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PERSONAL INJURY DAMAGES IN PRODUCTS LIABILITY*

GRAHAM L. FRICKE†

I. — INTRODUCTION.

"PRODUCTS LIABILITY" is a convenient term to denote the liability of manufacturers and distributors for personal and property injuries caused by their products. Obviously, the study of such a subject must involve some consideration of history, for each intersecting strand of doctrine has developed along a different line. Some attempt to compare and even to rationalize these developments must be made. The broadest division is that between contract and tort, and the most obvious potential defendants are the manufacturer and the retailer. This subject can therefore be most conveniently treated in four main divisions — manufacturer's liability in negligence; manufacturer's liability in warranty; vendor's liability in negligence; and vendor's liability in warranty. The primary focus of attention in this article will be these four possibilities insofar as actions for personal injuries are contemplated.

From the plaintiff's point of view the existence of these possibilities may present tactical, financial or jurisdictional problems. Usually he will look for a big name, whatever position in the chain of distribution that person may occupy, and ponder at length the possibility of suing that person. The chances are that the manu-

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facturer will be such a person, but the increasing growth of wealthy chain-store retailers is modifying this picture. If both the retailer and the manufacturer are resident within the jurisdiction, the plaintiff will normally play safe by joining them as defendants. The liberal trend in interpretation of jurisdictional requirements, makes it more likely that the plaintiff will be able to sue the manufacturer as well as the vendor, even though the manufacturer may have his head office and manufacturing plant located in another jurisdiction. If the vendor discovers that the plaintiff has chosen to sue him, but has not joined the manufacturer as co-defendant, then, if the manufacturer resides in, or has “minimum contacts” with, the jurisdiction, the vendor may implead the manufacturer. This course will be more convenient and cheaper than awaiting the outcome of the action and then bringing a separate suit against the manufacturer if liability is imposed. That the plaintiff has chosen not to join the manufacturer, however, will generally indicate that the vendor is a big name, such as a large chain group retailer, and the manufacturer is not. In such a case the vendor may very well decide, in consideration of maintaining good relations between himself and his supplier, not to exercise his strict legal right of impleader.

Difficulties arise when, even under the liberal view recently taken of jurisdictional requirements, the manufacturer cannot be sued in the same jurisdiction. American juries, like American sporting spectators, tend to favor the underdog, and the plaintiff may have to forego the sympathy-inducing spectacle of David fighting Goliath. Even so, it will probably be worthwhile suing the vendor, whatever the suspected financial standing of the latter, since the manufacturer, even though out-of-state and not technically suable, will probably stand behind the retailer and insure satisfaction of judgment. The manufacturer wishes to retain good relations with all his retail outlets, and to avoid the damaging effect on his name of a successful action, so he will in all likelihood step in with funds and representation as soon as he discovers that one of his retailers has been sued. When he does not, the retailer may write him a letter inviting him to come and defend the action. If he does not accede to this invitation, he runs

2. E.g., McGee v. International Life, 355 U.S. 220 (1957). California court had jurisdiction over Texas insurer company not resident or otherwise doing business in California, since it sold its policies there and the premium money was sent from there.
the risk that the local court will regard the decision in the action between consumer and retailer as binding on him when the retailer brings action for recoupment.\(^6\) Then not only will he have alienated one retailer, but he will have precluded himself from effectively arguing certain issues and will have incurred additional costs.

The action for breach of warranty against the retailer developed in an age which had different ideas on social policy. Codification seems to have had an unfortunate rigidifying effect on the development of law in this area. Nevertheless, so long as the plaintiff can meet the requirement of privity, he will probably have an action. The construction of the Sales Act has been very indulgent, so that the warranty action has tended to overshadow the negligence action against the vendor; the general adequacy of the former action has meant that the latter has only rarely been pursued. This has not been true of the two actions against the manufacturer, since with mass production negligence is often difficult to establish, and the two actions have tended to coalesce.

Action for the negligence against the manufacturer will normally be either for inadequate equipment — in determining which the standard in the industry will often be relevant — or for inferred negligence of an employee in the process of manufacture. It will be argued by plaintiff that the defectiveness of the product indicates carelessness where it could have been foreseen that the safety of the consumer would be in jeopardy if due care were not used. This is not the only possibility, however. The law of negligence in manufacture has undergone an interesting process of transition. In the first place *Winterbottom v. Wright*\(^7\) was decided and followed at a time when industry was in a nascent stage of development and needed judicial subsidization. The misinterpretation of its holding by which recovery was generally confined to those enjoying the privity relation operated for a short while without great injustice. But as industry matured and as the phenomenon of the middleman, invented for convenient mercantile purposes, came to operate fortuitously in precluding recovery by the consumer, the hardship of this restriction began to be felt. Various exceptions were developed to modify this hardship, the most important being that of inherently dangerous things. The distinction was between things which were dangerous when perfect, such as poisons, and things which were dangerous only when defectively made. This distinction

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\(^6\) This process is called “vouching in” the warrantor. See Note, 40 Mich. L. Rev. 872 (1942).

was illogical and operated harshly for some time, until rejected by Cardozo, J. in MacPherson v. Buick Motor Co.,\(^8\) in 1917. But the distinction has recently been revived\(^9\) and given a new significance. Normally the manufacturer will be held liable in the latter type of case, \textit{i.e.}, for making a defective product which caused injury to the plaintiff. But even where the manufacturer is able to say that nothing went wrong in the process of manufacture and the product was exactly as he intended it to be, the plaintiff may claim that issuing the admittedly non-defective product, without warning of the danger in the circumstances of the case, constituted negligence. Where the article even when made properly is dangerous, it may be the manufacturer's duty to discover a new, possibly more expensive, process to eliminate the danger. Assuming, however, that such a danger is unavoidable, there are two possibilities. Either the article is dangerous when employed for all its normal purposes, in which case presumably the manufacturer should cease making such goods, or the article is safe when used for some purposes but becomes dangerous when used for others. The question then arises as to how foreseeable it is that the product will be used for any of the dangerous purposes. If such uses are reasonably foreseeable, the dangers are not obvious to the consumer, and warning is at all feasible, the manufacturer may be under a duty to provide a warning to the consumer by way of label, printed message on the package or can or in some other convenient position, or literature accompanying the product.

This sort of case has been arising with increasing frequency and is usually brought against manufacturers of insecticides, sprays, or other chemical mixtures. Such manufacturers usually maintain large research departments, making it possible to argue that insufficient experiments were carried out before letting the product out into the community for use, or that members of such departments, in the process of mixing and testing, should have come to appreciate the necessity for warning against certain uses. Two writers even suggest a distinction between “directions for use” and “warnings,” the former relating to the promotion of efficiency in use, the latter concerning safety.\(^10\) In the context of the case they discuss, where the mandate “Do not use this product on bearing apple trees later than . . .” was regarded as a mere “direction for use” not satisfying the duty to warn, the distinction becomes very tenuous. It is possible

\(^10\) \textit{Id.} at 147.
to explain the decision as resting on the construction of conflicting provisions of a difficult statute. It may be preferable, however, to retain the distinction for cases where consequences of noncompliance with directions are so extreme that explicit mention of such consequences may add to the deterrent effect of the direction, and where it is suspected that the manufacturer refrained from mentioning them out of a regard for good consumer relations — fewer people may buy the product if danger is stressed. In such situations it does not seem unfair to require the manufacturer to weigh the relative economies of losing a few customers or paying compensation to those injured by his product.

Two important recent developments are affecting the law of products liability. These are national advertising and insurance. They have not effected an immediate change in the law, but clearly the law must gradually adapt itself to these facts of life, and cases contain increasing recognition of their importance.

In 1944, the comment was made that

"the growth of national advertising . . . has raised tremendously the potential responsibility of the seller. His buyers are now infinite in number and often quite remote in distance — they may be any one of the 3,000,000 readers of The Post, or of the 1,000,000 listners of WGN."  

In the intervening 15 years the figures have grown to astronomic proportions. With 42,310,000 television sets in homes in the United States, it is possible to reach as many as 50,000,000 people with one program. This not only makes the "Man in the Grey Flannel Suit" a power to reckon with, it also changes the relationship between manufacturer and consumer. The Washington court in the Baxter case was a little ahead of its time in relying upon this new factor to hold the manufacturer liable for breach of warranty in 1932; the decision provoked some unfavorable contemporary comment and an unenthusiastic reaction in other jurisdictions. In more recent years, however, the Baxter doctrine has been treated with greater enthusiasm.

13. TELEVISION AGE YEAR BOOK (1958). Figure for January 1, 1958.
In Rogers v. Toni Home Permanent Co.,\textsuperscript{18} where defendant's home permanent kit did not have the "very gentle" effect on plaintiff's coiffure that defendant had promised, but instead rendered it "cotton-like" and "gummy" and caused most of her hair to fall out, plaintiff sued in breach of warranty. In holding that plaintiff could proceed on this theory, the Supreme Court of Ohio drew support from considerations of history and the impact of modern advertising:

"Occasions may arise when it is fitting and wholesome to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization. Today, many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious."\textsuperscript{17}

This development, combined with the normal feeling of the manufacturer that he is responsible for defective goods,\textsuperscript{18} and the notion that the manufacturer is in the most convenient position to absorb the loss, have created pressures toward holding the manufacturer liable. This leads us to consider the development of insurance, for the accessibility

\textsuperscript{16} 167 Ohio St. 244, 147 N.E.2d 612 (1958); cf., Symposium, Advertised-Product Liability, 8 CLEV.-MARSH. L. Rev. 1 (1959).
\textsuperscript{17} Supra at 248-249, 147 N.E.2d at 615-16.
of products liability insurance facilitates the view that the cost of the injuries, or more accurately, the cost of the premiums, ought to be regarded as a cost of doing business, to be passed on to the consuming public in the form of higher prices.

The first known products liability insurance policy was issued in England in 1890, but most of the important developments have taken place in the last two decades. After the first policy in 1890, very little happened until after the first world war, and even in 1939 it was still true to say that there was a seller's market in such insurance. It was the old story of the vicious circle of caution bred of inadequate experience in underwriting this sort of risk, plus the fact that the ones to seek such insurance in the early stages were those with comparatively hazardous enterprises and high risk rates.

By 1944, however, one observer was able to report a widespread change in attitude on the part of insurers, and by 1951 the national figure for products liability insurance premiums was placed at $18\frac{1}{2} million. Not all manufacturers, however, agree as to the business wisdom of taking out products liability insurance. As this type of insurance has become more widespread, better-risk industries have been attracted and premiums have become cheaper with the result that it has become economical for almost any manufacturer, no matter how modest, to take out insurance. And with the increasing experience in underwriting such insurance, the insurance companies have become more liberal in the type of risk they are prepared to cover. They have also become more realistic; for example, the standard type of policy today is no longer restricted to losses for liability imposed by law, as distinct from losses for compensation "assumed by the insured," or by the unrealistic interpretation excluding implied warranties from such coverage.

II. Manufacturer's Liability in Negligence

The development of the action in negligence against the manufacturer has been case law at its best and most typical. When Dean Levi wanted an example of the judicial process in operation he chose this development. It exhibits the dynamic quality of the law, the flexibility, the importance of the subjective element in determining the

20. Ibid.
similarity of the present case to those previously decided, and the gradual crystallization of relatively certain rules as the borderlines of a fluid concept are pricked out from case to case — all typical features of the legal process.

Before the cases are examined, it may be worthwhile to consider whether this area of the law lends itself to judicial development, or whether it would have been preferable to have left the problem for legislation. Every now and then a judge will attempt to justify his conservatism, in this area as in others, by taking the position that if an injustice exists, then it is up to the legislature to correct it. Despite these expressions of judicial abstention, the legislature has sought to intrude into the tort field only on rare occasions. Sometimes its pronouncements are given indirect effect — as when courts impute to legislatures an intent to provide civil sanctions, or use the equity of statutes to inspire judicial developments — but generally legislatures have left it to the courts to develop their own doctrine.

The view taken here is that the occasional expression of judicial abstention reveals an over-refined Montesquieuan conception of the proper constitutional division of functions, and that the "hands off" attitude of the legislature has been entirely desirable. It is here par excellence that the judge is charged with the duty of making the law serve the ends and needs of justice in a changing world; here that the boasted flexibility and adaptability of the common law are needed.

First, it is doubtful whether tort liability contains sufficient vote-catching material to lead politicians to take a lively interest in the subject, especially when there is pressure of business such as exists today. But even if legislative inertia could be overcome, it would be impossible for the legislature to anticipate the infinite variety of situations which are to arise in the future. Consequently much experimentation would be necessary if the matter were left to legislation. Many statutes and much interpretation would be necessary and, even then, by the time satisfactory formulae had been arrived at, chances are they would be obsolete. It seems the common law technique, with its compromise of continuity and change, is much more appropriate.

Second, legislation of this sort would undoubtedly be opposed by powerful lobbies of manufacturers able to enlist the further support


25. Cf., Noel, Strict Liability of Manufacturers, 24 Tenn. L. Rev. 963, 1016 (1957): "Even those thoroughly familiar with the problem would have trouble drafting a suitable general statute."
of publishers who would have an interest based on expectation of advertising.\footnote{26} Local dealers, as a part of manufacturers' distributing system, would be susceptible to the influence of these manufacturers in securing their influence in turn with their local legislative representatives.\footnote{27} One could not expect the resulting legislation to provide much protection for the general public.

On the other hand the courts, being on the job all the time and alert to effectuate social justice, enjoying longer tenure and being comparatively free from political pressure, can be depended upon to reach results which represent a much broader cross-section of community interests.

Third, there is not the same need in this area for laying down clear, certain rules regulating the conduct of members of the community, as there is in other areas. Most of the situations in this area involve, by definition, inadvertent conduct, where the influence of legal rules must be comparatively ineffective. While the deterrent effect of tort law should not be minimized, it must be recognized that the law of torts tries to ride several horses, and in the compromise between deterrence and compensation, the latter is probably predominant. In any event, deterrence is more important in contracts and property than in torts which is more concerned with an equitable ex post facto resolution of losses which have already occurred. As such, its problems can be much more flexibly and efficiently handled by the judicial branch of government. In the area of contracts and property, it is of paramount importance to be able to prophesy accurately a court's reaction to a given pattern of conduct, since in those areas men act and plan consciously with a view to achieving a result which courts have indicated would involve certain consequences.\footnote{28} Such needs can be better met by the legislative organ of government.

\textit{Winterbottom v. Wright}\footnote{29} is now largely discredited — although it remains to haunt English law in cases involving the sale and leasing of real estate — but it played such an important part in the development of the subject, that its position in history cannot be ignored. The declaration alleged only that it was the duty of the defendant by virtue of a contract with the Postmaster General to repair a mail coach, and that failure of defendant to carry out this duty had led to plaintiff's

\begin{footnotesize}
\footnote{26} See New Yorker, March 7, 1959, p. 42: “Like any big, practical organization, Coca Cola has its own liaison channels to legislatures. Its chief lobbyist is its senior vice-president, Edgar J. Forio...”
\footnote{27} For this suggestion, see Freezer, Manufacturers' Liability, 37 Mich. L. Rev. 1, 18 & n. 45 (1938).
\footnote{29} 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).
\end{footnotesize}
injuries when the coach broke down. The defendant's demurrer was sustained. It is worth noting (1) that since the action was framed as an attempt to rely upon the breach of defendant's contractual obligation to another, and the matter was decided on declaration and demurrer, the actual decision holds that a person who has undertaken to do work for another does not thereby become liable to a person injured by his failure to perform the contract, and (2) that even with proper pleadings, the case would be decided the same way today — in his celebrated opinion in Donoghue v. Stevenson, Lord Atkin referred to the decision as "manifestly right."

Despite its correctness, it marred and retarded the development of the law for many decades. This is attributable to the wide dicta of Lord Abinger and Baron Alderson who foresaw the most "outrageous consequences" if the floodgates were to be opened. This led to the notion that if A undertook a contractual obligation toward B, and his non-performance or misperformance of that obligation resulted in damage to C, then C could not sue A unless he could show that A had undertaken toward him the same obligation he had assumed toward B. Under the elaborate system of marketing which was fast becoming the normal rule during the latter half of the nineteenth century this meant that the consumer injured by a defective product could not sue the careless manufacturer of the article since he was not in privity with the latter. With the refinement of the system to encompass wholesalers, jobbers, distributors and other links in the chain of distribution, the operation of this extended Winterbottom v. Wright rule became intolerable and courts began to invent exceptions to it.

As Llewellyn has said in reference to another, but similar, development, the emotional drive of the cases centered in the stomach, and one of the first exceptions to the general rule of nonliability concerned food and drugs; this was later extended to include firearms and rationalized to include all "articles intended to preserve, destroy

30. The declaration at one point uses the word "negligently," but the tenor of the declaration suggests that this word is used in the colloquial sense of "carelessly," and the overriding impression is that the plaintiff is trying to enforce a contract to which he is not a party. Cf., Cardozo, J. in MacPherson v. Buick Motor Co., 217 N.Y. 382, 389, 111 N.E. 1050, 1059 (1916): "... the form of the declaration . . . did not fairly suggest the existence of a duty aside from the special contract which was the plaintiff's main reliance. . . ." Cf., Donoghue v. Stevenson, [1932] A.C. 562, 589, Lord Atkin: "It is to be observed that no negligence apart from breach of contract was alleged — in other words, no duty was alleged other than the duty arising out of the contract. . . ." and at 608 Lord Macmillan: "... it is a singular fact that the case of Winterbottom v. Wright is one in which no negligence in the sense of breach of a duty owed by the defendant to the plaintiff was alleged on the part of the plaintiff."

33. LLEWELLYN, CASES ON SALES 342 (1930).
or affect human life.” The most important exception was known variously and vaguely as the exception of “imminently,” “intrinsically” or more often “inherently” dangerous articles — the distinction was between things the normal function of which was to destroy (such as guns, poisons etc.) and things which only became dangerous if negligently made. While these exceptions made the law more tolerable, they led to some quite irrational distinctions and refinements, and the tendency — encouraged by the decision in Huset v. The Case Threshing Mach. Co. — was to apply them pedantically. For example, the exclusion of machinery, motor cars, boilers and the like, on the basis that they were not intended when perfect to preserve, destroy or affect human life was irrational, since these things were just as dangerous when negligently made as the articles within the exception.

In 1916, in MacPherson v. Buick Motor Co., the New York Court of Appeals, speaking through Judge Cardozo, allowed the purchaser of a defective motor car to recover for his injuries against the manufacturer, with whom he was not in privity. Although Judge Cardozo paid lip service to the received doctrine and vocabulary, he effectively applied liability based on foreseeability of harm by extending liability beyond things which in their normal operation are implements of destruction to things the nature of which is such that they are “reasonably certain to place life and limb in peril when negligently made.” In jurisdictions which accepted it, the MacPherson case “caused the exception to swallow the asserted general rule of non-liability, leaving nothing upon which that rule could operate.”

Gradually other jurisdictions came to accept the MacPherson rule, Massachusetts being the last to capitulate in 1946.

It was a necessary part of judicial statesmanship to use the accepted concepts and preserve an appearance of continuity with the past in order to forestall the possible objection that he was innovating. But although some courts still talk in terms of things “inherently dangerous,” the trend has been to emphasize those parts of Cardozo’s

34. As Bohlen pointed out, the interchangeable use of “imminently” and “inherently” — words which are far from synonymous — shows how vague it was. Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendors, 45 L.Q. Rev. 343, 354-355 & n.22 (1929).
35. 120 Fed. 865 (8th Cir. 1903).
36. See Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendors, 45 L.Q. Rev. 343, 358-359 (1929).
38. So much so, that Lord Buckmaster, who dissented in Donoghue v. Stevenson thought that MacPherson was just another example of an exception: In . . . MacPherson v. Buick Motor Co. . . . the learned judge appears to base his judgment on the view that a motor-car might reasonably be regarded as a dangerous article.” [1932] A.C. 562, 577.
opinion which base liability on a “risk” approach, and the other language is conveniently forgotten:

“If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.”41

Sixteen years later the English House of Lords, using language strikingly reminiscent of Cardozo, and in fact expressly referring to the MacPherson decision, made even clearer the point that manufacturer's tort liability is simply part of a wider field of negligence, liability for which rested basically on factors of foreseeability and risk. This was the case of Donoghue v. Stevenson,42 which arose by way of a Scottish procedure similar to a demurrer. Appellant had averred that a friend had purchased for her some ginger beer contained in a bottle made out of dark opaque glass, that some of the ginger beer had been poured out into a glass, that she had consumed the first glass and her friend proceeded to pour the remainder of the contents of the bottle into the glass when a snail, in a state of decomposition, floated out. She further averred that the sight of the snail and the realization that she had already consumed ginger beer affected by the snail, caused her severe physical injuries. The respondent, manufacturer of the ginger beer, objected that these averments did not disclose a good cause of action. The holding of the House of Lords, by a three to two majority, in favor of the appellant, thus amounted to no more than a decision that she was entitled to recover if she could prove these allegations.

The difficulty of stating the holding, inevitably created by multiple court decisions, is especially acute here, where there are wide differences in reasoning even within the judgments of the three members of the majority. If the subsequent decisions are ignored, one can of course state an infinite number of propositions between a very wide foreseeability principle and a proposition so narrow — in terms of Scottish married women etc. — as to be virtually useless as a precedent. However the main field of controversy has narrowed to a choice between the wide “neighbour” rationale and the narrow (“headnote”) rationale which is confined to the question of the liability of

42. [1932] A.C. 562.
the manufacturer. Both principles are contained in the judgment of Lord Atkin, which reasons from the former to the latter. His statement of the wide rationale is the more famous:

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."\(^4^3\)

His statement of the narrow rationale is:

"[A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."\(^4^4\)

Professor Houston has argued\(^4^5\) that although the wider principle is the one for which the case is most frequently cited, and although this principle may be considered part of the rationale of the judgment of Lord Atkin, it cannot be regarded as part of the rationale of the court, and no amount of retroactive citation can make it such. This, while true, does not minimize the importance of the effect of the judgment of Lord Atkin on the development of this area of the law. However analytically sound Professor Houston's reasoning may be, the important thing is that subsequently courts have accepted Lord Atkin's reasoning and have regarded manufacturers' liability as simply part of a wider field of negligence. Of course it is true that each decision in the field of products liability, like decisions in any other area, tends to departmentalize the law of torts by pouring content into the reasonable foreseeability standard and fixing a precedent for similar fact situations. As MacDonald J. has put it,

"It is no less true that every case of a duty established in respect of a given situation-pattern established a legal duty in similar situation-patterns as they may arise. This process was strikingly manifested in Donoghue v. Stevenson itself and in later cases which applied its principle to varying aspects of the manufacturer-ultimate consumer situation."\(^4^6\)

\(^{43}\) Id. at 580.
\(^{44}\) Id. at 599.
\(^{45}\) 20 Modern L. Rev. 1, 9 (1957).
The fact remains that the courts take the same basic approach and employ the same general considerations in deciding products liability cases as any other negligence cases. Some of the important consequences of this will now be considered.

One consequence is that factors such as magnitude of risk, gravity of threatened harm, ease of precautions and value to be achieved by defendant's activity will be relevant to the question of the defendant's duty. If the defendant is manufacturing a high-powered explosive, he will have to exercise much more care than a fountain pen manufacturer. This is not to erect degrees of care or to place special significance on a category of dangerous chattels, but simply to say that "due care under the circumstances" requires greater caution in the former situation. Even if the risk is not very great and the harm which will occur if the risk materializes is comparatively slight, a showing that the defendant could easily have avoided the danger will raise the standard of care required of the defendant. A good example is provided by Pease v. Sinclair Refining Co., 47 where plaintiff, a teacher supplied by the defendant with "oil samples," poured liquid from a sample on some metal and was injured in the resulting explosion, the sample having contained water instead of kerosene. On appeal from a verdict for plaintiff, the appellate court stresses the fact that the danger could easily have been avoided:

"It would have been so easy to have warned the recipient. . . . If we feel the defendant at least somewhat culpable in failing to take the simple step of warning, then we see no reason to take the case from the jury when the consequences are serious, and, because serious, are unexpected." 48

The main consequence of this attitude is that the courts will use the same general criteria of foreseeability as they employ in other negligence issues. Thus if the plaintiff has put the product to an unusual use which could not reasonably have been foreseen by the manufacturer, the manufacturer will escape liability. In Schfranek v. Benjamin Moore & Co., 49 plaintiff purchased a painting compound manufactured by the defendant and distributed in powder form. In the course of mixing the compound plaintiff placed his hand in the package, whereupon his hand was cut by some glass contained in the powder. In granting the motion to dismiss the complaint alleging negligence, the court stated the appropriate question to be

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47. 104 F.2d 183 (2d Cir. 1939).
48. Id. at 186.
49. 54 F.2d 76 (S.D.N.Y. 1931).
"whether the probable normal and appropriate use to which the thing in question is intended by the manufacturer to be put would involve injury to its user, if it is wrongfully compounded or negligently inspected."50

Since the plaintiff’s use of the product was abnormal and not reasonably to be expected by the defendant-manufacturer, liability could not be imposed.

In Hentschel v. Baby Bathinette Corp.,51 purchaser of a baby bathinette sued the manufacturer for injuries resulting when the bathinette ignited in the buyer’s bathroom and its magnesium alloy supports burned fiercely before the fire could be extinguished. The evidence about the cause of the fire being in conflict, the trial court charged the jury that there could be no recovery unless the jury found that “this baby bathinette was the cause of the occurrence of the fire originally.” On the jury’s returning a verdict for the defendant, the plaintiff appealed, arguing that the jury charge had been erroneous. The United States Court of Appeals held that the charge was proper, since the bathinette was not dangerous when used in the normal way:

“It was only in situations of abnormality that it became dangerous; that is where it was exposed to extreme heat, and it would not reasonably be expected that a bathinette constructed in part of wood and plastic would be used where it would come into contact with heat of some 1100° F.”52

The dissent of Judge Frank does not challenge the reasoning of the majority but differs in the attitude taken toward what could be classified as reasonably foreseeable. Judge Frank took the view that a fire was reasonably foreseeable, in light of the number of fires occurring each year in the United States (roughly a million) and the millions of fire insurance policies issued.

This leads into a discussion of liability to people with abnormal susceptibilities, such as allergic conditions. This area presents two problems: (1) the liability for damages which are inflamed by the existence of plaintiff’s abnormal condition, in cases where “normal” persons would have suffered some harm, (2) liability for injury caused by the special susceptibility, where no injury would have been suffered by normal persons. The reasoning in the Polemis case53 suggests recovery for inflamed damages in the first situation. These cases are sometimes referred to as the “eggshell skull” situations, in which it is said that the tortfeasor takes his victim as he finds him. This in

50. Id. at 77.
51. 215 F.2d 102 (2d Cir. 1954).
52. Id. at 105.
fact is the answer given by courts.\textsuperscript{54} Where no injury would have been suffered by normal persons, the application of a \textit{Palsgraf} type duty analysis would suggest that no duty is owed to such persons, especially when it is remembered that "there must be knowledge of danger, not merely possible but probable."\textsuperscript{55} In an interesting passage in \textit{Bourhill v. Young},\textsuperscript{56} Lord Wright develops this theme. It is noteworthy, though, that every example of special susceptibility given could be based on the notion of voluntary assumption of risk — the "bleeder" who mixes with the crowd, the blind or deaf man crossing the busy street, and the pregnant plaintiff herself in \textit{Bourhill v. Young}. It may not be possible to say this of the allergic victim for many people are not aware of their own allergies. Therefore the examples put by Lord Wright may be distinguishable. There is another important difference in the manufacturer's situation which may lead to a different result. True it is that the defendant is not obliged to guard against a remote contingency,\textsuperscript{57} and it may appear at first sight that the manufacturer, even if he knows of the existence of an allergic group, is in the same position vis-à-vis a member of that group as the driver of a motorcycle vis-à-vis a pregnant fishwife — since the driver knows that there may be a pregnant woman in a large group of people. But in the latter case, the defendant is committing a single act, while in the former case the manufacturer is producing a large number of products. While each product, considered in isolation, may be unlikely to injure anybody, it may be possible to predict for example that in every hundred products sold, five will cause injury to an allergic group. Injury to them is not merely possible but probable. There may be a parallel in the situation where a person fires a shot into a large crowd. He does not know \textit{who} is going to be injured, but it may be likely that some person will be, and that person will certainly have an action against the firer. Such reasoning, then, seems to justify the special rule announced in \textit{Gerkin v. Brown & Sehler Co.},\textsuperscript{58} that where the seller or maker knows of the existence of an allergic group, he may be liable to a member of that group. Knowledge is essential, however, and an important factor in the decision in the \textit{Gerkin} case was defendant's letter to the local dealer which showed defendant was aware of a special group.

\textsuperscript{56} [1943] A.C. 92, 109-110.
\textsuperscript{58} 177 Mich. 45, 143 N.W. 48 (1913).
This reasoning merely shows that there may be foreseeability if a sufficiently large number of products is distributed. Where does that lead us? It certainly does not automatically establish liability but leads only to the conclusion that the defendant is under a duty of care. Another way of putting this is that the defendant is only liable in a negligence action if harm could have been avoided by the exercise of human care. Now it may be, as some cases have pointed out, that in some situations nothing the defendant could have done would have prevented the injury, and in such case the defendant would not be liable. This leads us to draw a distinction between cases where some preliminary test is available to determine whether the purchaser is within an allergic group, and those where no such test is available. In the former cases, where a special allergic group exists and is known, the defendant is under a duty to warn the consumer. If the product is one likely to be used in performance of some service, such as hair dye, defendant has a duty to warn the hairdresser or other person who will be using the product of the possibility of injury to members of an allergic group and to give instructions on how to test consumers or customers for allergic reactions before the product is used. Such warning discharges the defendant's duty to the consumer or ultimate recipient of the service. The duty to warn may put the manufacturer in something of a dilemma — giving the necessary warning may be bad customer relations, and may deter some from buying his product. However, if the manufacturer for business reasons prefers to conceal the possibility of injury, it seems fair to make him regard the damages resulting from injuries as part of the cost of operating his business.

Another important effect of regarding manufacturer's liability as a category of negligence has been to facilitate the extension of liability beyond the manufacturer-consumer relationship. In the MacPherson opinion, Judge Cardozo used cautious language — probably in order to make his opinion more acceptable to the conservative section of the profession — and was careful to limit his decision to situations where the manufacturer of the finished product, having put the product on the market to be used without inspection, is sued by the sub-vendee who has suffered personal injuries. Consistent with the Atkin-neighbour principle, however, there is no reason why recovery should

59. E.g., Merrill v. Beaute Vues Corp., 235 F.2d 893, 897 (10th Cir. 1956).
be confined to the ultimate purchaser — certainly in cases of products such as automobiles, injury to others than the purchaser is eminently foreseeable if care is not exercised in manufacture and inspection — and later courts have allowed recovery to persons outside the chain of distribution. It was an easy matter to say that the manufacturer of electric current transformers who shipped them with wooden blocks packed inside them could foresee injury to the employees of the purchaser of the transformers were installed without the blocks being removed. The transformers had to be installed by someone, and the employees of the purchaser constituted the most obvious class of persons foreseeably endangered by the defendant’s lack of care. An even more striking extension was made by the Supreme Court of Wisconsin in 1928 in Flies v. Fox Bros. Buick Co. when they permitted a pedestrian injured in an automobile accident to recover against the defendant used car dealer whose negligent failure to equip the car with efficient brakes before its resale was found to have caused the accident. Much of the reasoning of the opinion is unsatisfactory, but the basis for imposing liability is clearly stated in the following sentence: “[Defendants] should have anticipated that some one was likely to be run down upon the streets of the city of La Crosse in the then condition of the car.” This, and other cases which reach similar results, would seem to justify the proposition contained in the Restatement of Torts allowing recovery to persons whom the manufacturer “should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use.”

Another question expressly left open in the MacPherson case was that of the liability of the maker of component parts. This question has also been subsequently answered in favor of liability. This is consistent with modern notions of superseding cause, according to which the supervening conduct of another, even though that conduct

63. In fact, the application of this principle led to a non-purchaser recovering in the Donoghue case, itself.
65. 196 Wis. 196, 218 N.W. 855 (1928).
66. Id. at 210, 218 N.W. at 860.
67. E.g., Kalinowski v. Truck Equipment Co., 237 App. Div. 472, 261 N.Y. Supp. 657 (1933), which contains the much more satisfactory discussion: “This step beyond the literal application of the MacPherson and Smith opinions takes us no deeper into a region of doubt as to tort liability than do many cases in which recovery in tort has been granted to those whose liability to injury was held reasonably to be anticipated. . . . The situations of this plaintiff and the truck were neither strange nor remote from reasonable expectation — the girl walking along a public sidewalk, the truck being driven along a public street. . . .”
68. RESTATEMENT, TORTS § 395 (1934).
69. “We are not required, at this time, to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. . . .” 217 N.Y. 382, 390, 111 N.E. 1050, 1053 (1916).
is negligent,\textsuperscript{71} or even criminal,\textsuperscript{72} is not regarded as insulating the previous actor from liability, provided that the later conduct was foreseeable. There is even less reason for regarding the negligence of another person as having this effect where it takes the form of an omission to act.

Products liability has its own special problems of proof. Almost all negligence actions are subject to the difficulty that, with crowded court lists, witnesses are called upon to testify as to matters which occurred many months prior to the litigation. In light of the imperfection of human facility for observing and remembering events,\textsuperscript{73} this is bad enough. But the modern consumer who is injured by a defective product meets the additional difficulty that the supposedly negligent conduct occurred some time prior to his injury, generally in a factory using mass production techniques which make identification of individual products impossible. When to these problems are added that the plaintiff will probably lack access to information concerning the defendant's equipment and processes, and faces evidence of employees of the defendant who, wishing to retain good relations with their employer, are not likely to testify favorably to the plaintiff,\textsuperscript{74} it becomes obvious that the lot of the plaintiff is not an easy one — or would not be, if the courts had not responded to the need to rectify this injustice by giving new life to an old tool.

The “tool” referred to is the doctrine of res ipsa loquitur, which was developed in an age when the absence of modern pre-trial procedures such as interrogatories must often have placed the plaintiff in a position with respect to access to evidence inferior to that of the defendant. This raison d'etre which has been erroneously elevated to the position of an indispensable requirement by some courts\textsuperscript{75} has lost much of its force with the development of modern techniques for obtaining information in advance of trial,\textsuperscript{76} but the doctrine is retained to implement modern accident compensation policies — policies thought to have special application in this area where the defendant is generally in a superior position to absorb and redistribute the loss.

\textsuperscript{71} E.g., Teasdale v. Beacon Oil Co., 266 Mass. 25, 164 N.E. 612 (1929).
\textsuperscript{73} Cf., Williams, The Aims of the Law of Torts, 4 CURRENT LEGAL PROBLEMS, 137, 173 & n.173 (1951).
\textsuperscript{74} The likelihood of a witness employed by one of the litigants being biased in favor of his employer is so great and notorious, that it may be the subject of judicial notice. Levin & Levy, Persuading the Jury, 105 U. PA. L. REV. 139, 150 & n.66 (1956).
\textsuperscript{75} See cases collected in PROSSER, LAW OF TORTS 209 (2d ed. 1955); and see, Fricke, Of Mice and Men and Unrefreshing Pauses, 3 U. QUEENSLAND L.J. 321 (1959).
\textsuperscript{76} Although in special cases this factor may still give vitality to the rule. Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).
The use of the \textit{res ipsa loquitur} device has tended to erode concepts of fault liability in all negligence actions. To understand how it has had this effect, we need to examine the underlying rationale and the express requirements of the doctrine.

In the usual case, plaintiff will introduce direct evidence of defendant's conduct, \textit{e.g.}, that defendant did not slow down before turning a corner in his car. Sometimes, however, he lacks knowledge of any specific conduct on the part of the defendant, and will have to resort to circumstantial evidence from which the defendant's negligence can be inferred.

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."\textsuperscript{77}

The logical relationship between a requirement that the accident be of a type which is more often than not attributable to negligent conduct and the problems of proof should be obvious: the plaintiff in a civil case is required to establish this case "on the balance of probabilities," and proof of the occurrence of a type of injury which is as easily attributable to unavoidable accident as it is to negligence does not tend to establish the defendant's negligence by a preponderance of the evidence.\textsuperscript{78} But observe how the requirement is formulated in the above traditional statement of the doctrine — the accident must be "such as in the ordinary course of things does not happen if those who have the management use proper care." This is misleading. To determine whether an accident was more likely than not the result of the defendant's negligence, obviously one must look, not at the general range of experience concerning the use of such instrumentalities, but only at the occasions when accidents happen, and ask whether such accidents are more frequently than not attributable to the negligence of those in control. Whether accidents are rare or common throws no light on the question of the likelihood of the defendant's negligence being the cause of the accident. Yet the traditional formulation directs attention to such an inquiry. To give an example, suppose that on 90\% of the occasions when a certain instrumentality was used, it caused injury to nobody, while 70\% of the accidents, \textit{i.e.}, 7\% of total, were unavoidable by human care, and the remaining

\textsuperscript{78} Cf., Morris, \textit{Res Ipsi Loquitur in Texas}, 26 Texas L. Rev. 257, 260 (1948),
3% were attributable to human carelessness. It would then be true to say that such an accident “does not ordinarily happen if due care is used,” yet it would not be true to say that such accidents are “more often than not” negligently caused.

Starling Morris expresses this viewpoint well in the following passage:

“In the relatively simple cases, such as falling objects, a general conclusion that such mishaps do not ordinarily occur unless one is negligent is likely to be reached even though no evidence is offered in court to support that conclusion. Such a conclusion probably accords with fact more often than not. But in a large number of cases involving more complicated types of accidents which are not within common experience and the causes of which are certainly not a matter of common knowledge, the courts have said res ipsa loquitur when ‘the thing speaks for itself’ only because the court is willing to speculate or because it has special knowledge or imagines that it has. Does the electrocution of a person in his home by excessive current coming from an ordinary electrical fixture speak negligence of someone in causing the excessive current to enter the house? Does a derailment of a train speak negligence? Does the explosion of a ‘pop’ bottle without more indicate an absence of due care? Mishaps of that sort do not occur in the ordinary course of things, true, but is the ordinary course interrupted more often by negligence than by some other cause? Obviously such occurrences speak danger, but whether they speak unreasonable conduct is another matter. I doubt that the causes of such occurrences are sufficiently within common knowledge to say res ipsa loquitur. The result reached in such cases may be supportable, but not because the mishap speaks for itself unless evidence supports the conclusion that this is a type of mishap which is caused by negligence more often than not.”

The fallacious reasoning which the normal formulation is likely to induce is well illustrated in the case of Cavero v. Franklin Benevolent Society, where a child had died on the operating table during a tonsillectomy. An expert witness was asked whether death was the normal result of such operations when performed carefully, and replied that she had performed “hundreds of these tonsillectomies” and that this was “the first case in which a death had ever occurred.” The majority stated the requirement in the traditional terms of whether such an accident ordinarily occurs when due care is used, and concluded on the basis of this expert testimony that the requirement had been satisfied. Justice Traynor, dissenting, asserted that such testimony

79. Id. at 262-63. (Emphasis supplied).
80. 36 Cal. 2d 301, 223 P.2d 471 (1950).
“establishes only that such accidents are rare; it was silent on the question as to what are the probable causes when such deaths do occur . . . the court in effect holds that solely because an accident is rare it was more probably than not caused by negligence. There is a fatal hiatus in such reasoning. The fact that an accident is rare establishes only that the possible causes seldom occur. It sheds no light on the question of which of the possible causes is the more probable when an accident does happen . . . ”

Another example is provided by the case of United States v. Kesinger, where the court allowed recovery for an airplane accident by relying on evidence of safety records of airplane companies. This evidence showed that accidents are rare, but showed nothing about the relative incidence of negligent and non-negligent factors which cause such accidents.

Later we will consider the “exploding bottle” cases in detail, but at this point it is worth observing that in the very first case where res ipsa was applied to the bursting bottle situation, the reasoning of the court was infected with the type of fallacious thinking we have been discussing. That was the case of Payne v. Rome Coca-Cola Bottling Co., where the defendant’s bottle exploded, destroying the plaintiff’s sight. In applying the res ipsa doctrine to this situation, the Georgia court said:

“If the plaintiff can recover at all, he can do so only upon an application of the maxim ‘res ipsa loquitur.’ The occurrence was unusual. Bottles filled with a harmless and refreshing beverage do not ordinarily explode. When they do, an inference of negligence somewhere and in somebody may arise. There is no presumption of law, but merely an inference of fact. Negligence is not necessarily to be inferred merely from the act itself; but the tribunal designated by the law to decide the issues of fact may infer negligence from the happening of an event so unusual.”

Subsequently many courts have been guilty of a similar logical slide.

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81. Id. at 313, 223 P.2d at 479.
82. 190 F.2d 529 (10th Cir. 1951).
83. This point is taken simply to show that the traditional statement of the requirement tends to obscure the inquiry which is logically relevant to fault liability. There may be, however, another inquiry into the justness and expediency of spreading the loss irrespective of fault, in relation to which a showing of rarity might be relevant. See, Fricke, The Use of Expert Evidence in Res Ipsa Loquitor Cases, 5 Vill. L. Rev. 59 (1959).
84. 10 Ga. App. 762, 73 S.E. 1087 (1912).
85. Id. at 763, 73 S.E. at 1087. (Emphasis supplied).
It should be obvious from the foregoing collection of cases that the strict liability trend is facilitated by the traditional statement of the doctrine of res ipsa loquitur, or, as one writer has well put it, by the "tendency of the doctrine to focus attention on the fact that carefully made and operated appliances do not in the vast majority of instances cause injury and to obscure the inquiry whether the majority of the accidents which occur are due to negligence."  

Associated with this tendency, there has been a tendency to assume that the probabilities favor the plaintiff without insisting on support from expert evidence, even in technical and complicated matters. As Fleming James Jr. has said:

"[T]he propriety of assuming the postulate is clear enough under the facts of some cases. . . . But the doctrine is probably more often invoked in practice in run of the mill occurrences where the facts of the occurrence before the courts are meager. . . . It is here the doctrine is most sorely needed and it is here that the postulates as to probabilities are most often doubtful since most machines and appliances simply are not foolproof, even when made and kept and used with reasonable care. By and large courts have been pretty liberal in responding to this need, though undoubtedly they have done so only where there is a fair chance that the probabilities are as they assume. Moreover they have been willing to adopt the needed postulate in the widest variety of situations without requiring expert testimony as to the balance of probability."

To remain faithful to the fault premise, it is submitted that the courts would have to take the position taken in 1943 by the California court in this case of Honea v. City Dairy, Inc. 88 a case involving the breaking of a milk bottle. Dealing with the argument that an inference of negligence in manufacture could be drawn, the court said:

"Nor can the court take judicial notice that glass bottles are not ordinarily damaged or that defects will not ordinarily occur unless the bottler is negligent, for the subject is not a matter of common knowledge. Many of the courts have received expert testimony to determine the possible or probable causes of bottle-breakage. . . . An analogy may be found in Judson v. Giant Powder Co., 107 Cal. 549, 561, 40 P. 1020, . . . where this court held relevant and material evidence that dynamite would

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87. 2 HARPER & JAMES, TORTS 1079 n.16 (1956).
88. Id., at 1081-83 (footnotes omitted); cf. id. at 1079: "... the practical impact . . . of res ipsa loquitur has probably consisted in its tendency to invite or encourage the assumption of broad and doubtful postulates favorable to liability in many situations where the courts would otherwise be understandably reluctant to adopt them, at least without the aid of expert opinion." Cf., Morris, supra note 78, at 262-63.
89. 22 Cal. 2d 614, 140 P.2d 369 (1943).
not explode if the correct process of manufacturing and handling were carefully carried out. While it may often be a matter of common knowledge that certain articles or substances are not ordinarily rendered defective in the absence of negligence, we cannot say that this is true of glass containers."

The history of the California bottle cases subsequent to the Honea case shows another way in which \textit{res ipsa} tends to erode concepts of fault liability. Once expert evidence has been used and accepted in one case it will be regarded as conclusive in subsequent cases even though the propositions accepted in the earlier cases are only doubtfully applicable to the later cases, and even though the result is that the expert who testified in the earlier case is not subject, in the later case, to defendant’s cross examination by which his earlier statements might be refined to suit the facts of the later case. The California cases show a startling progression from \textit{Gerber v. Faber},\textsuperscript{91} where recovery was denied, through \textit{Honea v. City Dairy, Inc.},\textsuperscript{92} where in denying recovery the court emphasized the lack of expert testimony, to \textit{Escola v. Coca-Cola Bottling Co.},\textsuperscript{93} where the use of expert testimony changed the result, \textit{Gordon v. Astec Brewing Co.},\textsuperscript{94} where the court relied upon the \textit{Escola} decision even though in the \textit{Gordon} case intermediate handlers were involved,\textsuperscript{95} \textit{Hoffing v. Coca-Cola Bottling Co.},\textsuperscript{96} and \textit{Zents v. Coca-Cola Bottling Co.}\textsuperscript{97} The last case represents a high water mark, for the decision is reached via a discussion in which the court exercises its own native reasoning powers and speculates to the fullest extent.\textsuperscript{98}

The foregoing reasons — the tendency of the doctrine to predispose courts to accept evidence of rarity in satisfaction of the first requirement, the tendency to invite the assumption of doubtful postulates, and the precedent-creating value of cases in which expert testimony has been accepted — explain why the doctrine facilitates the "drift toward strict liability"\textsuperscript{99} in negligence cases generally. If the doctrine has had this effect generally, its influence has been especially

\begin{itemize}
\item[90.] \textit{Id.} at 620, 140 P.2d at 372.
\item[91.] 54 Cal. App. 2d 674, 129 P.2d 485 (1942).
\item[92.] 22 Cal. 2d 614, 140 P.2d 369 (1943).
\item[93.] 24 Cal. 2d 453, 150 P.2d 436 (1944).
\item[94.] 33 Cal. 2d 514, 203 P.2d 522 (1949).
\item[95.] See cases cited notes 122-126 infra.
\item[96.] 87 Cal. App. 2d 371, 197 P.2d 56 (1948).
\item[97.] 39 Cal. 2d 436, 247 P.2d 344 (1952).
\item[98.] \textit{Id.} at 447-49, 247 P.2d at 349-51.
\item[99.] The phrase is Professor Noel’s; Noel, \textit{Manufacturers of Products — The Drift Toward Strict Liability}, 24 Tenn. L. Rev. 963 (1957).
\end{itemize}
marked in products liability cases, for various reasons which we will now consider. 100

Due to special facts surrounding mass production processes — the delay between manufacture and consumption, and the impossibility of distinguishing between individual products, or of inquiring into the conduct of employees at the time any given product was manufactured — defenses which in other types of res ipsa cases may be available to the defendant, such as positive explanation absolving the defendant from responsibility, will not generally be open to the defendant. The defendant will be limited to an assertion that his processes are up-to-date, i.e., evidence of a general character. He will rarely be able to do more to offset the effect of plaintiff’s evidence than the defendant in De Lape v. Liggett & Myers Tobacco Co. was able to do. In the words of the court in that case:

“All that the defendant has done to offset the effect of the evidence establishing the defectively manufactured cigarette is to show the general process of fabricating the brand of cigarette involved, from the receipt of the tobacco at the factories of defendant company until shipment of the finished product thence to distributors or dealers. The ingredients used and the various steps in manufacture are described generally, and it is stated that the modus operandi is uniform. There is no proof of the fabrication of the particular package from which the defective cigarette was taken or of the dangerous cigarette itself.” 101

At this point, the defendant finds himself in a dilemma. The accident may suggest several possible forms of negligence on the part of the defendant, e.g., sub-standard machinery, deficient testing and inspection processes, or negligence of employees in operating the machinery. In this type of situation, however, the elimination of one form of negligence may reinforce the probability of another, i.e., negligence of the employees in operating the admittedly efficient system. As Professor James puts it, “The less effective his precautions to prevent the occurrence the more apt they are to appear negligent; the more effective the precautions testified to, the less likely they are to have been taken in this case since the accident did happen.” 102

This view was taken at a comparatively early stage in English law. In Chaproniere v. Mason, 103 plaintiff sued for injuries sustained

102. 2 Harper & James, Torts 1106 (1956). The text continues: “Indeed the showing of a foolproof system of precautions demonstrates negligence unless it succeeds in convincing the trier that no such occurrence ever proceeded from the defendant.”
when he bit into a stone in a bun manufactured and sold by defendant. His action was brought in breach of warranty and in negligence. On the jury's deciding special issues in the defendant's favor, plaintiff applied successfully for a new trial. In the Court of Appeal, Collins, M.R. is reported as follows:

"With regard to the second part of the case, the question of negligence, it was admitted that the principle of res ipsa loquitur applied.... The unexplained presence of the stone in the bun was prima facie evidence of negligence on the part of the person who made the bun. That was admitted, and the defendant produced evidence to rebut this prima facie presumption of negligence. He called witnesses who gave evidence to the effect that in the manufacture of his buns he made use of a system which rendered it impossible that a stone should be present in the dough. One of the witnesses said that it was not feasible, in the system adopted by the defendant, for a stone to pass into the dough of which the buns were made. He must have meant that it was not possible if proper care had been used. This did not rebut the presumption of negligence, but, on the contrary, it showed that the system was not properly carried out — that there was negligence. A stone did get into the dough, and that fact was evidence that the system followed by the defendant was not carried out with proper care and skill. There was, therefore, certainly evidence of negligence causing the injury."

This accords with the predominant view in the United States. When the matter has arisen, the courts have usually taken the view that evidence of general care in manufacture will not gain for the defendant a directed verdict. It is only necessary in a res ipsa case for the plaintiff to show a preponderant likelihood that the accident was caused by something for which the defendant would be responsible, even though the inference is equivocal as to just what the defendant's specific acts or omissions were. Thus a passenger injured in a derailment may recover damages from the railway company without pinpointing the precise cause of the accident — defect in track, defect in car, negligence in operation of the car — since it is more probable than not that the accident was caused by one of these possibilities, and the defendant would be responsible for any of these explanations.

104. Id. at 634. (Emphasis supplied). Doubt cast on the possibility invoking res ipsa in this situation by Lord Macmillan in Donoghue v. Stevenson, [1932] A.C. 562, 662 (Scot.), would seem to have been resolved by the subsequent decision in Grant v. Australian Knitting Mills, Ltd., [1936] A.C. 85 (P.C. Austl. 1935), although Daniels v. White, [1938] 4 All E.R. 258, is contra.

105. Cf. Prosser, LAW OF TORTS 216 (2d ed. 1955); 2 HARPER & JAMES, TORTS 1106 (1956).

In the type of case with which we are concerned, the two most likely explanations are inadequate machinery and negligence on the part of employees operating the machinery. For either of these causes of the accident the defendant would be responsible. When the defendant seeks to eliminate the former explanation, he may make the case against him even more damming. Sometimes it is simply said that such evidence "does not eliminate" the possibility of negligent conduct on the part of the defendant's servants. In other cases the courts have gone so far as to say such evidence emphasizes the latter possibility:

"The full evidence as to the modern equipment of the plant and the details of operation, including inspection both before and after filling the bottle, serve rather to emphasize than to disprove negligence of some employee in passing into the market a bottle containing the articles disclosed in the evidence."  

A typical discussion is contained in the opinion in *Richenbacher v. California Packing Corp.*

"The statement of the defendant as to the manner the spinach is handled in the factory before it is placed in sealed cans for sale and distribution for human consumption did not establish that it is impossible that the glass was in the can when it was sealed, but only that it was not feasible if proper care were used and the servants of the defendant were not negligent in working out the system. The fact that the glass got into the can during the preparation of the spinach and before the can was sealed, notwithstanding the great care . . . which was customarily used in canning spinach, was a . . . circumstance which warranted an inference that some person whose duty it was to see that the system was observed was negligent in the examination of the contents of the can before it was sealed, if not negligent in preventing the presence of glass at a place where it could be put or might fall into the can."

There are a small group of cases where the introduction of evidence of general care in manufacture gained for the defendant a directed verdict. After mentioning these cases, Prosser comments:

"The correctness of these decisions seems open to question. As the defendant's evidence approaches definite proof that the defect

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109. 250 Mass. 198, 202-03, 145 N.E. 281, 282 (1924); a similarity between this passage and that quoted from the English Court of Appeal, 21 Tasm. L.R. 633 (Austl. 1905), may be detected.
could not be present, it is all the more clearly rebutted by the fact that the defect is there.\textsuperscript{110}

Another commentator refers to the same group of cases and offers the comment:

"Most of the confusion at this point arises from a failure to distinguish between the general care the defendant exercised over a period of time and over a wide range of operations, and the care he used at the particular time and place. There is also some tendency to forget the normal . . . principle of respondeat superior.\textsuperscript{111}

This criticism has been persuasive with most of the courts. The cases which gave judgment for the defendant are all over twenty years old, and in 1950 it was possible for one commentator to say that:

"An examination of the cases of this type reported during the last five years reveals none in which the defendant's showing of due care used in manufacturing has been declared sufficient as a matter of law in the face of a finding that the food or beverage was unwholesome and caused injury to the plaintiff.\textsuperscript{112}

The courts have gone even further in imposing what amounts to strict liability in the "exploding bottle" situation. In a broad sense, perhaps, the courts are applying fault concepts. They differentiate the situation where a soft drink has been lying in the retailer's refrigerator for a considerable time\textsuperscript{113} from that in which the accident occurs immediately after delivery of the bottle by defendant; they deny recovery where there is some likelihood that a sudden change of temperature caused the accident,\textsuperscript{114} and they place significance in the fact that the bottle has undergone much handling and was exposed to many opportunities for rough usage weakening its walls\textsuperscript{115} — all rational criteria resulting from the application of fault concepts. But it is equally true that there are many departures from this broad division

\textsuperscript{110} Prosser, Torts 216 n.23 (2d ed. 1955); The text continues: "If he [defendant] testifies that he used proper care . . . to keep defunct mice and wandering insect life out of his bottled beverage, the fact that . . . bug was in the bottle, with the background of common experience that such things do not usually happen if proper care is used, may permit reasonable men to find that his witnesses are not to be believed, that the precautions described were not sufficient to conform to the standard required or were not faithfully carried out, and that the whole truth has not been told."

\textsuperscript{111} Dickerson, \textit{Products Liability and the Food Consumer} 127 (1951).

\textsuperscript{112} King, \textit{Evidence & Presumptions in Food Products Liability}, 5 \textit{Food & Drug Cosm.} L.J. 513, 524 (1950).

\textsuperscript{113} Dunn v. Hoffman Beverage Co., 126 N.J.L. 556, 20 A.2d 352 (1941).

\textsuperscript{114} Steward v. Crystal Coca-Cola Bottling Co., 50 Ariz. 60, 68 P.2d 952 (1937); Wheeler v. Laurel Bottling Works, 111 Miss. 442, 71 So. 743 (1916).

and many cases imposing liability cannot be explained satisfactorily in terms of proven fault.

Possible causes of exploding bottles include such occurrences as sudden changes in temperature causing unequal expansion of different parts of the glass, overcharging of gas, defectively manufactured bottles, inadequate system of inspection for defects, excessive shaking on a hot day, and mishandling in transportation weakening the fabric of the bottle. These are not, of course, equal probabilities. Now, in the situation where the defendant does his own delivering, and the accident happens shortly after defendant's employee has delivered the bottles, and the plaintiff can give evidence, possibly with supporting testimony, that the bottles were inaccessible to others and the particular bottle was carefully handled immediately prior to the accident, it may be true to say that the possibilities favor the plaintiff's claim that the defendant has been negligent in some way, whether in manufacture, carbonation, inspection or transportation. There are many such cases where recovery has been justifiably allowed, and in some of them the courts have placed express emphasis on such factors as the proximity in time of the delivery to the accident.

There are, however, an increasing number of cases where despite the intervention of third party delivery men, the courts have allowed recovery after the plaintiff has provided "affirmative proof" of careful handling subsequent to the bottles' leaving the defendant's factory. These call for closer consideration.

It is a truism that res ipsa loquitur is inapplicable where the occurrence of the accident is equally consistent with causes which do not connote the defendant's negligence as with those for which the defendant would be responsible. Some exploding bottle cases involving plural distributors have denied recovery to the plaintiff on the


basis of such a proposition. The experience and findings of experts suggests that these causes are more consistent with the fault principle that those which in similar situations have allowed recovery, even though the latter cases purport to insist on an affirmative showing of due care by the plaintiff. According to Dingwall,

"Examination of a very large number of bottles including those involved in personal injuries and alleged to have been caused by the bottle 'exploding' lead to the conclusion that bottles in the soft drink industry do not break because of internal pressure alone. About fifty per cent of them break because they were struck a blow no normal bottle could withstand. About forty five per cent break because they were struck but the bottles are already so weakened that they fail to withstand normal handling. This weakening is produced by damaging the internal surface of the bottle. About three per cent break because they are damaged by the machine that places the cap on the bottle. The bottle is cracked at that time and subsequent efforts to remove the cap causes the bottle to break. About two per cent break because the bottles are defective due to manufacturing defects that had not been discovered by the inspectors of the glass manufacturer."

It would therefore seem that if the plaintiff is suing a bottler who does not make his own deliveries, and shows simply the fact of the accident, he should be non-suited. Courts which have allowed such cases to go to the jury have attempted to reconcile their decisions with theories of fault liability by purporting to insist on an affirmative showing of due care on the part of all handlers subsequent to the time the bottle left the defendant's hands. It is true that if it is possible to exclude the possibility of negligence on the part of the intervening handlers, the residual inference that the manufacturer was negligent would then become an eminently reasonable one. Despite the view of experts that the "explosion" of a bottle without impact is virtually impossible, courts have been extremely liberal in reaching the conclusion that the plaintiff has "affirmatively excluded" the possibility of the accident being due to subsequent mishandling.

How does one "affirmatively exclude" the possibility of the accident being due to rough handling by intervening carriers? According

120. Dingwall, supra note 116, at 161-62.
121. Dingwall, supra note 116, at 164: "For either a beer or a soft drink bottle at room temperature to 'explode', that is, break from internal pressure alone, then the strength of the bottle must be only about 70 pounds per square inch, gage. So poor a bottle is impossible to visualize."
to a recent California case, this may be done by introducing evidence that the carrier's trucks were not involved in any accidents during the month of delivery:

"Tracing the case containing the bottle which exploded from the defendant's plant to his hand the plaintiff introduced evidence to the effect that it suffered no damage at any stage of its transportation. . . . Evidence was presented which showed that La Salle trucks were not involved in accidents during August, 1944; that no accidents occurred in the Associated warehouse that month which might have affected the beer; that the driver who delivered the case to the plaintiff was not involved in an accident en route and did not bump the case; that is was in excellent condition on delivery, and that the plaintiff handled the case and bottle carefully."122

The unsatisfactory character of such evidence in rebutting the very strong inference that the accident was caused by some impact in the course of delivery is obvious: such evidence does not exclude the possibility of rough handling short of an accident, e.g., in the course of loading and unloading. We are all aware that truck drivers who deliver bottles of soft drink do not handle their products with great delicacy.123 The Gordon case is a particularly glaring example of the abandonment of fault liability for two other reasons which are brought out in the concurring judgment of Justice Traynor. In the first place, even assuming that evidence of absence of accidents excludes the possibility of intervening negligence, the "proof" of no accidents was extremely tenuous. The manager of the distributing company called by the plaintiff claimed he would have knowledge of any accidents which might have occurred during that month, but on cross examination he admitted that accidents were not normally reported to him. He even went so far as to say that accidents were frequent.124 Secondly, although the majority say that "it was the jury's province to determine, after being properly instructed, whether the plaintiff had sufficiently proved the absence of intervening harmful forces after the defendant shipped the bottle,"125 it is clear from the instructions, quoted in the

123. "It is common knowledge that bottled beverages are transported and handled with abandon." Slack v. Premier-Pabst Corp., 40 Del. 97, 5 A.2d 516 (1939).
124. "There isn't any time that there isn't a bottle or two broken in the case. There is always something broken on account of handling it." Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 518, 203 P.2d 522, 525 (1949).
concurring judgment, that the issue of the adequacy of the plaintiff's exclusion of intervening forces was not even left to the jury, but was concluded peremptorily by the trial court.\(^\text{126}\)

Indeed, it seems obvious from the talk of public policy which constantly recurs in opinions,\(^\text{127}\) that courts are designedly imposing strict liability as a means of ensuring that soft drink manufacturers take consummate precautions. As a Kansas court has indicated, the possibility of danger reflected in the volume of litigation makes it important that the highest degree of care be exercised by those who engage in the business of beverage manufacture.\(^\text{128}\) The vacillation and inconsistencies of different jurisdictions do not seem to proceed on the basis of rational fault differentia, so much as the predisposition of each particular jurisdiction to impose strict liability — California in this respect being the most progressive. While it is possible to justify on a fault basis some cases involving claims brought against manufacturers who make their own deliveries,\(^\text{129}\) and some recent cases which allow an action joining each member in the chain of distribution,\(^\text{130}\) it is difficult to justify the cases which allow the plaintiff to get to the jury on a showing that the accident was not caused by intermediate handlers. It is difficult to avoid the suspicion that the liberality with which the courts accept plaintiffs' "affirmative proof" in such cases betrays a desire to impose liability on manufacturers irrespective of fault — unless one can say that the bottles are defective, and give rise to responsibility in the manufacturer, if they are not made strong enough to withstand the rough handling they customarily receive.\(^\text{131}\) These cases stand in sharp contrast to other cases involving the possibility of

\(^{126}\) See Traynor, J., dissenting and concurring in Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 524 n.1, 203 P.2d 522, 528 n.1 (1949), and cf. footnote 2 in the same opinion quoting the intermediate court: "It is to be noted that nowhere in these later instructions did the court direct the jury that it must find the indicated facts to be true before the supposed inference of negligence might be applied to the defendant . . . ."

\(^\text{127}\) E.g., Stolle v. Anheuser-Busch, Inc., 307 Mo. 271 S.W. 497 (1925); Grant v. Graham Chero-Cola Bottling Co., 176 N.C. 256, 97 S.E. 27 (1918).


\(^\text{129}\) See cases cited note 117 supra.


\(^\text{131}\) Gordon v. Aztec Brewing Co., 33 Cal. 2d 514, 351-32, 203 P.2d 522, 534 (1949); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). Cf., view expressed in Fick v. Pilsener Brewing Co., 86 N.E.2d 616, 621 (C.P. Ohio 1949), that the bottler is required to anticipate changes in temperature arising from normal and customary refrigeration practices. Accordingly the bottler "owed the duty to furnish glass containers of sufficient tensile strength to withstand such anticipated changes in temperature."
intervening mishandling. As with the "foreign substance" cases, one also finds courts readily condoning the failure of the plaintiff to utilize the best available evidence. Dingwall suggests that the pieces of the exploded bottle be kept, examined and introduced into evidence in order to throw light on the cause of the explosion, but there seems to be only one case where any importance is attached to the plaintiff's failure to do this. Once again, the indulgence suggests that a deliberate policy is being pursued.

To summarize, then, it is clear that there are many ways in which the res ipsa device tends to have an erosive effect on concepts of fault liability. It does so,

(a) generally,

(1) by predisposing courts to accept evidence of rarity in satisfaction of the requirement that the accident indicate a probability of the defendant's negligence;

(2) by inviting the assumption of broad and doubtful probability postulates favorable to liability, and reducing the likelihood that the court will insist on expert testimony;

(3) by attaching to propositions advanced by experts and accepted in earlier cases, the reverence of precedents, invulnerable from review;

(b) and specifically, in relation to products liability cases,

(1) by allowing the plaintiff to get to the jury in foreign substance cases, no matter how strong the defendant's evidence of general care and precautions;

(2) by indulgent acceptance of evidence designed to exclude the possibility of intermediate mishandling in exploding bottle cases.

Since the second requirement of exclusive control may pose special problems in this area, it will be briefly mentioned. If it is interpreted literally, as some courts have thought it should be, this requirement

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132. E.g., Hart v. Emery Bird, Thayer Dry Goods Co., 233 Mo. App. 312, 118 S.W.2d 509 (1938), where the falling of an awning from a shop counter was held not to justify an inference that the defendant had negligently stacked the awnings on the counter, since other customers had access to the awnings.


134. Stewart v. Crystal Coca-Cola Bottling Co., 30 Ariz. 60, 67, 68 P.2d 952, 959 (1957): "The five pieces into which the bottle was blown were in the possession of the plaintiffs up to the day of the trial but they made no effort at that time to prove by experts or otherwise that an examination of these, either separately or when put together as a bottle, disclosed any defects, such as thin spots or bubbles . . . ."

has the effect of preventing res ipsa from ever being used in a case of products liability for the product will always be in the exclusive control of the victim, not the manufacturer, at the time it causes injury. Some courts have modified the severity of this requirement by only requiring exclusive control at the time of the negligent act\textsuperscript{136} — which in this type of case will precede the plaintiff’s injury — but the better view would seem to be to abandon the requirement as a universal test.\textsuperscript{137} It is true that the plaintiff must show not only that the facts indicate negligence, but that they indicate that the defendant was negligent.\textsuperscript{138} It is also true that a showing that (1) more often than not the accidents of this type are attributable to the negligence of those in control, and (2) the defendant was in exclusive control of the instrumentality, is one way of tying the negligence to the defendant. But there are other ways of doing this, such as the method adopted in some recent California cases already discussed, namely of showing (1) more often than not such accidents are attributable to somebody’s negligence, (2) then eliminating the other possibilities by affirmatively showing care on the part of the subsequent handlers, leaving the inference that the defendant was negligent.\textsuperscript{139} While it has been suggested that some of these cases have gone too far in accepting flimsy evidence of the second aspect, these cases place the element of control in its proper perspective. The important thing is some proof connecting the inference of negligence with the defendant, and the exclusive control technique is only one way of doing this, but is not itself an independent requirement.

III. MANUFACTURER’S LIABILITY IN WARRANTY

It should be obvious from the foregoing section that the common law in products liability has been exhibiting a gradual trend toward strict liability over the last hundred years. At any one point during this period the change is imperceptible since it has been and is being effected in the manner typical of common law — gradual change under a cloak of continuity. This change may be seen against a background of changing philosophical climate, which has brought new public policies to the foreground. These policies and the effectiveness of the law’s arsenal of weapons to secure them will be examined in due course.

\textsuperscript{137} Cf., Prosser, LAW OF TORTS 206 (2d ed. 1955).
\textsuperscript{139} E.g., Zentz v. Coca-Cola Bottling Co., 39 Cal. 2d 436, 443, 247 P.2d 344, 350 (1952): The control requirement’s “use is merely to aid the courts in determining whether, under the general rule, it is more probable than not that the injury was the result of the defendant’s negligence.”
but a brief inquiry into the philosophical background which has made courts more ready to impose strict liability will now be made, not for any purpose of barren intellectual satisfaction, but because this change is currently affecting the thinking of the judges, and is therefore one element in the predictive process which lawyers must undertake.

Seavey has sketched the outlines of this development very capably:

"In determining whether there is tort liability when harm has been caused, the focal point of conflict has been whether one should be liable for harm irrespective of fault. The law has been in a state of flux in its desire to protect the two basic interests of individuals — the interest in security and the interest in freedom of action. The protection of the first requires that a person who has been harmed as a result of the activity of another should be compensated by the other irrespective of his fault; the protection of the second requires that a person who harms another should be required to compensate the other only when his activity was intentionally wrongful or indicated an undue lack of consideration for the interests of others. At any given time and place the law is the resultant derived from the competition between these two basic concepts.

Primitive law stressed security. In the eighteenth century, under the influence of doctrines of natural law and of laissez faire, emphasis was placed upon freedom of action, and culpability tended to be the basis for tort liability. Nineteenth-century jurisprudence referred all legal problems to the idea of free will. . . . [I]n common-law countries an attempt was made to state the entire law of torts in terms of culpability. Towards the end of the century, however, juristic thinking recognized that there should be a two-fold basis for the law of torts and that, in striking a balance to determine what most nearly satisfies the needs of, all both the concept of security and that of culpability must be used in varying degrees."140

The pattern of development seems to be cyclical, similar to the recurrence and disappearance of the caveat emptor philosophy.141 Starting with the medieval period, the wheel seems now to be approaching full circle with an emphasis on compensation and security, while the interest in commercial freedom of action is minimized. Dealing with the enterprise theory, by which liability is regarded as a normal business or operating expense similar to raw materials, Granville Williams comments: "That this attitude has come into prominence

140. Seavey, Principles of Torts, 56 Harv. L. Rev. 72, 73-74 (1942).
in the present century, though not unknown in the last, is symptomatic of the general search for security at the cost, if need be, of freedom of enterprise.”

This general philosophical climate has shaped a new public policy of strict liability which has two main aspects, deterrence and socialization of losses. These twin aspects of the new public policy are mentioned in the opinion of Justice Traynor in *Escola v. Coca-Cola Bottling Co.*

“Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.”

Let us examine each of these aspects separately.

**Deterrence**

It is clear from statements made by nineteenth century judges that the development of warranties represented a little piece of social engineering on the part of the court; that they were consciously setting out to elevate the standards of manufacture by imposing sanctions on the manufacturer of defective products. Especially illuminating are the words of Chief Justice Best in *Jones v. Bright*:

“It is the duty of the Court, in administering the law, to lay down rules calculated to prevent fraud; to protect persons who are necessarily ignorant of the qualities of a commodity they purchase;

144. *Id.* at 462, 150 P.2d at 440-41 (concurring opinion); *cf.,* Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 621-22 164 S.W.2d 828, 833 (1942).
145. 5 Bing. 533, 130 Eng. Rep. 1167 (C.P. 1829).
and to make it the interest of manufacturers and those who sell, to furnish the best article that can be supplied.”146

Compare his later observation:

“[T]he case is of great importance; because it will teach manufacturers that they must not aim at underselling each other by producing goods of inferior quality, and that the law will protect purchasers who are necessarily ignorant of the commodity sold.”147

Today’s judges are rarely as outspoken as Chief Justice Best,148 but one may speculate that in encouraging the trend toward strict liability outside of privity they are similarly motivated in part by a desire to improve manufacturing standards for reasons of safety. This is what Dean Leon Green calls the prophylactic factor.149

To what extent, however, is it possible to achieve the deterrent aim by imposing strict liability? Salmond thought that nobody could be deterred “by a threat of punishment from doing harm which he did not intend and which he did his best to avoid. . . . There is no more reason why I should insure other persons against the harmful results of my own activities, in the absence of any mens rea on my part, than why I should insure them against the inevitable accidents which result to them from the forces of nature independent of human actions altogether.”150 While this language is loaded, especially the phrase “which he did his best to avoid,” the suggestion that fault liability is consistent with the deterrent aim, but strict liability is not, wears at first the appearance of sweet reasonableness.

On reflection, however, it loses much of its force. As Granville Williams points out, this reasoning ignores the subconscious factors: “there is something that tends to make us remember the things we want to remember and to forget the things we want to forget. The threat of punishment may aid the memory.”151 There are other reasons for believing, contrary to what a priori reasoning might at first suggest, that the deterrent aim is better served by strict than by fault liability. Professor James makes the important

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146. *Id.* at 542-43, 130 Eng. Rep. at 1171.
147. *Id.* at 546, 130 Eng. Rep. at 1173.
point that strict liability places pressure on organized groups, which are in a position to undertake large accident prevention campaigns:

"The accident problem calls for . . . steps which will cut down accidents. . . . Studies of the human behavior that causes accidents show that such conduct is not by and large marked by individual ethical or moral shortcoming. It also appears that the most effective steps towards accident prevention have been taken by institutions and organized groups rather than by persons acting as unorganized individuals. In the problem at hand, for instance, the manufacturer is in a peculiarly strategic position to improve the safety of his products, so that the pressure of strict liability could scarcely be exerted at a better point if accident prevention is to be furthered by tort law." 152

Dickerson is another who believes that strict liability is a more effective deterrent than fault liability. In his words:

"To hold the defendant to a standard of 'due care' is to encourage only his keeping abreast of existing technology. To hold him absolutely accountable is to put pressure on him to better those standards. This is borne out by the experience of the X Dairy. On the firing line of ordinary claim settlement many food companies feel impelled to make a settlement whenever the claimant's injury is property laid at their door. The virtual absolute liability which thus exists for small claims induced the X Dairy to replace the 'best' with better." 153

The difficulty of establishing foresight may also be a practical reason for imposing strict liability, especially in the area of products liability. Of course, it is difficult to prove any of these things, but the observation of those who have witnessed factories in operation both before and after Factories Act type legislation supports the suggestion that strict liability is effective to deter. Many people are convinced that since the enactment of this and workmen's compensation legislation, employers are taking safety precautions which were not taken before such legislation, and the drop in the industrial fatality rate since the passage of those acts has been truly remarkable — it was cut by half between the two world wars. 154 It may therefore be speculated that the imposition of strict liability on the manufacturer by providing a direct warranty action against it would reinforce the sanctions of

152. James, General Products — Should Manufacturers Be Liable Without Negligence?, 24 Tenn. L. Rev. 923 (1957). The omitted footnotes refer to 2 Harper & James, Torts 729-58 (1956), which contains an extended discussion of this subject, and which states more fully the basis for Professor James's belief that strict liability deters.

153. Dickerson, Products Liability and the Food Consumer 261-62 (1951); cf., Dickerson, op. cit. supra at 253-54; cf., Noel, supra note 99 at 1011.

154. 2 Harper & James, Torts 757 n.22 (1956).
ad hoc legislative devices such as pure food regulations by providing a stronger inducement to set the law's machinery in motion — the victim who stands to gain from the outcome of the litigation has a stronger inducement to sue than the police have to prosecute. In relation to products not governed by such legislation the private action would further the policy reflected in this type of legislation.

If it is objected that allowing manufacturers to take out products liability insurance is inconsistent with this suggested deterrent aim, so that such contracts should be void as against public policy, then the answer is that deterrence is not completely abandoned by allowing such contracts: insurance companies have their own methods of discouraging the expensive client, such as no-claim bonuses and raising or refusing coverage. There are also the factors of inconvenience and adverse publicity. The process of establishing guilt publicly may deter even though an insurer pays for the damage inflicted.

Socialization of losses or better risk bearer approach.

The current philosophical climate with its emphasis on security and compensation has paved the way for an approach which takes into account the relative financial capacity of each party to withstand the loss represented by the plaintiff's injury. In determining whether the loss should be shifted from the plaintiff's shoulders to those of the defendant, courts will be affected by the knowledge that the defendant is in a strong position to absorb such a loss.

This is not, of course, the sort of argument that can be addressed to a court in an individual case. The suggestion that the defendant should pay because he is richer than the plaintiff would offend notions of democracy and fairness. The idea is rather that some account be given to the class of person represented by each party. If defendant is engaged in an activity which over a period of time is bound to cause injuries to others, sound accounting policy dictates that he should make reserves for such possibilities or take out insurance against such risks. It does not offend one's sense of fairness that he should regard such normal business hazards as part of the cost of manufacture much the same as other overhead expenses, especially if the average victim of these operations is not likely to be in a position to cope adequately with the financial shock of such injuries. This is eminently true of the situations with which we are concerned where manufacturers will almost always be superior riskbearers. They will normally carry

products liability insurance which will affect pricing and so be passed on to consumers, spread so thin that no one will be seriously affected.

While this type of analysis has undoubtedly affected the thinking of the courts, predisposing them to impose strict liability, there has been little articulation of the importance of this factor in the opinions. 157

These general considerations combine with factors such as advertising, which create a more direct relationship between manufacturer and consumer, 158 and the realization that the series of actions to which the privity requirement may lead is a wasteful process 159 to create pressures toward the imposition of strict liability on the manufacturer, giving the ultimate consumer a direct action against the manufacturer. But the means employed to achieve this result have been diverse.

Perhaps the least fictitious of the devices used has been the enforcement of express warranties created by advertising. Some courts have referred to the development of advertising and trade marks as changing the commercial milieu and creating the need for new legal rules. 160 Courts using this device have been able to utilize the advertising material more directly. It is well established that statements of fact contained in advertisements may constitute express warranties. The difficulty about this, however, is that in today's commercial structure there will rarely appear to be any contractual relationship between the consumer and the manufacturer. The Uniform Sales Act talks of the relationship between "seller" and "buyer". Some courts have met this difficulty squarely, stating that they regard the privity


158. It has often been suggested that the privity requirement developed fortuitously. Originally a breach of warranty was conceived of as tortious. Ames, The History of Assumpsit, 2 Harv. L. Rev. 1, 8 (1888) comparable to the action of deceit, except, however, for the requirement of scienter. A century after the first use of the warranty action, some lawyers introduced the method of declaring on a warranty in indebitatus assumpsit. Stuart v. Wilkins, 1 Doug. 18, 99 Eng. Rep. 15 (1778). This method was more frequently used, so that during the nineteenth century the courts came to regard warranty as a purely contractual obligation, with the concomitant requirement of privity. In that, different, commercial and industrial milieu, manufacturer was usually also vendor, so that the assumption that privity was required, induced by the fact that privity was nearly always present, may not have caused much hardship. With the increasing development of modern marketing and distribution arrangements during the nineteenth century, the hardship of such a requirement became more noticeable. The development of national advertising and trademark practices have created a "vacuum" between manufacturer and consumer, the latter relying more and more on the former's representations and general reputation. Opinions often refer to the impact of advertising in giving the consumer a direct action against the manufacturer. See e.g., Le Blanc v. Louisiana Coca-Cola Bottling Co., 221 La. 919, 924-25, 60 So. 2d 873, 874-75 (1952); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 619, 164 S.W.2d 828, 832 (1942); cf., Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 467, 150 P.2d 436, 442-43 (1944).

159. The warranty action against the retailer, with actions over, led to the accumulation of costs way out of proportion to the value of the original suit in Kasler & Cohen v. Slavonski, [1928] 1 K.B. 78.

160. See note 158 supra.
requirement as anachronistic, and refuse to apply the requirement, emphasizing the ability of the modern manufacturer to obtain the psychological effect of representation by advertising:

"Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, billboards, and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess, and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable." 161

Although the Baxter doctrine did not find immediate acceptance, and has indeed been given a restrictive application in the jurisdiction of its birth, 162 there are more recent indications that the doctrine is growing in acceptance. We have already seen that the Supreme Court of Ohio has recently accepted such a doctrine in Rogers v. Toni Home Permanent Co. 163 A more recent opinion of the Second Circuit of the United States Court of Appeals contains extensive discussion of the problem as well as the decision announced in the Rogers case. That was the case of Arfons v. E.I. DuPont De Nemours & Co., 164 where, prior to the Rogers decision, the lower court had arbitrarily rejected the contention that an action might lie against a manufacturer for breach of express warranty. The place of sale was uncertain, but the federal court dealt with the case on the assumption that the plaintiff could establish that Ohio law was applicable:

"Assuming that appellant can demonstrate the applicability of Ohio law we turn now to the question of whether that law would permit recovery in the absence of privity. This leads in turn to an examination of recent far-reaching changes in the Ohio law of warranties.

163. 167 Ohio St. 244, 147 N.E.2d 612 (1958).
164. 261 F.2d 434 (2d Cir. 1958).
In Rogers v. Toni Home Permanent Co., 1958, 167 Ohio St. 244, 147 N.E.2d 612, decided after Judge Smith's decision below, the Supreme Court of Ohio reasserted the requirement of privity in express warranty cases. After a searching inquiry into the history of the rule and the relevant policy considerations, the privity requirement was rejected as inconsistent with the true relationships between manufacturer and consumer created by modern advertising and merchandising methods.

The rationale of the Rogers case is clear. In recent years an increasing number of manufacturers have made their principal appeal directly to the ultimate purchaser through extensive and effective advertising. We know that a given article may pass through several hands after it leaves the factory and that the retailers or middle-men are mere 'conduits . . . through which the manufacturer distributes his goods.' Rogers v. Toni Home Permanent Co., supra, 147 N.E.2d at page 615. Thus, the consumer has come to rely more and more upon the representations and reputation of the manufacturer and less and less upon those of the retailer. This reliance is particularly justified where the articles are either sold in sealed containers or are otherwise of such a nature that no consumer could reasonably rely upon anyone but the manufacturer to detect or prevent latent defects.

The Rogers case permits the consumer to look to the manufacturer to make good losses caused by defective products, where the sale or use of the product was induced by representations directed by the manufacturer to the consumer. In taking this forward step the Ohio court recognized that, in this modern society, laws which fitted the needs of other times must be adjusted to keep pace with society's growth and present needs. Clearly, the key relationship is one between producer and buyer. The retailer is in the unhappy position of being governed, in the selection of many products which he sells, by consumer pressure generated by manufacturer advertising. In addition the manufacturer is in the best position to minimize the possibility of latent defects.

We do not read the Rogers case as merely another step along a well travelled road. That decision blazed a new trail in Ohio and the court acknowledged as much in its opinion.

Although, of course, the federal court is merely applying Ohio law, it may be significant that the opinion contains overtones of approval.

Other courts have not felt able to take this bold step, but have managed to enforce the warranty arising from the advertising statements by

165. This is sometimes referred to in economic and commercial circles as the "vacuum concept"; cf., note 158 supra. (author's footnote).
a careful process of reasoning. Accepting the privity requirement, they have nevertheless been able to spell out a contractual relationship between the manufacturer and consumer, based on the consideration, on the one hand that the purchaser shall buy the manufacturer's product, and on the other hand that the product shall possess the qualities claimed for it in the advertisement:

"It is true that a warranty of personality does not run with the article warranted. But a manufacturer may warrant his products to ultimate purchasers. In this day of progressive and highly competitive business, a warranty of his product by a manufacturer to the ultimate purchaser of his product may be intended by the manufacturer as an added inducement to the ultimate purchaser to buy the product of that manufacturer rather than that of his competitor. The consideration for such a warranty would be the purchase by the ultimate purchaser of that manufacturer's product, which is in effect a direct purchase as it would have been if the purchaser had bought from an agent of the manufacturer instead of an independent dealer or contractor. . . . Generally the law does not bridge the gap between the manufacturer and ultimate purchasers by implying warranties, but it throws up no barrier preventing a manufacturer from . . . making a contract with an ultimate consumer to guarantee an article sold to the latter, directly or indirectly, if the elements of intention to contract, and consideration are present, as they are in this case."

This analysis would seem to be correct. Even though warranty has come to be regarded as contractual, the supporting contract does not have to be a contract of sale. The existence of a contract between the purchaser and his dealer does not prevent the coexistence of a contract between the purchaser and the manufacturer. A unilateral contract may exist between the manufacturer and consumer based on

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168. Note, 2 VAND. L. REV. 765 (1949). Some recent English cases make this clear. Brown v. Sheen & Richmond Car Sales, Ltd., [1950] 1 All E.R. 1102 (hire-purchase of used car — formal arrangement a sale from dealer to finance company, and a hire-purchase from finance company to plaintiff, who successfully enforced an express warranty against the dealer); Shanklin Pier, Ltd. v. Detel Products, Ltd., [1951] 2 K.B. 854 (plaintiffs, pier owners, who had contracted with X to have X paint their pier, with the right to specify the paint to be used, contacted defendants, paint manufacturers; latter informed plaintiffs that certain type paint would suit plaintiffs' special needs, so plaintiffs specified that X use that paint. Defendants sold paint to X who used it on the pier. When it proved unsuitable, plaintiffs sued defendants); cf., U.S. Pipe & Foundary Co. v. City of Waco, 130 Tex. 126, 108 S.W.2d 433 (1937).

169. See cases cited note 168 supra; see also Timberland Lumber Co. v. Climax Mfg. Co., 61 F.2d 391, 393 (3d Cir. 1932): "... Climax Company overlooks the possibility of the manufacturer contracting with both the dealer and the consumer."
the benefit derived by the manufacturer from the purchase.\textsuperscript{170} It is therefore submitted that proper analysis, supported by well-established authorities, justifies the position taken by the court in the Studebaker case.\textsuperscript{171} It also has the advantage that it develops the reliance concept, long the basis of commercial doctrines in this area, to conform to changes effected by modern marketing and advertising practices.

But while this approach may be more conceptually acceptable it is also more limited, confining the right of action to those in the chain of distribution in circumstances where advertising has induced reliance on the claims of the manufacturer. For this reason the approach taken in these cases has been regarded as unnecessarily restrictive by those more concerned with the grave problem of accident compensation — a problem which is thought to transcend the question of reasonable commercial expectations. Fleming James, Jr. is the vanguard of this line of thinking:

"While these considerations may have some relevance in a commercial context, they are makeweight factors at most in a context of strict liability for physical injuries. It would be a pity that they should emerge as requirements, or limitations on liability under an implied warranty. If injury from defective products is properly a risk of the producer's enterprise, it should be so whether he advertised or not and whether or not there was a conscious need to rely on his skill. In either event it is the maker who creates the risk and reaps the profit."\textsuperscript{172}

It is this feeling that "the remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales"\textsuperscript{173} that has led some courts to abhor the path of fiction in reaching the desired position of manufacturer's strict liability, and to "fix that responsibility openly."\textsuperscript{174} As the Supreme Court of Texas said in Jacob E. Decker & Sons v. Clapp:\textsuperscript{175} "We believe the better and sounder rule places liability solidly on the ground of warranty not in contract, but imposed by law as a matter of public policy."

\textsuperscript{170} Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256 (advertisement offering to pay $100 to anybody contracting influenza after using smoke ball; plaintiff bought defendant's smoke ball from retailer, nevertheless contracted influenza after using the ball as instructed, and successfully maintained action against manufacturer); see also, Timberland Lumber Co. v. Climax Mfg. Co., supra note 169.

\textsuperscript{171} This reasoning has been developed at greater length by the present writer; see, Fricke, Manufacturers Warranty, 33 Australian L.J. 35 (1959).

\textsuperscript{172} 2 Harper & James, Torts 1573 (1956); cf., Prosser, Law of Torts 510-11 (2d ed. 1955).


\textsuperscript{175} 139 Tex. 609, 618, 164 S.W.2d 828, 832 (1942).
Other courts, however, have felt the need for the prop of fiction in reaching this result. In the exceptional cases which have imposed strict liability on the manufacturer, many fictions have been used. Once again the emotional drive has centered in the stomach and these developments are at present practically confined to food cases.\(^{176}\) The most acceptable fiction has been to spell out a third party beneficiary contract in favor of the consumer from the circumstances of the modern chain of distribution.

First of all, it is clear that a warranty is to be implied from the manufacturer to his vendee.\(^{177}\) But it is well known that the chances of the latter, who buys for resale rather than consumption, being personally injured, are very slight. As Judge Cardozo said in a slightly different context in the *MacPherson* case: "The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used."\(^{178}\) Therefore, the argument runs,\(^{179}\) if the warranty of safety is to serve the purpose of protecting health and safety it must give rights to others than the immediate vendee of the manufacturer. The only situations where the immediate vendee will avail himself of the rights created by the manufacturer's warranty will be where he has had to pay damages under a similar warranty running between himself and the sub-purchaser and he seeks recoupment from his vendor — a situation which wears the appearance of the trustee acting on behalf of the beneficiary to enforce the trust. The argument is well developed in the opinion in *Ward Baking Co. v. Trizzino*:\(^{180}\)

"The Baking Company, when it delivered the cake in question to the groceryman, to say the least, impliedly represented to the public, who is the ultimate consumer, that this cake is free from injurious substances and fit for consumption as food. There is no doubt that an implied warranty arises between the groceryman who purchased the cake and the Baking Company. Since the Baking Company was fully aware that the groceryman did not purchase the cakes for his own consumption, but purchased the same instead for the purpose of selling the same to members of the public, who are the ultimate consumers, this implied obligation which unquestionably arose in favor of the groceryman may be legally said to have also arisen for the benefit of the


\(^{177}\) 2 *Williston, Sales* § 614 (2d ed. 1924).


\(^{180}\) 27 Ohio App. 475, 481-82, 161 N.E. 557, 559 (1928).
consumer. The groceryman, who is in effect merely a distributing medium for the articles of food furnished by the Baking Company, having full knowledge of that fact, . . . entered into a contractual relationship for the benefit of the public, which is the ultimate consumer. In other words, this contract between the groceryman and the Ward Baking Company to all intents and purposes was a contract entered into for the benefit of a third party, to wit, the ultimate consumer. Whatever implied warranty arises in favor of the groceryman, who established the contractual relationship with the Baking Company, is for the benefit of the third party, namely, the ultimate consumer."

The objection that the injured person eo nomine is not known at the time of contracting may be met by pointing out that there are other cases where is was possible to say this, but where the courts have nevertheless spelled out a third party beneficiary contract.\(^{181}\)

Another fiction by which strict liability has been imposed is the theory that the cause of action vested in the manufacturer's vendee is assignable to the sub-purchaser. This theory presents difficulties. First, although the original buyer can, by appropriate language, assign his contract of purchase with all rights thereunder, "the mere resale of the article is not sufficient evidence in and of itself . . . to show that the original buyer intended to part with his cause of action for damages against the one who originally sold the article to him."\(^{182}\) Second, even if it is treated as having been assigned, warranties have been regarded very much like insurance policies, as contracts of personal indemnity, so that all the original purchaser could have assigned would be his cause of action if he should happen to be injured.

There are other fictions. Perhaps most frequently encountered is the theory that the warranty runs with the chattel, just as covenants run with the land. An example is provided by Masetti v. Armour & Co.,\(^{183}\) where it was said: "A manufacturer of food products under modern conditions impliedly warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade."

Although most of the courts which have imposed strict liability through these theories have done so in relation to food, a recent trend is discernible to extend these doctrines to other products.\(^{184}\) It seems that food is performing the thin-edge-of-the-wedge function it per-

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182. Id. at 151.

183. 75 Wash. 622, 630, 135 Pac. 633, 636 (1913).

formed in the development of vendor’s warranty and of the negligence action. The predicted trend should ultimately place the responsibility for dangers resulting from the use of products on the industry producing them, and free this branch of the law “from the restrictions on warranties which operate so arbitrarily and capriciously when they are transplanted from commercial law to the accident problem.”

185. 2 Harper & James, Torts 1593 (1956).

[TO BE CONTINUED]