring it closer to strict liability for dangerous products.

The first involved the doctrine of *res ipsa loquitur*. In theory this concept is a consistent and integral part of the law of negligence. It is regarded as merely a form of circumstantial evidence which permits the jury to infer from the defective condition of the chattel that the manufacturer must have been negligent. In practice, the opportunity

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19 This was true in both Spence v. Three Rivers Builders & Masonry Supply, Inc., 333 Mich. 120, 90 N.W.2d 873 (1958), and Di Vello v. Gardner Mach. Co., 46 Ohio App. 161, 102 N.E.2d 289 (1951). See also General Motors Corp. v. Dodson, 47 Tenn. App. 438, 338 S.W.2d 655 (1960).

20 Thus, in the first case of Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932), on second appeal, 179 Wash. 123, 35 P.2d 1090 (1934), an automobile was advertised as having shatterproof glass. When this proved not to be true, so that a rock striking the windshield caused a sliver of glass to put out the plaintiff's eye, he was allowed to recover against the manufacturer. Numerous later cases had followed the holding. See Randy Knitware, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399 (1962); Restatement (Second) Torts § 402A (Tent. Draft No. 6, 1961)
to hold for the plaintiff has often been all that the jury needed, and juries must have sometimes found manufacturers negligent in creating or failing to discover a defective condition when the facts were actually otherwise. There has been little that the defendant could do about this development because the only evidence he could make available was that of due care in the manufacturing process, and this is almost never sufficient to take the case out of the hands of the jury. Even in a negligence action, therefore, proof that the article was defective when it left the manufacturer has often been all that the plaintiff needed in order to obtain a verdict in his favor.

The second involves the doctrine of negligence per se, especially as it has been applied to the various pure-food laws. As construed by many courts, a person who sells foods or drugs which are adulterated or impure is negligent per se and is liable for injury caused from the food without any need of proving his knowledge of the impure condition, his negligence in creating it or his failure to discover it. Although these holdings use the language of negligence, their effect is to impose strict liability.

IV. EXPRESS RECOGNITION OF STRICT LIABILITY IN TORT

Within the past few years there has evolved a recognition that the liability here being imposed is a form of strict liability, directly in tort. This new development is distinct from the opinions pointing out that the personal-injury action for breach of implied warranty is based on the tort aspect of the warranty action. Here the warranty language is disregarded as superfluous, and the liability is forthrightly recognized as tortious in nature and strict in character because it does not require proof of defendant’s negligence.

The leading case is Greenman v. Yuba Power Prods., Inc., ren-
dered in California in 1963. As the court said in that case, after citing a number of other cases:

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the 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.29

This holding was followed by the same court and the application broadened to apply to a retailer in Vandermark v. Ford Motor Co.30 The New York Court in Goldberg v. Kollsman Instrument Corp.,31 although treating the action as being one for breach of an implied warranty of fitness and saying that such an action sounds in tort, cited the Greenman case with approval and stated that its characterization of "strict tort liability" is "surely a more accurate phrase."32 The Missouri court has cited Greenman with approval under similar circumstances,33 and the Nevada court, although holding that an action for breach of warranty will not lie without privity, expressly left open the question as to whether an action for strict liability in tort might be maintained.34

Strict liability in tort is the explanation which has been adopted in the Restatement of Torts (Second). Section 402A provides that the seller is "subject to liability" even though he has "used all possible care,"35 and comment m expressly states that the language of war-

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29 59 Cal. 2d at 63, 377 P.2d at 901.
32 12 N.Y.2d at 437, 191 N.E.2d at 83.
33 Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963).
35 The whole section reads as follows:
§ 402A. Special Liability of Seller of Product 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. Restatement (Second), Torts § 402A (Tent. Draft No. 10, 1964).

The words in italics, though not to be found in Tentative Draft Number 10, have subsequently been added, and will appear in the permanent edition, to be published soon.
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ranty is both superfluous and likely to prove misleading. The Re- 4
porter, Dean Prosser, has elaborated on this in a recent article and in the latest edition of his treatise.27

The combination of the California and New York opinions, the new Restatement provisions and the Prosser writings is likely to prove very influential in the immediate future, and the strict-liability explanation may soon supplant the warranty explanation.

After all, as the New York court says, it is "more accurate," and as the Restatement says, it is "much simpler." It eliminates completely the whole problem of the requirement of privity of contract. Neither the Uniform Commercial Code nor the Uniform Sales Act will be applicable, with their definitions of buyer and seller, provisions as to the scope of warranty and requirements of notice of breach. Contractual aspects of disclaimer and rescission are avoided. Reliance on a warranty or on the seller's abilities need not be proved, and no express representation is required. There is no problem about maintaining a death action, and it seems likely that questions of conflict of laws can be more easily solved.28 From every standpoint it seems far more desirable to eschew the language of warranty and to speak of strict liability in tort. As a famous quotation puts it, "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales."29

V. EXTENT OF ADOPTION

A little over sixty years ago, the Supreme Court of Washington decided the first case imposing strict liability for foodstuffs, despite the absence of privity.40 Since that time cases have gradually augmented the list until seventeen states are now listed as expressly holding that a manufacturer of foodstuffs is strictly liable to the consumer.41 In five others there are holdings in regard to other articles which will probably apply to foods. Three impose strict liability through a per-se interpretation of pure-food statutes, and four others have statutes expressly imposing strict liability. This makes a total of

36 Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960).
37 Prosser, op. cit. supra note 16, § 97.
38 See, generally Restatement (Second), Torts § 402A, comment m (Tent. Draft No. 10, 1964); Prosser, op. cit. supra note 16, 678-81.
39 First stated in Ketterer v. Armour & Co., 200 Fed. 322, 323 (S.D.N.Y. 1912), and often quoted since then.
41 The listing is by Dean Prosser, op. cit. supra note 16, at 671.
twenty-nine. Still adhering to the old rule are twelve states, leaving nine states uncommitted.\(^{42}\)

It has been only a half-dozen years since the first decision was rendered applying strict liability to articles other than food products.\(^{43}\) Already there are holdings or other indications in about half of the states that strict liability will extend beyond food products.\(^{44}\) A movement this rapid is almost completely unprecedented and is indicative of a strong trend amounting to a groundswell. When this development is combined with the authority of the Restatement and of the numerous writers in the field,\(^{45}\) the future state of the law becomes quite clear.

\(^{42}\) Id. at 674-76. See also Dickerson, op. cit. supra note 24, §§ 2.1-2.5; 1 Frumer & Friedman, op. cit. supra note 16, § 23.01.

\(^{43}\) The case is Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958). Several years earlier, an intermediate court in Ohio had so held in Di Vello v. Gardner Mach. Co., 46 Ohio App. 161, 102 N.E.2d 289 (1951), but the case was subsequently overruled by the supreme court in Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953).

\(^{44}\) See, e.g., Jaeger, Privity of Warranty: Has the Tocsin Sounded?, 1 Duquesne L. Rev.
The strict liability for the so-called express warranty, which began with a holding of the Supreme Court of Washington in 1932, has now been accepted in some twenty jurisdictions, and there have been no contrary decisions since 1938. It has been adopted in the Restatement of Torts (without the warranty terminology) and now seems clearly established.

VI. NATURE OF STRICT LIABILITY

What do we mean when we speak of strict liability of a manufacturer for harm caused by his products? Is it sufficient for a plaintiff to show that he used the defendant's product and that he was injured? The answer to this is no. If the plaintiff's theory is breach of warranty, he must prove the breach—i.e., that the article was not merchantable or was not fit for the purpose sold. If the theory is strict liability in tort, the plaintiff must still prove that the article was unsafe in some way. Thus, the liability is not that of an insurer; it is not absolute in the literal sense of that word.

On the other hand, it is strict in the same sense that there is no need to prove that the manufacturer was negligent. If the article left the defendant's control in a dangerously unsafe condition (or if it failed to comply with the implied warranty), the defendant is liable whether or not he was at fault in creating that condition or in failing to discover and eliminate it.


For cases, see Restatement (Second), Torts § 402B, at 40-43 (Tent. Draft No. 6, 1961); Prosser, op. cit. supra note 16, at 684-85.

Restatement (Second), Torts § 402B (Tent. Draft No. 6, 1961). The section reads as follows:

§ 402B. Misrepresentation by Seller of Chattels to Consumer

One engaged in the business of selling chattels who, by advertising, labels or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

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

The portion in italics, though not to be found in Tentative Draft Number 6, has been added subsequently, and will appear in the permanent edition, to be published soon.
In essence, strict liability in this sense is not different from negligence per se. Selling a dangerously unsafe product is the equivalent of negligence regardless of the defendant's conduct in letting it become unsafe. This is exactly the situation when a pure-food status is construed to make its violation negligence per se; if the food is not wholesome, the statute is violated and the defendant is negligent. It has long been recognized that although the normal test for negligence is the general standard of what a reasonable man would do under similar circumstances and, although this test is ordinarily applied by the jury, the courts on appropriate occasions may lay down specific rules of conduct. They do this when they accept a criminal statute as setting forth a specific rule and then adopt that rule for a civil case. But they also do it from time to time even in the absence of a statute. Thus, a court which appears to be taking the radical step of changing from negligence to strict liability for products is really doing nothing more than adopting a rule that selling a dangerously unsafe chattel is negligence within itself.

Section 402A of the Restatement sets forth two requirements for liability—that the product be "in a defective condition" and that it be "unreasonably dangerous." The requirement of a defective condition is easily understandable in the usual situation in which a particular article has something wrong with it. Because of a mistake in the manufacturing process, for example, the product was adulterated or one of its parts was broken or weakened or not properly attached, and it did not function as expected. If this occurs, there is no need of proving fault in letting it come to be in that condition. But a defect may be only a minor one, and the Restatement indicates that strict liability is not to be imposed unless it makes the product unreasonably dangerous.

The more difficult problem arises with a product which was made in the way it was intended to be made and in the condition planned and which yet proves to be dangerous. Is such an article defective?

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49 See Restatement (Second), Torts § 286 (Tent. Draft No. 4, 1959); Prosser, op. cit. supra note 16, at 193; Morris, The Role of Criminal Statutes in Negligence Actions, 49 Colum. L. Rev. 21 (1949).
51 In a sense this is also similar to applying the doctrine of res ipsa loquitur and saying that selling a dangerously unsafe product gives rise to the inference that there was negligence in letting it become unsafe or in failing to discover its condition. But there it is necessary for the jury to find negligence.
Perhaps it can be said to be improperly designed, and the bad design may be called a defect. But then the design is "defective" only because it made the product unreasonably dangerous. Or what of a product to which a certain number of people are allergic. Is it defective? This too depends upon whether it is unreasonably dangerous. In cases of this general type the phrase "defective condition" has no independent meaning, and the attempt to use it is apt to prove misleading. The only real problem is whether the product is "unreasonably dangerous," because "defective condition," if it is to be applied at all, depends on that. Strict liability is appropriate for these cases, and it would be better in them not to refer to any requirement of defectiveness. As a matter of fact, even in the first type of cases in which the article was defective because of something that went wrong in the manufacturing process, the true problem in the end is whether that defect makes the product unreasonably dangerous.

Thus, the test for imposing strict liability is whether the product was unreasonably dangerous, to use the words of the Restatement. Somewhat preferable is the expression, "not reasonably safe." It has been suggested that this amounts to characterizing the product rather than the defendant's conduct. This is quite true, but it is easy to phrase the issue in terms of conduct. Thus, assuming that the defendant had knowledge of the condition of the product, would he then have been acting unreasonably in placing it on the market? This, it would seem, is another way of posing the question of whether the product is reasonably safe or not. And it may well be the most useful way of presenting it.

It may be argued that this is simply a test of negligence. Exactly. In strict liability, except for the element of defendant's scienter, the test is the same as that for negligence. Take Greenman v. Yuba Power

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53 It is, of course, perfectly possible to give the term a special legal meaning which would apply to this type of situation, but it seems pointless to attempt to do this when the second phrase covers the whole idea. In Crane v. Sears, Roebuck & Co., 218 Cal. App. 2d 851, 32 Cal. Rptr. 754 (Dist. Ct. App. 1963), the question was whether adequate warning was given that a "surface preparer" gave off inflammable fumes. After quoting the Greenman case with its reference to defects, the court said: "While there was no 'defect' in the surface preparer manufactured by Universal, it contained latent dangerous characteristics against which it was incumbent to protect during handling and use, with respect to which appropriate warning must be given the public." 32 Cal. Rptr. at 757. It held strict liability applicable.

54 "Unreasonably dangerous" carries an overtone of "ultrahazardous" and that type of strict tort liability. "Not reasonably safe" is closer to the language normally used in breach-of-warranty cases: "reasonably fit for the purpose for which sold," "wholesome." See the expression in Morrow v. Caloric Appliance Corp., 372 S.W.2d 41, 55 (Mo. 1963): "fit and reasonably safe for use by the 'consumer' when used in the manner and for the purpose for which they are manufactured and sold. . . ."

of Products, Inc.,” the famous California case, for example. If the defendant manufacturer knew that the design of the machine (a power tool, called a “Shopsmith”) was such that inadequate set screws would sometimes allow the tailstock of the lathe to move away from the piece of wood and thus cause the piece to fly out of the machine, it would clearly be liable in negligence in putting the machine on the market. (Indeed, the defendant was almost certainly negligent for failing to discover this.) The court held in the case that strict liability might be imposed because of a “defect in design and manufacture . . . that made the Shopsmith unsafe for its intended use.” This is by no means an indication that the machine must be made perfectly safe or foolproof, but instead is a holding that this product was not reasonably safe.

Strict products liability clearly does not require a perfectly safe product. A simple instrument like a hammer, for example, will not infrequently smash a finger or thumb if used unskillfully. It could probably be designed to make this possibility less likely, but at the cost of impairing its usefulness. Despite the dangers which the hammer creates, it is treated as reasonably safe. Or consider an automobile. It occasionally may be involved in an accident in which there is no fault on the part of anyone. It is designed, for example, to go so fast that if an obstacle suddenly and unexpectedly looms in front of it, the driver will be unable to stop or swerve in time to avoid a collision. Yet the manufacturer is not held liable if this happens. Nor is the manufacturer of an airplane automatically held liable if the plane crashes. Take an object for internal human consumption—e.g., aspirin, which may occasionally cause serious internal bleeding or produce other complications, or penicillin, to which the reactions of

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99 59 Cal. 2d at 64, 377 P.2d at 901. In Hentschel v. Baby Bathinette Corp., 215 F.2d 102 (2d Cir. 1954), a baby bathinette was made of a magnesium alloy, which would burn when over 1,050°F; the court treated the problem of liability in negligence and for breach of warranty as the same, and held that the product was reasonably fit for normal use.

The same rule applies to the retailer's liability. See, e.g., Landers v. Safeway Stores, Inc., 172 Ore. 116, 139 P.2d 788, 793 (1943): "a warranty does not constitute an agreement that the goods can be used with absolute safety or are perfectly adapted to the intended use but only that they shall reasonably fit for normal use."
some persons are quite drastic. Yet there is no contention that the manufacturer should be held to an insurer’s liability.

What goes into a consideration of whether a product is reasonably safe or not? This is a standard, as distinguished from a precise rule, and it affords flexibility and individualization of determination. If the test is equivalent to that of whether a reasonable prudent man would put it on the market if he knew of the dangers of this particular article, then the elements for determining negligence are relevant. We have here again the problem of balancing the utility of the risk against the magnitude of the risk. Factors involved in making this determination include, among others, the following: (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Who makes the determination as to whether a product is reasonably safe? In many cases there will be a factual dispute as to the actual condition of the article, and this of course will normally go to the jury. But putting this situation aside, who decides whether the established condition was reasonably safe or not? There is little treatment of this. By analogy to negligence, we would say that the jury applies the standard unless it is so clear that only a single result could reasonably be reached. Yet in the field of strict liability for ultrahazardous activities—or abnormally dangerous activities, as the new Restatement now characterizes them—the determination as to whether the activity is one for which strict liability is to be imposed is normally made by the court.

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59 See Restatement, Torts §§ 291-93 (1934); Prosser, Torts § 31 (3d ed. 1964).
60 The suggestion has been made that the best single test is that of the reasonable expectations of the buying public. See Dickerson, supra note 55 at 593. And see Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64 (1960).
61 Whether the conduct of the defendant has been that of a reasonable man of ordinary prudence, or in the alternative has been negligent, is ordinarily an issue to be left to the jury.... The imposition of strict liability, on the other hand, involves a characterization of the defendant’s activity or enterprise itself, and a decision as to whether he is free to conduct it at all without being liable for the harm which ensues even though he has used all reasonable care. This calls for a decision of the court; and it is no part of the province of the jury to decide whether an industrial enterprise upon which the community’s prosperity might depend is located in the wrong place.... Restatement (Second), Torts § 520, comment 1 (Tent. Draft No. 10, 1964).
saying that the court makes the determination that strict liability will be applied to products in general and that the jury makes the determination as to whether it will be applied to the kind of product involved. It would seem likely, however, that the court's function will prove to be somewhat broader and that it will sometimes make the determination for the kind of product—e.g., hammers, automobiles, aspirin—and leave to the jury the question of whether the particular article involved was reasonably safe. This would appear not to be inconsistent with the usual practice regarding the relative functions of judge and jury in actions for breach of warranty.

Certain types of situations have given rise to considerable difficulty in the past. A few comments on some of them may be helpful. Take first the cases involving allergies. Courts have often said that there is no breach of warranty if the product is safe to the normal consumer. This gives the misleading impression that a person is unable to recover if his injury comes about through his allergy to the product. The true issue in these allergy cases is no different from that involving other products. Is the product reasonably safe? It is not if a significant proportion of the consumers are allergic to it or an element in it. What proportion? That question is not answered in advance when a standard is applied. Some of the factors affecting it are (1) the kind of product and the public need for it, (2) the feasibility of eliminating the allergen, (3) the seriousness of the reaction which it may produce, (4) the public's knowledge as to the likelihood of allergic reactions and (5) the feasibility and usefulness of a warning. There is no need to prove negligence on the part of the manufacturer in failing to ascertain whether the product would produce an allergic reaction on the part of a portion of the public; instead, it need be shown only that there was negligence in selling the product in its present condition, assuming that the manufacturer knew of its propensity.

Another group of cases involves trichinae-infested pork. As in the other food cases involving strict liability, the courts have generally used warranty terminology and have often spoken of the requirement of wholesomeness or fitness for human consumption. The true issue

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is whether the trichinous pork is reasonably safe in the light of the
common practice of cooking it and the common knowledge of the
danger of trichinosis from uncooked pork. Putting the problem in
these terms eliminates extraneous issues which complicate the de-
cision in many cases.66

The cigarette cases have caused considerable disagreement. Are
cigarettes reasonably safe for human consumption? Two courts have
held that this determination must be made in the light of human
knowledge available at the time of manufacture.67 Two others have
taken the position that in strict liability the state of either the de-
fendant's own knowledge or of human knowledge generally is not
relevant; the question is whether the product itself was reasonably
safe.68 The last two cases seem more logically consistent with the basis
of strict liability. It is significant that in later trials following these
two cases the juries held for the defendant.69 Today, when the tobacco
companies do have knowledge of the possibility of contracting cancer
from the use of cigarettes, it is still unlikely that they will be held
liable for selling cigarettes. There is no present way of eliminating
this propensity, and people who want to smoke want to do it badly
enough to buy the cigarettes regardless of the danger. Similarly, one
who buys whiskey and becomes an alcoholic or develops cirrhosis of
the liver probably has no action against the manufacturer.70 If a

Scheib, 408 Pa. 452, 184 A.2d 700 (1962). For a good treatment, see Dickerson, Products
Liability and the Food Consumer §§ 4.4-4.21 (1951).
67 Ross v. Phillip Morris & Co., 328 F.2d 3 (8th Cir. 1964); Lartigue v. R. J. Reynolds
68 Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961); Green v.
American Tobacco Co., 154 So. 2d 169 (Fla. 1963).
69 Of particular significance is the result in the Florida case. In answer to a question
certified to it by the Fifth Circuit, the Florida Supreme Court had held that the warranty
of merchantable quality—"of a product's reasonable fitness for human use or consumption"
—would apply even though the individual could not discover the unsafe condition by exer-
cise of due care, and even though the state of human knowledge at the time did not dis-
Circuit then held that it was for the jury to determine whether the cigarettes were "reas-
sonably fit and wholesome," since there was no requirement that they be "'foolproof or
incapable of producing injury.'" Green v. American Tobacco Co., 325 F.2d 673, 677 (5th
Cir. 1963). The case was then tried in the federal district court in Florida, with the judge
instructing that the jury were to determine whether cigarettes are reasonably fit for human
consumption, and that if they "impose a threat to any substantial number of people who
use them, then they would not be reasonably fit," but that the warranty "does not impose
upon the defendant the duty to make an absolutely safe product." The jury returned a ver-
70 "Good whiskey is not unreasonably dangerous merely because it will make some people
drunk, and is especially dangerous to alcoholics. . . . Good tobacco is not unreasonably
dangerous merely because the effects of smoking may be harmful. . . ." Restatement (Sec-
ond), Torts § 402A, comment i (Tent. Draft No. 10, 1964). Compare the remarks of
Goodrich, J., concurring, in Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 302
(3d Cir. 1961). And see Keeton, Products Liability—Current Developments, 40 Texas L.
dangerous characteristic cannot be eliminated, a product still may sometimes be sufficiently desirable to make its sale proper and not the basis for liability.\(^6\)

Another group of cases involves the use of blood plasma. Under the current state of scientific knowledge, the presence of the hepatitis virus cannot be discovered, and there is no way to process the plasma to eliminate it. Thinking that to apply strict liability to this type of situation would require holding the defendant liable, several courts have resorted to the expedient of holding that the supplying of the plasma is a service, not a sale, so that no warranty should apply.\(^7\) These courts are wrong on both counts. It would be far simpler and less damaging to the state of the law to hold the blood plasma reasonably safe when the virus is unlikely to be present and impossible to eliminate, and the need for the plasma is great. This could well be pronounced in these cases as a matter of law.\(^8\)

It is necessary, of course, that the plaintiff show not only that the product was unsafe but also that the defendant was responsible for its condition. This is not a requirement that the defendant be at fault in this regard; if that were true he would be liable for negligence. The issue is usually whether the article was in an unsafe condition when it left the defendant’s control. This usually gives rise to a

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\(^6\) See Restatement (Second), Torts § 402A, comment k (Tent. Draft No. 10, 1964) "(Unavoidably Unsafe Products)." The example is cited there of "the Pasteur treatment of rabies, which not uncommonly leads to very serious and even permanently injurious consequences when it is injected. Since the disease itself invariably results in a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidably high degree of risk which they involve."

\(^7\) E.g., Perlmutter v. Beth David Hosp., 308 N.Y. 100, 123 N.E.2d 792, 795 (1954) ("If . . . the court were to stamp as a sale the supplying of blood . . . it would mean that the hospital, no matter how careful, no matter that the disease-producing potential in the blood could not possibly be discovered, would be held responsible, virtually as an insurer, if anything were to happen to the patient as a result of 'bad' blood"); Dibblee v. Dr. W. H. Groves Latter-Day Saints Hosp., 12 Utah 2d 241, 364 P.2d 1085, 1087 (1961) (hospitals "should not be strapped with an insurability of blood purity, absent negligence"). See also Merck & Co. v. Kidd, 242 F.2d 592 (6th Cir. 1957).

\(^8\) On the sales-service dichotomy and the presence of warranties, see Farnsworth, *Implied Warranties of Quality in Non-Sales Cases*, 37 Colum. L. Rev. 653 (1937); Note, 2 Vand. L. Rev. 675 (1949).

\(^*\) Compare Fischer v. Wilmington General Hosp., 149 A.2d 749 (Del. Super. 1959). "[T]he risk of transferring the hepatitis virus is almost an insignificant risk in comparison of [sic] the risk of shock if transfusion is needed and not given. In effect, the ordering of a transfusion in a case such as was here involved is considered to be a calculated risk." Id. at 752. This was apparently a negligence action, but the alleged negligence was not in failing to discover the presence of the virus but in using the plasma with knowledge of the possible presence. The problem here is not significantly different in the strict liability cases. The court also held that there was no negligence in failing to warn the plaintiff of the risk since the transfusion was needed and the warning would only add worry.
dispute of fact, and the plaintiff will often have resort to circumstantial evidence to supply his proof. If he sues the retailer, plaintiff will not run into the problem of proving when the dangerous condition arose, leaving that problem to be determined among the several sellers.

VII. SOME PROBLEMS

There is opportunity only for a cursory glance at some problems in connection with the application of strict liability.

A. Parties

What defendants are liable? If strict liability is to be imposed, it will clearly apply to the manufacturer of the finished product. Although the New York court indicated that it was not yet ready to extend liability to the manufacturer of a component part and the Restatement has caveated this problem, there is no real reason to doubt that the liability will eventually be extended to him. The Restatement section also imposes strict liability upon the retailer and wholesaler. The Restatement limits liability to defendants who are "engaged in the business of selling such a product."

Parties plaintiff? The cases have gone beyond the purchaser and members of the family or his employees to any user. As yet they have not gone beyond a "consumer" or "user" of the product, unless a passenger in an automobile is not to be so characterized. This being tort liability, it may well extend in the future to the foreseeable bystander.

B. Plaintiff's Fault

The cases appear to be in disagreement as to whether contributory negligence of the plaintiff bars his recovery in an action for strict

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73 This is similar to res ipso loquitur but different because that doctrine involves the use of circumstantial evidence to prove negligence on the part of the defendant.


75 Most of the retailer actions have been warranty actions, treated as such. But there are cases imposing tort liability for warranty, e.g., Henningens v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), and strict tort liability without the warranty terminology, e.g., Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

76 The cases are about evenly divided on the wholesaler's liability, and there is no logical reason for treating him differently. For citations, see Prosser, op. cit. supra note 59, at 682 n.47.

77 Note that this limitation applies only to strict liability. Liability in negligence may still be applicable to a person not in the business.


79 This is left to a caveat in the Restatement. See Note, Strict Products Liability and the Bystander, 64 Colum. L. Rev. 916 (1964).
products liability. In general, however, they can be reconciled by adverting to the customary distinction between contributory negligence and assumption of risk. If the plaintiff's negligence was in failing to discover the unsafe condition of the product he can usually recover; if his negligence was in continuing to use the product after learning of the danger condition, his recovery is usually barred.\textsuperscript{80}

C. Disclaimers Or Warnings

Unless a court is confused by warranty terminology into treating the action as one in contract, a disclaimer (or limitation of liability) will not automatically bar recovery. A disclaimer does not bar a tort action. On the other hand, one can consent to what would otherwise be a tort, and an actual agreement that the defendant will not be liable for his tort will be controlling as between the parties to the contract unless it is held to be against public policy and void.\textsuperscript{81} So also with a warning. A second-hand chattel, for example, sold on an as-is basis or with an express warning of a defective condition may well not give rise to a cause of action in strict liability in the immediate buyer. A statement of the ingredients of a particular product to bring it to the attention of an allergic user or instructions for the use of a dangerous chattel may make it reasonably safe. But in all of these situations, a difficult problem can still arise when the chattel comes into the hands of a subsequent purchaser who uses it without any knowledge of the agreement or the warning or the instructions. Two issues may be raised: (1) Was the defendant negligent toward the plaintiff in failing to take proper action to see that the warning or the instructions would come to the attention of the subsequent purchaser, and (2) can the defendant "shift the responsibility" to the first purchaser? These situations necessarily presume knowledge on the part of the first purchaser of the dangerous condition of the chattel, and holdings in negligence cases are entirely relevant.\textsuperscript{82}

D. Causation

A plaintiff must prove that the dangerous condition of the product was a substantial factor in bringing about his injury. This is cause-in-fact, which is normally for the jury to determine. There must also be legal, or proximate, cause. Is the ambit of liability here essentially the same as in a negligence action, or is it broader or more narrow? In the case of strict liability for extrahazardous or abnormally dan-

\textsuperscript{80} For discussion and citation of cases, see Prosser, \textit{op. cit. supra} note 59, at 656-57. See also 1 Frumer \& Friedman, \textit{Products Liability} \textsection 16.01 [3] (1964).
\textsuperscript{82} See Prosser, \textit{op. cit. supra} note 59, at 670-71.
gerous activities, it is generally agreed that the extent of liability is somewhat narrower than in negligence cases. So also would it appear to be in strict liability for products. The warranty cases speak of fitness for the purpose for which sold, and in the leading case expressly recognizing strict liability in tort, the court spoke of the product being "unsafe for its intended use." In Hardman v. Helene Curtis Indus., Inc., the court held that the "essential question presented by a claim of breach of implied warranty of merchantability is whether the product failed to safely and adequately satisfy the uses to which such products are ordinarily put." It seems to have regarded this as different from the test of foreseeability in negligence cases, though it treated those cases as analogous in indicating that the question was one of fact for the jury. Liability for fault, it should be remembered, is still available to the plaintiff if he can prove negligence, and the basis for determining negligence may create a wider scope of liability in that action.

E. Unfinished Products

A manufacturer may produce goods which are not in a finished condition and will require further processing before they are ready to reach the hands of the ultimate consumer. If, in the unfinished condition, the goods were unsafe and the person to whom he delivered them failed to make them safe, is the defendant liable? This question

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84 See, e.g., Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294, 297 (1961) ("reasonably fit for the purpose intended"); Vincent v. Nicholas E. Tsiakas Co., 337 Mass. 726, 151 N.E.2d 263, 265 (1958) ("reasonably suitable for the ordinary uses for which goods of that kind and description are sold"); Morrow v. Caloric Appliance Corp., 372 S.W.2d 41, 55 (Mo. 1963) ("fit and reasonably safe for use by the 'consumer' when used in the manner and for the purpose for which they are manufactured and sold"); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 76 (1960) ("reasonably fit for the general purpose for which it is manufactured and sold").
85 Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901 (1963). The complete statement reads: "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use." Ibid.
87 "[T]he question of what is an ordinary use is as much a question of fact as is the question of what is a foreseeable use." Ibid. In the case, a little girl had put her hair spray on the upper part of her dress because she liked the smell, and the dress had become ignited from a candle. A jury verdict for plaintiff was upheld.
88 Compare Chapman v. Brown, 198 F. Supp. 78 (D. Hawaii 1961), aff'd, 304 F.2d 149 (9th Cir. 1962), involving a hula skirt which ignited. An instruction had been given that the warranty was that the skirt "is reasonably fit and safe for the ordinary uses and purposes for which it is designed and sold, or for any purpose the seller might reasonably anticipate it will be used." Id. at 94 n.28. The court conceded that the last phrase might be too broad as a general proposition, but found it not to constitute substantial prejudice under the facts.
89 Compare also Manns v. Macwhitze Co., 155 F.2d 445, 452 (3d Cir. 1946), in which a descriptive warranty was held not applicable when the wire rope was used "for a purpose for which it was not manufactured."
was left as a caveat in the Restatement and was the subject of considerable debate at the May, 1964, meeting of the American Law Institute.

There are two significant decisions. In Vandermark v. Ford Motor Co., a dealer apparently failed properly to complete the final steps of processing a new Ford for delivery to a customer, with the result that the brakes were defective. It was held that the manufacturer could not “delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects,” and could not “escape liability on the ground that the defect . . . may have been caused by something one of its authorized dealers did or failed to do.” In Schneider v. Subbrann, a supplier of pork informed the retailer that it could no longer supply processed pork, and the retailer asked him to continue shipments, of raw pork, which the retailer would properly process. The supplier was held not liable to a buyer who contracted trichinosis. The cases indicate some of the problems involved. Is the original manufacturer identified in the customer’s mind with the finished product? Is the processor a responsible person to whom the risk can be properly shifted?

F. Indemnity

A manufacturer who produces an article which is not reasonably safe should be liable not only in strict liability to the ultimate consumer who is injured by it, but also in indemnity to the retailer (or intermediate supplier) who has paid the consumer. Abrogation of the privity requirement should enure also to the benefit of the retailer. And it should make no difference whether the retailer was liable to the consumer in strict liability or negligence so long as the negligence consisted only of failing to discover the dangerous condition of the chattel. A consumer, if he sued the retailer, would not have to show when the defective condition arose; the retailer would have to show that the manufacturer was responsible for it.

On the other hand, a manufacturer may himself be entitled to indemnity against the maker of a component part or against a final processor who failed to meet his responsibility for making the chattel safe.

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89 391 P.2d at 171.
91 On this second issue, see Restatement (Second), Torts § 452 (2) (Tent. Draft No. 7, 1962).
92 See, e.g., Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951).
95 In Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P.2d 168 (1964), for
VIII. Conclusion

Since the first modern decision almost 130 years ago, the law of products liability has been in a process of continuous change. The end is not yet. The trend for the future is clear.

The manufacturer's liability for negligence will remain, with no difficulties about the absence of privity. His responsibility in strict liability, already recognized in a majority of the states regarding food products, is extending now beyond products for intimate bodily use to products in general. It will soon become the established rule in the United States that the manufacturer is subject to strict tort liability without regard to the requirement of privity. Some courts will continue to speak the language of warranty, but they will usually recognize that the liability sounds in tort, and they will seldom be misled into applying contractual restrictions. Gradually a majority of the courts will slough off the warranty language and will be ready to follow the lead of the Restatement and the California court in frankly and accurately describing the liability as strict tort liability.

But this liability, though strict, will not be that of an insurer. The manufacturer will be liable on this basis only if he puts on the market a product which is not reasonably safe and the plaintiff is injured as a result of a contemplated use of it.

Plaintiffs will frequently bring a cause of action against a manufacturer seeking to recover on either a negligence basis or a strict-liability basis. The essential difference between the two is that in the latter the plaintiff will not need to prove either that the defendant negligently created the unsafe condition of the product or that he was aware of it. And the use of the doctrine of res ipsa loquitur has the effect of minimizing this difference.\(^1\)

\(^1\) example, it seems likely that the manufacturer would be able to recover against the dealer if its claims were true.


\(^2\) The case of Santor v. A & M Karadheusian, Inc., 33 U.S.L. Week 2446 (N.J. Feb. 17, 1965), decided sometime after this Article was finished, and not yet published at the time of galleyproof, is of such significance as to require a final note. First, it commits New Jersey to the theory of strict liability in tort as the "sound solution." Second, it indicates that this liability will apply to damage to property caused by a dangerous condition of the product. These two developments were easily predictable. But, in addition, it holds that an action for "loss of bargain" can be maintained directly against the manufacturer despite the absence of privity, when the article (carpeting, here) was not up to the standard required by the implied warranty of fitness or merchantability, "even though plaintiff's damage is limited to loss of value" of the product. Judge Francis, who wrote the opinions in Courtois v. General Motors Corp., 37 N.J. 523, 182 A.2d 145 (1962), and Henningsen v. Bloomfield Motors, Inc., 32 N.J. 318, 161 A.2d 69 (1960), makes this drastic change consciously and deliberately. Does it portend another step toward "an enterprise liability . . . not depend[ent] upon the intricacies of the law of sales," to be taken by "courts mindful that the public interest demands consumer protection" (language of the opinion)? What will be its relationship to the Uniform Commercial Code?