

TOPIC
PRODUCT STRICT LIABILITY

Supreme Court of California, In Bank.
GREENMAN, v. YUBA POWER PRODUCTS,
59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697,
13 A.L.R.3d 1049 (1963)

TRAYNOR, Justice.

Plaintiff brought this action for damages against the retailer and the manufacturer of a Shopsmith, a combination power tool that could be used as a saw, drill, and wood lathe. He saw a Shopsmith demonstrated by the retailer and studied a brochure prepared by the manufacturer. He decided he wanted a Shopsmith for his home workshop, and his wife bought and gave him one for Christmas in 1955. In 1957 he bought the necessary attachments to use the Shopsmith as a lathe for turning a large piece of wood he wished to make into a chalice. After he had worked on the piece of wood several times without difficulty, it suddenly flew out of the machine and struck him on the forehead, inflicting serious injuries. About ten and a half months later, he gave the retailer and the manufacturer written notice of claimed breaches of warranties and filed a complaint against them alleging such breaches and negligence.

After a trial before a jury, the court ruled that there was no evidence that the retailer was negligent or had breached any express warranty and that the manufacturer was not liable for the breach of any implied ***699 **899 warranty. Accordingly, it submitted to the jury only the cause of action alleging breach of implied warranties against the retailer and the causes of action alleging negligence and breach of express warranties against the manufacturer. The jury returned a verdict for the retailer against plaintiff and for plaintiff against the manufacturer in the amount of \$65,000. The trial court denied the manufacturer's motion for a new trial and *60 entered judgment on the verdict. The manufacturer and plaintiff appeal. Plaintiff seeks a reversal of the part of the judgment in favor of the retailer, however, only in the event that the part of the judgment against the manufacturer is reversed.

Plaintiff introduced substantial evidence that his injuries were caused by defective design and construction of the Shopsmith. His expert witnesses testified that inadequate set screws were used to hold parts of the machine together so that normal vibration caused the tailstock of the lathe to move away from the

piece of wood being turned permitting it to fly out of the lathe. They also testified that there were other more positive ways of fastening the parts of the machine together, the use of which would have prevented the accident. The jury could therefore reasonably have concluded that the manufacturer negligently constructed the Shopsmith. The jury could also reasonably have concluded that statements in the manufacturer's brochure were untrue, that they constituted express warranties, [FN1] and that plaintiff's injuries were caused by their breach.

FN1. In this respect the trial court limited the jury to a consideration of two statements in the manufacturer's brochure. (1) 'WHEN SHOPSMITH IS IN HORIZONTAL POSITION Rugged construction of frame provides rigid support from end to end. Heavy centerless-ground steel tubing insures perfect alignment of components.' (2) 'SHOPSMITH maintains its accuracy because every component has positive locks that hold adjustments through rough or precision work.'

[1] The manufacturer contends, however, that plaintiff did not give it notice of breach of warranty within a reasonable time and that therefore his cause of action for breach of warranty is barred by section 1769 of the Civil Code. Since it cannot be determined whether the verdict against it was based on the negligence or warranty cause of action or both, the manufacturer concludes that the error in presenting the warranty cause of action to the jury was prejudicial.

Section 1769 of the Civil Code provides: 'In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.'

Like other provisions of the uniform sales act (Civ.Code, *61 ss 1721-1800), section 1769 deals with the rights of the parties to a contract of sale or a sale. It does not provide that notice must be given of the breach of a warranty that arises independently of a contract of sale between the parties. Such warranties are not

imposed by the sales act, but are the product of common-law decisions that have recognized them in a variety of situations. (See *Gagne v. Bertran*, 43 Cal.2d 481, 486-487, 275 P.2d 15, and authorities cited; *Peterson v. Lamb Rubber Co.*, 54 Cal.2d 339, 348, 5 Cal.Rptr. 863, 353 P.2d 575; *Klein v. Duchess Sandwich Co., Ltd.*, 14 Cal.2d 272, 276-283, 93 P.2d 799; *Burr v. Sherwin Williams Co.*, 42 Cal.2d 682, 695-696, 268 P.2d 1041; *Souza & McCue Constr. Co. v. Superior Court*, 57 Cal.2d 508, 510-511, 20 Cal.Rptr. 634, 370 P.2d 338.) It is true that in many of these situations the court has invoked the sales act definitions of warranties (Civ.Code, ss 1732, 1735) in defining the defendant's liability, but it has done so, not because the statutes so required, but because they provided appropriate standards for the ***700 **900 court to adopt under the circumstances presented. (See *Clinkscales v. Carver*, 2 Cal.2d 72, 75, 136 P.2d 777; *Dana v. Sutton Motor Sales*, 56 Cal.2d 284, 287, 14 Cal.Rptr. 649, 636 P.2d 881.)

The notice requirement of section 1769, however, is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. (*La Hue v. Coca-Cola Bottling*, 50 Wash.2d 645, 314 P.2d 421, 422; *Chapman v. Brown*, D.C., 198 F.Supp. 78, 85, *affd.* *Brown v. Chapman*, 9 Cir., 304 F.2d 149.) 'As between the immediate parties to the sale (the notice requirement) is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary. The injured consumer is seldom 'steeped in the business practice which justifies the rule,' (James, *Product Liability*, 34 *Texas L.Rev.* 44, 192, 197) and at least until he has had legal advice it will not occur to him to give notice to one with whom he has had no dealings.' (Prosser, *Strict Liability to the Consumer*, 69 *Yale L.J.* 1099, 1130, footnotes omitted.) It is true that in *Jones v. Burgermeister Brewing Corp.*, 198 Cal.App.2d 198, 202-203, 18 Cal.Rptr. 311; *Perry v. Thrifty Drug Co.*, 186 Cal.App.2d 410, 411, 9 Cal.Rptr. 50; *Arata v. Tonegato*, 152 Cal.App.2d 837, 841, 314 P.2d 130, and *Maecherlein v. *62 Sealy Mattress Co.*, 155 Cal.App.2d 275, 278, 302 P.2d 331, the court assumed that notice of breach of warranty must be given in an action by a consumer against a manufacturer. Since in those cases, however, the court did not consider the question whether a distinction exists between a warranty based on a contract between the parties and one imposed on a manufacturer not in privity with the consumer, the decisions are not authority for rejecting the rule of the *La Hue* and *Chapman* cases, *supra*. (*Peterson v. Lamb*

Rubber Co., 54 Cal.2d 339, 343, 5 Cal.Rptr. 863, 353 P.2d 575; *People v. Banks*, 53 Cal.2d 370, 389, 1 Cal.Rptr. 669, 348 P.2d 102.) We conclude, therefore, the even if plaintiff did not give timely notice of breach of warranty to the manufacturer, his cause of action based on the representations contained in the brochure was not barred.

[2] Moreover, to impose strict liability on the manufacturer under the circumstances of this case, it was not necessary for plaintiff to establish an express warranty as defined in section 1732 of the Civil Code. [FN2] A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective. (*Peterson v. Lamb Rubber Co.*, 54 Cal.2d 339, 347, 5 Cal.Rptr. 863, 353 P.2d 575 (grinding wheel); *Vallis v. Canada Dry Ginger Ale, Inc.*, 190 Cal.App.2d 35, 42-44, 11 Cal.Rptr. 823 (bottle); *Jones v. Burgermeister Brewing Corp.*, 198 Cal.App.2d 198, 204, 18 Cal.Rptr. 311 (bottle); *Gottsdanker v. Cutter Laboratories*, 182 Cal.App.2d App.2d 602, 607, 6 Cal.Rptr. 320, 79 A.L.R.2d 290 (vaccine); *McQuaide v. Bridgport Brass Co., D.C.*, 190 F.Supp. 252, 254 (insect spray); *Bowles v. Zimmer Manufacturing Co.*, 7 Cir., 277 F.2d 868, 875, 76 A.L.R.2d 120 (surgical pin); *Thompson v. Reedman*, D.C., 199 F.Supp. 120, 121 (automobile); *Chapman v. Brown*, D.C., 198 F.Supp. 78, 118, 119, *affd.* *Brown v. Chapman*, 9 Cir., 304 F.2d 149 (skirt); *B. F. Goodrich Co. v. Hammond*, 10 Cir., 269 F.2d 501, 504 (automobile tire); *Markovich v. McKesson and Robbins, Inc.*, 106 Ohio App. ***701 **901 265, 149 N.E.2d 181, 186-188 *63 (home permanent); *Graham v. Bottenfield's Inc.*, 176 Kan. 68, 269 P.2d 413, 418 (hair dye); *General Motors Corp. v. Dodson*, 47 Tenn.App. 438, 338 S.W.2d 655, 661 (automobile); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 76-84, 75 A.L.R.2d 1 (automobile); *Hinton v. Republic Aviation Corporation*, D.C., 180 F.Supp. 31, 33 (airplane).)

FN2. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.'

[3] Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law (see e. g., *Graham v. Bottenfield's, Inc.*, 176 Kan. 68, 269 P.2d 413, 418; *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612, 614, 75 A.L.R.2d 103; *Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 617, 164 S.W.2d 828, 142 A.L.R. 1479), and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products (*Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 84-96; *General Motors Corp. v. Dodson*, 47 Tenn.App. 438, 338 S.W.2d 655, 658-661; *State Farm Mut. Auto. Ins. Co. v. Anderson-Weber, Inc.*, 252 Iowa 1289, 110 N.W.2d 449, 455- 456; *Pabon v. Hackensack Auto Sales, Inc.*, 63 N.J.Super. 476, 164 A.2d 773, 778; *Linn v. Radio Center Delicatessen*, 169 Misc. 879, 9 N.Y.S.2d 110, 112) make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.

[4] We need not re-canvass the reasons for imposing strict liability on the manufacturer. They have been fully articulated in the cases cited above. (See also 2 Harper and James, *Torts*, ss 28.15-28.16, pp. 1569-1574; Prosser, *Strict Liability to the Consumer*, 69 Yale L.J. 1099; *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461, 150 P.2d 436, concurring opinion.) The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose *64 fitfully at best. (See Prosser, *Strict Liability to the Consumer*, 69 Yale L.J. 1099, 1124-1134.) In the present case, for example, plaintiff was able to plead and prove an express warranty only because he read and relied on the representations of the Shopsmith's ruggedness contained in the manufacturer's brochure. Implicit in the machine's presence on the market, however, was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements

in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do. It should not be controlling whether the details of the sales from manufacturer to retailer and from retailer to plaintiff's wife were such that one or more of the implied warranties of the sales act arose. (Civ.Code, s 1735.) 'The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales.' (*Ketterer v. Armour & Co.*, D.C., 200 F. 322, 323; *Klein v. Duchess Sandwich which Co.*, 14 Cal.2d 272, 282, 93 P.2d 799.) To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.

[5] The manufacturer contends that the trial court erred in refusing to give three ***702 **902 instructions requested by it. It appears from the record, however, that the substance of two of the requested instructions was adequately covered by the instructions given and that the third instruction was not supported by the evidence.

The judgment is affirmed.

GIBSON, C. J., and SCHAUER, McCOMB, PETERS, TOBRINER and PEEK, JJ., concur.

Supreme Court of California
ESCOLA v. COCA COLA BOTTLING CO. OF FRESNO.
150 P.2d 436 (Cal 1944.)

GIBSON, Chief Justice.

Plaintiff, a waitress in a restaurant, was injured when a bottle of Coca Cola broke in her hand. She alleged that defendant company, which had bottled and delivered the alleged defective bottle to her employer, was negligent in selling 'bottles containing said beverage which on account of excessive pressure of gas or by reason of some defect in the bottle was dangerous * * * and likely to explode.' This appeal is from a judgment upon a jury verdict in favor of plaintiff.

Defendant's driver delivered several cases of Coca Cola to the restaurant, placing them on the floor, one on top of the other, under and behind the counter, where they remained at least thirty-six hours. Immediately

before the accident, plaintiff picked up the top case and set it upon a near-by ice cream cabinet in front of and about three feet from the refrigerator. She then proceeded to take the bottles from **438 the case with her right hand, one at a time, and put them into the refrigerator. Plaintiff testified that after she had placed three bottles in the refrigerator and had moved the fourth bottle about 18 inches from the case 'it exploded in my hand.' The bottle broke into two jagged pieces and inflicted a deep five-inch cut, severing blood vessels, nerves and muscles of the thumb and palm of the hand. Plaintiff further testified that when the bottle exploded, 'It made a sound similar to an electric light bulb that would have dropped. It made a loud pop.' Plaintiff's employer testified, 'I was about twenty feet from where it actually happened and I heard the explosion.' A fellow employee, on the opposite side of the counter, testified that plaintiff 'had the bottle, I should judge, waist high, and I know that it didn't bang either the case or the door or another bottle * * * when it popped. It sounded just like a fruit jar would blow up * * *.' The witness further testified that the contents of the bottle 'flew all over herself and myself and the walls and one thing and another.'

The top portion of the bottle, with the cap, remained in plaintiff's hand, and the lower portion fell to the floor but did not break. The broken bottle was not produced at the trial, the pieces having been thrown away by an employee of the restaurant shortly after the accident. Plaintiff, however, described the broken pieces, and a diagram of the bottle was made showing the location of the 'fracture line' where the bottle broke in two.

*457 One of defendant's drivers, called as a witness by plaintiff, testified that he had seen other bottles of Coca Cola in the past explode and had found broken bottles in the warehouse when he took the cases out, but that he did not know what made them blow up.

Plaintiff then rested her case, having announced to the court that being unable to show any specific acts of negligence she relied completely on the doctrine of *res ipsa loquitur*.

Defendant contends that the doctrine of *res ipsa loquitur* does not apply in this case, and that the evidence is insufficient to support the judgment.

Many jurisdictions have applied the doctrine in cases involving exploding bottles of carbonated beverages. See *Payne v. Rome Coca-Cola Bottling Co.*, 10 Ga.App. 762, 73 S.E. 1087; *Stolle v. Anheuser-Busch*, 307 Mo. 520, 271 S.W. 497, 39 A.L.R. 1001; *Bradley*

v. Conway Springs Bottling Co., 154 Kan. 282, 118 P.2d 601; *Ortego v. Nehi Bottling Works*, 199 La. 599, 6 So.2d 677; *MacPherson v. Canada Dry Ginger Ale, Inc.*, 129 N.J.L. 365, 29 A.2d 868; *Macres v. Coca-Cola Bottling Co.*, 290 Mich. 567, 287 N.W. 922; *Benkendorfer v. Garrett*, Tex.Civ.App., 143 S.W.2d 1020. Other courts for varying reasons have refused to apply the doctrine in such cases. See *Gerber v. Faber*, 54 Cal.App.2d 674, 129 P.2d 485; *Loebig's Guardian v. Coca-Cola Bottling Co.*, 259 Ky. 124, 81 S.W.2d 910; *Stewart v. Crystal Coca-Cola Bottling Co.*, 50 Ariz. 60, 68 P.2d 952; *Glaser v. Seitz*, 35 Misc. 341, 71 N.Y.S. 942; *Lucians v. John Morgan, Inc.*, 267 App.Div. 785, 45 N.Y.S.2d 502; cf. *Berkens v. Denver Coca-Cola Bottling Co.*, 109 Colo. 140, 122 P.2d 884; *Ruffin v. Coca Cola Bottling Co.*, 311 Mass. 514, 42 N.E.2d 259; *Slack v. Premier-Pabst Corporation*, 1 Terry 97, 40 Del. 97, 5 A.2d 516; *Wheeler v. Laurel Bottling Works*, 111 Miss. 442, 71 So. 743, L.R.A.1916E, 1074; *Seven-Up Bottling Co. v. Gretes*, 182 Va. 138, 27 S.E.2d 925; *Dail v. Taylor*, 151 N.C. 284, 66 S.E. 135, 28 L.R.A.,N.S., 949. It would serve no useful purpose to discuss the reasoning of the foregoing cases in detail, since the problem is whether under the facts shown in the instant case the conditions warranting application of the doctrine have been satisfied.

[1] *Res ipsa loquitur* does not apply unless (1) defendant had exclusive control of the thing causing the injury and (2) the accident is of such a nature that it ordinarily *458 would not occur in the absence of negligence by the defendant. *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 616, 617, 140 P.2d 369, and authorities there cited; cf. *Hinds v. Wheadon*, 19 Cal.2d 458, 461, 121 P.2d 724; *Prosser on Torts* [1941], 293-301.

[2][3][4][5] Many authorities state that the happening of the accident does not speak for itself where it took place some time after defendant had relinquished control of the instrumentality causing the injury. Under the more logical view, however, the doctrine may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession. See **439 cases collected in *Honea v. City Dairy, Inc.*, 22 Cal.2d 614, 617, 618, 140 P.2d 369. As said in *Dunn v. Hoffman Beverage Co.*, 126 N.J.L. 556, 20 A.2d 352, 354, 'defendant is not charged with the duty of showing affirmatively that something happened to the bottle after it left its control or management; * * * to get to the jury the plaintiff must show that there was due care during that period.' Plaintiff must also prove that she handled

the bottle carefully. The reason for this prerequisite is set forth in Prosser on Torts, supra, at page 300, where the author states: 'Allied to the condition of exclusive control in the defendant is that of absence of any action on the part of the plaintiff contributing to the accident. Its purpose, of course, is to eliminate the possibility that it was the plaintiff who was responsible. If the boiler of a locomotive explodes while the plaintiff engineer is operating it, the inference of his own negligence is at least as great as that of the defendant, and res ipsa loquitur will not apply until he has accounted for his own conduct.' See, also, Olson v. Whitthorne & Swan, 203 Cal. 206, 208, 209, 263 P. 518, 58 A.L.R. 129. It is not necessary, of course, that plaintiff eliminate every remote possibility of injury to the bottle after defendant lost control, and the requirement is satisfied if there is evidence permitting a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it. Cf. Prosser, supra, p. 300. If such evidence is presented, the question becomes one for the trier of fact (see, e. g., *459 MacPherson v. Canada Dry Ginger Ale, Inc., 129 N.J.L. 365, 29 A.2d 868, 869), and, accordingly, the issue should be submitted to the jury under proper instructions.

In the present case no instructions were requested or given on this phase of the case, although general instructions upon res ipsa loquitur were given. Defendant, however, has made no claim of error with reference thereto on this appeal.

[6] Upon an examination of the record, the evidence appears sufficient to support a reasonable inference that the bottle here involved was not damaged by any extraneous force after delivery to the restaurant by defendant. It follows, therefore, that the bottle was in some manner defective at the time defendant relinquished control, because sound and properly prepared bottles of carbonated liquids do not ordinarily explode when carefully handled.

[7] The next question, then, is whether plaintiff may rely upon the doctrine of res ipsa loquitur to supply an inference that defendant's negligence was responsible for the defective condition of the bottle at the time it was delivered to the restaurant. Under the general rules pertaining to the doctrine, as set forth above, it must appear that bottles of carbonated liquid are not ordinarily defective without negligence by the bottling company. In 1 Shearman and Redfield on Negligence (Rev.Ed.1941), page 153, it is stated that: 'The doctrine * * * requires evidence which shows at least the

probability that a particular accident could not have occurred without legal wrong by the defendant.'

An explosion such as took place here might have been caused by an excessive internal pressure in a sound bottle, by a defect in the glass of a bottle containing a safe pressure, or by a combination of these two possible causes. The question is whether under the evidence there was a probability that defendant was negligent in any of these respects. If so, the doctrine of res ipsa loquitur applies.

[8][9][10][11] The bottle was admittedly charged with gas under pressure, and the charging of the bottle was within the exclusive control of defendant. As it is a matter of common knowledge that an overcharge would not ordinarily result without negligence, it follows under the doctrine of res ipsa loquitur that if the bottle was in fact excessively charged an inference of defendant's negligence would arise. If *460 the explosion resulted from a defective bottle containing a safe pressure, the defendant would be liable if it negligently failed to discover such flaw. If the defect were visible, an inference of negligence would arise from the failure of defendant to discover it. Where defects are discoverable, it may be assumed that they will not ordinarily escape detection if a reasonable inspection is made, and if such a defect is overlooked an inference arises that a proper inspection was not made. A difficult problem is presented where the defect is unknown and consequently might have been one not discoverable by a reasonable, practicable inspection. In the Honea case we refused to take judicial notice of the technical practices and information available to the bottling industry **440 for finding defects which cannot be seen. In the present case, however, we are supplied with evidence of the standard methods used for testing bottles.

A chemical engineer for the Owens-Illinois Glass Company and its Pacific Coast subsidiary, maker of Coca Cola bottles, explained how glass is manufactured and the methods used in testing and inspecting bottles. He testified that his company is the largest manufacturer of glass containers in the United States, and that it uses the standard methods for testing bottles recommended by the glass containers association. A pressure test is made by taking a sample from each mold every three hours--approximately one out of every 600 bottles--and subjecting the sample to an internal pressure of 450 pounds per square inch, which is sustained for one minute. (The normal pressure in Coca Cola bottles is less than 50 pounds per square inch.) The sample bottles are also subjected to the standard thermal shock

test. The witness stated that these tests are 'pretty near' infallible.

It thus appears that there is available to the industry a commonly-used method of testing bottles for defects not apparent to the eye, which is almost infallible. Since Coca Cola bottles are subjected to these tests by the manufacturer, it is not likely that they contain defects when delivered to the bottler which are not discoverable by visual inspection. Both new and used bottles are filled and distributed by defendant. The used bottles are not again subjected to the tests referred to above, and it may be inferred that defects not discoverable by visual inspection do not develop in bottles after they are manufactured. Obviously, if such defects do *461 occur in used bottles there is a duty upon the bottler to make appropriate tests before they are refilled, and if such tests are not commercially practicable the bottles should not be re-used. This would seem to be particularly true where a charged liquid is placed in the bottle. It follows that a defect which would make the bottle unsound could be discovered by reasonable and practicable tests.

[12] Although it is not clear in this case whether the explosion was caused by an excessive charge or a defect in the glass there is a sufficient showing that neither cause would ordinarily have been present if due care had been used. Further, defendant had exclusive control over both the charging and inspection of the bottles. Accordingly, all the requirements necessary to entitle plaintiff to rely on the doctrine of *res ipsa loquitur* to supply an inference of negligence are present.

[13] It is true that defendant presented evidence tending to show that it exercised considerable precaution by carefully regulating and checking the pressure in the bottles and by making visual inspections for defects in the glass at several stages during the bottling process. It is well settled, however, that when a defendant produces evidence to rebut the inference of negligence which arises upon application of the doctrine of *res ipsa loquitur*, it is ordinarily a question of fact for the jury to determine whether the inference has been dispelled. *Druzanich v. Criley*, 19 Cal.2d 439, 444, 122 P.2d 53; *Michener v. Hutton*, 203 Cal. 604, 610, 265 P. 238, 59 A.L.R. 480.

The judgment is affirmed.

SHENK, CURTIS, CARTER, and SCHAUER, JJ., concurred.

TRAYNOR, Justice.

I concur in the judgment, but I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A.1916F, 696, Ann.Cas.1916C, 440 established the principle, recognized by this court, that irrespective of privity of contract, the manufacturer is responsible *462 for an injury caused by such an article to any person who comes in lawful contact with it. *Sheward v. Virtue*, 20 Cal.2d 410, 126 P.2d 345; *Kalash v. Los Angeles Ladder Co.*, 1 Cal.2d 229, 34 P.2d 481. In these cases the source of the manufacturer's liability was his negligence in the manufacturing process or in the inspection of component parts supplied by others. 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 **441 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. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection (see *Sheward v. Virtue*, 20 Cal.2d 410, 126 P.2d 345; *O'Rourke v. Day & Night Water Heater Co.*,

Ltd., 31 Cal.App.2d 364, 88 P.2d 191; *Smith v. Peerless Glass Co.*, 259 N.Y. 292, 181 N.E. 576), or unknown causes that even by the device of *res ipsa loquitur* cannot be classified as negligence of the manufacturer. The inference of negligence may be dispelled by an affirmative showing of proper care. If the evidence against the fact inferred *463 is 'clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved, the court must instruct the jury that the nonexistence of the fact has been established as a matter of law.' *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868, 870. An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.

In the case of foodstuffs, the public policy of the state is formulated in a criminal statute. Section 26510 of the Health and Safety Code, St.1939, p. 989, prohibits the manufacturing, preparing, compounding, packing, selling, offering for sale, or keeping for sale, or advertising within the state, of any adulterated food. Section 26470, St.1941, p. 2857, declares that food is adulterated when 'it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health.' The statute imposes criminal liability not only if the food is adulterated, but if its container, which may be a bottle (§ 26451, St.1939, p. 983), has any deleterious substance (§ 26470(6)), or renders the product injurious to health (§ 26470(4)). The criminal liability under the statute attaches without proof of fault, so that the manufacturer is under the duty of ascertaining whether an article manufactured by him is safe. *People v. Schwartz*, 28 Cal.App.2d Supp. 775, 70 P.2d 1017. Statutes of this kind result in a strict liability of the manufacturer in tort to the member of the public injured. See cases cited in Prosser, *Torts*, p. 693, note 69.

The statute may well be applicable to a bottle whose defects cause it to explode. In any event it is significant that the statute imposes criminal liability without fault, reflecting the public policy of protecting the public

from dangerous products placed on the market, irrespective of negligence in their manufacture. While the Legislature imposes criminal liability*464 only with regard to food products and their containers, there are many other sources of danger. It is to the public interest to prevent injury to the public from any defective goods by the imposition of civil liability generally.

The retailer, even though not equipped to test a product, is under an absolute liability to his customer, for the implied warranties of fitness for proposed use and merchantable quality include a warranty of **442 safety of the product. *Goetten v. Owl Drug Co.*, 6 Cal.2d 683, 59 P.2d 142; *Mix v. Ingersoll Candy Co.*, 6 Cal.2d 674, 59 P.2d 144; *Gindraux v. Maurice Mercantile Co.*, 4 Cal.2d 206, 47 P.2d 708; *Jensen v. Berris*, 31 Cal.App.2d 537, 88 P.2d 220; *Ryan v. Progressive Grocery Stores*, 255 N.Y. 388, 175 N.E. 105, 74 A.L.R. 339; *Race v. Krum*, 222 N.Y. 410, 118 N.E. 853, L.R.A.1918F, 1172. This warranty is not necessarily a contractual one (*Chamberlain Co. v. Allis-Chalmers, etc., Co.*, 51 Cal.App.2d 520, 524, 125 P.2d 113; see 1 *Williston on Sales*, 2d ed., §§ 197-201), for public policy requires that the buyer be insured at the seller's expense against injury. *Race v. Krum*, supra; *Ryan v. Progressive Grocery Stores*, supra; *Chapman v. Roggenkamp*, 182 Ill.App. 117, 121; *Ward v. Great Atlantic & Pacific Tea Co.*, 231 Mass. 90, 94, 120 N.E. 225, 5 A.L.R. 242; see Prosser, *The Implied Warranty of Merchantable Quality*, 27 *Minn.L.Rev.* 117, 124; *Brown, The Liability of Retail Dealers For Defective Food Products*, 23 *Minn.L.Rev.* 585. The courts recognize, however, that the retailer cannot bear the burden of this warranty, and allow him to recoup any losses by means of the warranty of safety attending the wholesaler's or manufacturer's sale to him. *Ward v. Great Atlantic & Pacific Tea Co.*, supra; see *Waite, Retail Responsibility and Judicial Law Making*, 34 *Mich.L.Rev.* 494, 509. Such a procedure, however, is needlessly circuitous and engenders wasteful litigation. Much would be gained if the injured person could base his action directly on the manufacturer's warranty.

The liability of the manufacturer to an immediate buyer injured by a defective product follows without proof of negligence from the implied warranty of safety attending the sale. Ordinarily, however, the immediate buyer is a dealer who does not intend to use the product himself, and if the warranty of safety is to serve the purpose of protecting health and safety it must give rights to others than the dealer. In the words *465 of Judge Cardozo in the *MacPherson* case [217 n.y. 382, 111 N.E. 1053, L.R.A.1916F, 696, Ann.Cas.1916C, 440]: '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. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion.' While the defendant's negligence in the MacPherson case made it unnecessary for the court to base liability on warranty, Judge Cardozo's reasoning recognized the injured person as the real party in interest and effectively disposed of the theory that the liability of the manufacturer incurred by his warranty should apply only to the immediate purchaser. It thus paves the way for a standard of liability that would make the manufacturer guarantee the safety of his product even when there is no negligence.

This court and many others have extended protection according to such a standard to consumers of food products, taking the view that the right of a consumer injured by unwholesome food does not depend 'upon the intricacies of the law of sales' and that the warranty of the manufacturer to the consumer in absence of privity of contract rests on public policy. *Klein v. Duchess Sandwich Co., Ltd.*, 14 Cal.2d 272, 282, 93 P.2d 799, 803; *Ketterer v. Armour & Co., D.C.*, 200 F. 322, 323; *Id.*, 2 Cir., 247 F. 921, 160 C.C.A. 111, L.R.A.1918D, 798; *Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828, 142 A.L.R. 1479; see *Perkins, Unwholesome Food As A Source of Liability*, 5 Iowa L. Bull. 6, 86. Dangers to life and health inhere in other consumers' goods that are defective and there is no reason to differentiate them from the dangers of defective food products. See *Bohlen, Studies in Torts, Basis of Affirmative Obligations, American Cases Upon The Liability of Manufacturers and Vendors of Personal Property*, 109, 135; *Llewellyn, On Warranty of Quality and Society*, 36 Col.L.Rev. 699, 704, note 14; *Prosser, Torts*, p. 692.

In the food products cases the courts have resorted to various fictions to rationalize the extension of the manufacturer's warranty to the consumer: that a warranty runs with the chattel; that the cause of action of the dealer is assigned to the consumer; that the consumer is a third party beneficiary of the manufacturer's contract with the dealer. They have also held the manufacturer liable on a mere fiction of negligence: '*466 Practically he must know it [the product] is fit, or take the consequences, if it proves destructive.' *Parks v. C. C. Yost Pie Co.*, 93 Kan. 334, 144 P. 202, 203 L.R.A.1915C, 179; see *Jeanblanc, Manufacturer's Liability to Persons Other Than Their Immediate Vendees*, 24 Va.L.Rev. 134. Such fictions are **443 not necessary to fix the manufacturer's

liability under a warranty if the warranty is severed from the contract of sale between the dealer and the consumer and based on the law of torts (*Decker & Sons v. Capps*, supra; *Prosser, Torts*, p. 689) as a strict Liability. See *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952, 60 A.L.R. 475; *McGrath v. Basich Bros. Const. Co.*, 7 Cal.App.2d 573, 46 P.2d 981; *Prosser, Nuisance Without Fault*, 20 Tex.L.Rev. 399, 403; *Feezer, Capacity To Bear The Loss As A Factor In The Decision Of Certain Types of Tort Cases*, 78 U. of Pa.L.Rev. 805, 79 U. of Pa. L.Rev. 742; *Carpenter, The Doctrine of Green v. General Petroleum Corp.*, 5 So.Cal.L.Rev. 263, 271; *Pound, The End of Law As Developed In Legal Rules And Doctrines*, 27 Harv.L.Rev. 195, 233. Warranties are not necessarily rights arising under a contract. An action on a warranty 'was, in its origin, a pure action of tort,' and only late in the historical development of warranties was an action in assumpsit allowed. *Ames, The History of Assumpsit*, 2 Harv.L.Rev. 1, 8; 4 *Williston on Contracts* (1936) § 970. 'And it is still generally possible where a distinction of procedure is observed between actions of tort and of contract to frame the declaration for breach of warranty in tort.' *Williston, loc. cit.*; see *Prosser, Warranty On Merchantable Quality*, 27 *Minn.L.Rev.* 117, 118. On the basis of the tort character of an action on a warranty, recovery has been allowed for wrongful death as it could not be in an action for breach of contract. *Greco v. S. S. Kresge Co.*, 277 N.Y. 26, 12 N.E.2d 557, 115 A.L.R. 1020; see *Schlick v. New York Dugan Bros.*, 175 Misc. 182, 22 N.Y.S.2d 238; *Prosser, Torts*, p. 119. As the court said in *Greco v. S. S. Kresge Co.*, supra [277 N.Y. 26, 12 N.E.2d 561, 115 A.L.R. 1020], 'Though the action may be brought solely for the breach of the implied warranty, the breach is a wrongful act, a default, and, in its essential nature, a tort.' Even a seller's express warranty can arise from a noncontractual affirmation inducing a person to purchase the goods. *Chamberlain Co. v. Allis-Chalmers, etc., Co.*, 51 Cal.App.2d 520, 125 P.2d 113. 'As an actual agreement to contract is not essential, the obligation *467 of a seller in such a case is one imposed by law as distinguished from one voluntarily assumed. It may be called an obligation either on a quasi-contract or quasi-tort, because remedies appropriate to contract and also to tort are applicable.' 1 *Williston on Sales*, 2d Ed. § 197; see *Ballantine, Classification of Obligations*, 15 *Ill.L.Rev.* 310, 325.

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either

inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks. See *Thomas v. Winchester*, 6 N.Y. 397, 57 Am.Dec. 455; *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P.2d 409, 15 P.2d 1118, 88 A.L.R. 521; *Crist v. Art Metal Works*, 230 App.Div. 114, 243 N.Y.S. 496, affirmed 255 N.Y. 624, 175 N.E. 341; see *Handler, False and Misleading Advertising*, 39 Yale L.J. 22; *Rogers, Good Will, Trade-Marks and Unfair Trading* (1914) ch. VI, *A Study of The Consumer*, p. 65 et seq.; *Williston, Liability For Honest Misrepresentations As Deceit, Negligence Or Warranty*, 42 Harv.L.Rev. 733; 18 Cornell L. Q. 445. Consumers no longer approach products warily but accept them on faith, relying on the reputation of the manufacturer or the trade mark. See *Max Factor & Co. v. Kunsman*, 5 Cal.2d 446, 463, 55 P.2d 177; *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, 106 A.L.R. 1476; *Schechter, The Rational Basis of Trade Mark Protection*, 40 Harv.L.Rev. 813, 818. Manufacturers have sought to justify that faith by increasingly high standards of inspection and a readiness to make good on defective products by way of replacements and refunds. See *Bogert and Fink, Business Practices Regarding Warranties In The Sale Of Goods*, 25 Ill.L.Rev. 400. The manufacturer's obligation to the consumer must keep pace with the changing relationship between them; it cannot be escaped because the marketing of a product has become so complicated as to require one or more *468 intermediaries. Certainly there is greater reason to impose liability on the **444 manufacturer than on the retailer who is but a conduit of a product that he is not himself able to test. See *Soule, Consumer Protection*, 4 Encyclopedia of The Social Sciences, 282; *Feezer, Manufacturer's Liability For Injuries Caused By His Products: Defective Automobiles*, 37 Mich.L.Rev. 1; *Llewellyn, Cases And Materials on Sales*, 340 et seq.

The manufacturer's liability should, of course, be defined in terms of the safety of the product in normal and proper use, and should not extend to injuries that cannot be traced to the product as it reached the market.

Rehearing denied; EDMONDS, J., dissenting.

Restatement (Second) of Torts

§ 402A (1965)

§ 402A. Special Liability Of Seller Of Product For Physical Harm To User Or Consumer

[Link to Case Citations](#)

[Westlaw Note: This section has been superseded by the Restatement of the Law Third, Torts: Products Liability. To retrieve the Restatement of the Law Third, Torts: Products Liability documents, enter the following query: ci(torts-pl % t.d. p.f.d.).]

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

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

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

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

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

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

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether the rules stated in this Section may not apply

(1) to harm to persons other than users or consumers;

(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or

(3) to the seller of a component part of a product to be assembled.

Comment:

a. This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer

even though he has exercised all possible care in the preparation and sale of the product. The Section is inserted in the Chapter dealing with the negligence liability of suppliers of chattels, for convenience of reference and comparison with other Sections dealing with negligence. The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.

b. History. Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied "corrupt" food and drink. In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer even though there was no showing of negligence on the part of the seller. These decisions represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract. In the beginning, these decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. The various devices included an agency of the intermediate dealer or another to purchase for the consumer, or to sell for the seller; a theoretical assignment of the seller's warranty to the intermediate dealer; a third party beneficiary contract; and an implied representation that the food was fit for consumption because it was placed on the market, as well as numerous others. In later years the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer, either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer. Other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.

Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption. The first extension was into the closely analogous cases of other products intended for intimate bodily use, where, for example, as in the case of cosmetics, the application to the body of the consumer is external rather than internal. Beginning in 1958 with a Michigan case involving cinder building blocks, a number of recent decisions have discarded any limitation to intimate association with the body, and

have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.

c. On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

d. The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

e. Normally the rule stated in this Section will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated.

f. Business of selling. The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the

rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, § 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, § 2-314, to a seller who is a merchant. This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like.

g. Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

h. A product is not in a defective condition when it is safe for normal handling and consumption. If the injury

results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment *j*), and a product sold without such warning is in a defective condition.

The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed. No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container is itself dangerous, the product is sold in a defective condition. Thus a carbonated beverage in a bottle which is so weak, or cracked, or jagged at the edges, or bottled under such excessive pressure that it may explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition. The container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this Section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle while he is handling it preparatory to consumption.

i. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because

the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

j. Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified,

notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

l. User or consumer. In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.

"Consumers" include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

Illustration:

1. A manufactures and packs a can of beans, which he sells to B, a wholesaler. B sells the beans to C, a jobber, who resells it to D, a retail grocer. E buys the can of beans from D, and gives it to F. F serves the beans at lunch to G, his guest. While eating the beans, G breaks a tooth, on a pebble of the size, shape, and color of a bean, which no reasonable inspection could possibly have discovered. There is satisfactory evidence that the pebble was in the can of beans when it was opened. Although there is no negligence on the part of A, B, C, or D, each of them is subject to liability to G. On the other hand E and F, who have not sold the beans, are not liable to G in the absence of some negligence on their part.