Manufacturer's Liability for Defective Products

Introduction

The purpose of this paper is to shed some light on the difficulties which the courts have experienced in finding ways of imposing liability on the manufacturer in favour of the ultimate consumer for damages suffered as a result of defective products. The scope of this paper includes a discussion of the jurisprudence in Quebec involving manufacturer's liability for defective products, as well as a close scrutiny of the evolution of the law in the United States in this area. It is hoped that an analysis of the treatment given to this area of the law by the American courts may help to disclose the possible policy considerations to which our courts in the future may choose to adhere. However, one must always bear in mind that whereas American judges are dealing with a fully blossomed economy, and with a strong and powerful industrial class, judges in Canada must consider the fact that Canada is still an infant, industrially-speaking, and while the burden of liability may not weigh heavily on the shoulders of American manufacturers, such a burden in Canada might be disastrous to a large segment of the industrial class.

At the outset, it must be made clear that the problem of the manufacturer's liability for defective products may be broken down into several components; first of all, that of the regime under which he is liable. For example, in Quebec, if the manufacturer has a contractual relationship with the party who is seeking damages for injuries resulting from a defective product, Articles 1522 and following of the *Civil Code* apply. However, if the injured party is not within privity of contract with the defendant manufacturer, the action must be taken under Article 1053 C.C.[1] Based on the textual law of Quebec, this distinction cannot be minimized, for the burden of proof on the plaintiff-consumer and the means of exculpation open to the defendant-manufacturer are vastly different in both regimes. Once having determined the regime under which the suit will be heard, the problem arises as to the intensity of the obligation of the manufacturer to prevent latent defects in his products. For example, in the contractual regime, is the presumption of knowledge provided for in Article 1527 C.C. rebuttable or not? In the delictual regime, is the burden of proof on the plaintiff to

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[1] *Ferstenfeld* v. *Kik Co.*, (1939), 77 C.S. 165, at p. 166.

show fault on the part of the manufacturer, or does the court presume fault when injury from a defective good is proved? Should the element of fault or negligence have any bearing? Moreover, may the manufacturer rebut the presumption by merely showing that he acted as a "bon père de famille", or is something greater required? Finally, attention will be given to the effect of disclaimer clauses in both regimes.

Liability arising out of Contract

Articles 1522 and following of the *Civil Code* provide for recourses against the manufacturer when the purchaser has been injured by a defective product. However, these articles apply only in the instances where there is a contractual relationship between the manufacturer-vendor and the purchaser.

Article 1527 C.C. states:

> If the seller knew the defect of the thing, he is obliged not only to restore the price of it, but to pay all damages suffered by the buyer.
>
> He is obliged in like manner in all cases, in which he is legally presumed to know the defects.

The second paragraph of Article 1527 C.C. provides for the situation where the vendor maintains that he, in fact, did not know of the defective condition of his goods; its application creates a presumption of knowledge on his part. According to Pothier the reason for this provision is:

> (Q)'un ouvrier, par la profession de son art, *spondet peritiam artis*, il se rend envers tous ceux qui contractent avec lui, responsable de la bonté de ses ouvrages, pour l'usage auquel ils sont naturellement destinés. Son impérité ou défaut de connaissance dans tout ce qui concerne son art, est une faute qui lui est imputée, personne ne devrait professer publiquement un art, s'il n'a toutes les connaissances nécessaires pour le bien exercer.[2]

This presumption of article 1527 C.C. is irrebutable, in cases involving manufacturer-vendors. Thus where a purchaser of a bottle of soft-drink swallowed a piece of glass and suffered damages, it was not sufficient for the manufacturer to show that reasonable care was taken in the manufacturing process:[4]

> (L)e vendeur qui connaît les vices de la chose qu'il vend et qui ne les dénonce pas à son acheteur, commet un dol, et mérite de payer les dommages qui peuvent en résulter. S'il était présumé avoir connu ces vices, son

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[2] Pothier, *Traité du contrat de vente*, t. 1, (Paris, 1781), No. 213, p. 223.

[3] Mignault, *Le droit civil canadien*, t. 8, (Montreal, 1909), p. 111; Faribault, *Traité de droit civil du Québec*, t. 11, No. 320, p. 294; *Samson* and *Filion* v. *Davie Shipbuilding Co.*, [1925] S.C.R. 202, [1925] 2 D.L.R. 856; *Bélanger* v. *Coca Cola*, [1954] C.S. 158.

[4] *Bélanger* v. *Coca Cola*, *supra*, n. 3.

ignorance serait aussi inexcusable que celle de celui qui vend la chose d'autrui en croyant qu'il en est lui-même le propriétaire.[5]

However, the benefit of the presumption of Article 1527 C.C. only accrues to those who are in privity with the manufacturer.[6] In reality, the manufacturer is selling his product to the retailer or distributor with the knowledge that his product is going to be offered to the consumer public. The representations the manufacturer makes concerning his product are mainly to help promote the image of his product among the consumers at large. Why, then should the law only provide this presumption of knowledge of 1527 C.C. for the benefit of direct purchasers, and not for the sub-purchasers and others who might be affected by the defective product? Essentially, privity is only a means of protecting a party, guilty of a breach of a contractual obligation, against losses which may have been suffered by remote parties. For example, a party in a contractual relationship with another might engage himself to build a hotel on a certain piece of property. If he fails to do so, the person with whom he has contracted will have an action for breach of contract.[7] However, the person who built a travel bureau in the vicinity in the hope that the hotel would be built has no recourse against the guilty party, for the latter was in no way obligated to the injured party. Yet is there not a vast distinction between one who contracts with another for the purpose of furthering his business by promoting his goods to the public in the hope that they will buy from the person he originally sold to, and he who contracts with the sole intention of obligating himself to another?

When the *Civil Code* was formulated, the rule, rather than the exception, was for manufacturers or specialist-vendors to sell to the public. Both these classes of persons are covered by Article 1527 C.C. However, with the growth of large retail entreprises the knowledge formerly attributable to sellers concerning their wares no longer applies. Thus, the purchaser is left without recourse for damages suffered as a result of latently defective products since the ordinary vendor is not presumed to know of latent defects [8] and the purchaser is not in privity with the manufacturer.[9]

It is apparent that with the growth of commercial enterprise the privity requirement can not co-exist with modern methods of marketing which feature direct appeals to the consumer public.

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[5] Faribault, *op. cit.*, t. 11, No. 320, p. 294. See also, *Wilson* v. *Vanchestein*, (1897), 6 B.R. 217; *Parent* v. *Rutishauser*, (1937), 63 B.R. 226.

[6] *Ferstenfeld* v. *Kik Co.*, *supra*, n. 1, at p. 166.

[7] Art. 1065 C.C.

[8] *Bouvier* v. *Thrift Stores Ltd.*, (1936), 74 C.S. 93.

[9] *Ferstenfeld* v. *Kik Co.*, *supra*, n. 1, at p. 166.

> 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.[10]

In the United States the courts began to realize that the apparently isolated sales between the manufacturer and the retailer, and between the retailer and the consumers, are in fact interrelated, and that the rules governing the initial transaction should not be set aside because of the privity rule. It became more and more apparent that with the growth of retailing outlets, and with the specialization involved in a large number of the products, the intermediate vendor had very little opportunity to control or inspect the quality of the goods he was offering to the public. Also, frequently the merchandise sold by the intermediary bears special labels and brand names and is never changed in any way during the successive sales transactions. It seemingly "makes little sense to apply the privity doctrine *à outrance* and flatly deny protection by direct contract action to the injured consumer." [11] "The remedies of injured consumers . . . ought not to depend upon the intricacies of the law of sales." [12] How different this approach sounds when compared to the former insulation of manufacturers from direct liability for defective products because the factor "of personal relationship loomed quite large in the consciousness of law courts."[13]

Thus, the courts, aware of techniques used by manufacturers, attempted to find wherever possible a direct warranty running to the purchasers whether they be immediate or not. Consequently,

> an affirmation of quality prepared or authorized by the manufacturer and contained in purchase orders, factory warranties, owner's service certificates, catalogues, labels and even general advertisements have been treated as express warranties running to the ultimate buyer (who may be required to sign and mail an acceptance card). In this process, the privity doctrine was subtly modified by distinguishing between privity of sale and privity of contract. Some courts treated devices soliciting trade as offers to warrant if the consumer will buy.[14] Others dispensed with privity altogether, on the theory that 'the basis of warranty may be representation as well as contract,'[15] thus marketing as such would be covered. Even the distinction

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[10] *Baxter* v. *Ford Motor Co.*, 12 P. 2d 409, at p. 412.

[11] Kessler, F., *Products Liability*, (1966-67), 76 Yale L.J. 887, at p. 892.

[12] *Ibid.*; *Ketterer* v. *Armour & Co.*, (1912), 200 F. 322, at p. 323 (S.D.N.Y.).

[13] Kessler, *loc. cit.*, at p. 891; *Freeman* v. *Navarre*, (1955), 284 A. 2d 1015, at p. 1018, 47 Wash. 2d 760.

[14] *Timberland Lumber Co.* v. *Climax Mrg. Co.*, (1932), 61 F. 2d 391 (3rd. Cir.).

[15] *Williston on Contracts*, 3rd. ed., vol. 8, (Mount Kisko, N.Y., 1964), § 998, p. 727.

between express and implied warranties often insisted upon has become blurred if not obliterated.[16]

Other means of cutting back the privity doctrine still further have been employed by the American courts. For example, the doctrines of agency, third-party beneficiary contract, and assignment have been employed. The courts have, at times, looked upon the intermediary vendor as either the "agent" for the manufacturer or the "agent" for the consumer-public. This resulted in the manufacturer not being able to control his risk and liability by using the sale technique rather than the agency system of distribution.[17]

It is highly improbable that the Quebec courts will choose to disregard the doctrine of privity which has for so long been a cherished principle of the law. It is thus unlikely that the remote consumer will be able to benefit from the presumption contained in Article 1527 C.C. Albeit that the Supreme Court of Canada has stated that Article 1527 C.C. applies in favour of sub-purchasers as well as the original purchasers,[18] this pronouncement has not been followed in subsequent cases.

Even if the courts were to extend privity to the ultimate consumer by any of the aforementioned techniques, this, in itself, would lead to a great many more problems. First of all, it would mean reading into Articles 1522 and following of the *Civil Code* something which the codifiers never intended, for the mere fact that these articles are found in the chapter entitled *Sale,* and speak of a vendor-purchaser relationship presupposes a contract which can be regulated by the parties thereto. Secondly, the recourse of Article 1527 C.C. clearly arises out of contract and cannot be given the same application as, for example, Article 1716 C.C., which has been held to arise out of equity.[19] Furthermore, if privity were to be extended, the question arises as to how far, and to whom. The problems such an approach would create might not balance the rewarding values involved. It is therefore submitted that "the tort aspect of warranty theory is more amenable to Judicial Development, since it is conceptually more difficult to construct a "contract" after the fact than merely to expand the tort theory to include new fact situations."[20]

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[16] *Rogers* v. *Toni Home Permanent Co.*, (1958), 167 Ohio 244, (1958), 147 N.E. 2d 612, cited in Kessler, *loc. cit.*, at p. 892.

[17] Kessler, *ibid.*, at p. 893; *Studebaker Corp.* v. *Nail*, (1950), 62 S.E. 2d 198, (1950), 82 Ga. App. 779.

[18] *Ross* v. *Dunstall*, (1922), 62 S.C.R. 393, at p. 400, (1922), 63 D.L.R. 63, at p. 67.

[19] *Marcil* v. *Ladouceur*, (1930), 68 C.S. 337.

[20] Weaver, K.R., *Allocation of Risk in Products Liability Cases*, (1966), 52 Va. L. Rev. 1028, at p. 1029.

Liability arising out of Delict

An anomalous situation has been created by the fact that the presumption of Article 1527 C.C. only operates for the benefit of the injured plaintiff where he is in a contractual relationship with the defendant manufacturer.[21] In reality, it is not the person who is in privity with the manufacturer who will generally be affected by a defective product, but rather the consumer-public, which does not buy directly from the manufacturer. As a result of this break in the chain of distribution, the application of Article 1527 C.C. is often unavailable to the injured party. However, this does not mean that he is left without recourse. The courts of Quebec have readily accepted the notion that not only does the manufacturer owe a duty to those who contract with him for his goods, but that he also owes a duty of care to the consumer-public.[22] Yet, a perusal of the case law may help to illustrate the difficulties which have been encountered by injured consumers in their claims against manufacturers arising out of delict.

While the injured party in a contractual relationship with the manufacturer must prove the presence of a defect in the goods, that the defect was present when it left the manufacturer's plant, and that the injury resulted from the defect, the injured party suing out of delict has the added burden of establishing fault on the part of the manufacturer. Moreover, while the plaintiff in an action based on Article 1527 C.C. has the benefit of an irrebutable presumption of knowledge against the defendant manufacturer, a person suing out of delict often has found his proof being satisfactorily rebutted by the manufacturer showing that his manufacturing process was carried out in a prudent manner.[23] As a result, the basis for liability of the manufacturer as regards those with whom he is in privity, and those who are the ultimate users of his goods, has been vastly different.

In *G. H. Hanson & Co.* v. *J. Christin & Co.*,[24] Mr. Justice Archambault stated:

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[21] *Ferstenfield* v. *Kik Co.*, *supra*, n. 1, at p. 166.

[22] *Guinea* v. *Campbell*, (1902), 22 C.S. 257; *Ross* v. *Dunstall*, *supra*, n. 18; *G. H. Hanson & Co.* v. *J. Christin & Co.*, (1934), 72 C.S. 124; *Cie des Liqueurs Corona Soft Drinks Co.* v. *Champagne*, (1938), 64 B.R. 353; *Richard* v. *La France*, [1942] C.S. 280; *Cohen* v. *Coca Cola Co.*, [1967] S.C.R. 469; (1967), 62 D.L.R. (2d) 285.

[23] *Butt* v. *Pepsi-Cola Co. of Canada*, (1939), 77 C.S. 108; *Fernstenfeld* v. *Kik Co.*, *supra*, n. 1.

[24] *Supra*, n. 22.

> This case expressly approves the principle of law laid down in the case of *George* v. *Skivington*,[25] which case is also referred to by Chief Justice Duff in the case of *Ross* v. *Dunstall*,[26] when he says:
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> 'Whatever be the state of the English law, the principle of *George* v. *Skivington* is, in my opinion, the principle of responsibility which, by force of Article 1053 C.C., is part of the law of Quebec.'[27]

The principle propounded in *George* v. *Skivington* appears to be sufficient to support the proposition that a manufacturer is responsible if he negligently manufactures and puts into circulation a mischievous thing which may be a trap to people using it.[28] Mr. Justice Archambault, in the aforementioned case went on to say that "this is a sound doctrine to which this court subscribes wholeheartedly."[29]

The burden of proof on the plaintiff-purchaser was later discussed in the above case;

> (I)t is clear that the burden of proof is on the plaintiff, and that in order to succeed, plaintiff must prove that the defendant was guilty of negligence, either in over-charging it or supplying it to the trade when it was of insufficient strength to withstand the pressure or by not having made an adequate test.[30]

In a situation where the plaintiff is suing more than one manufacturer in an attempt to place the liability for injuries sustained as a result of defect upon one of the persons who took part in the manufacturing process, it is incumbent upon the plaintiff to allege generally the fault of each of the defendants, and to allege specifically to what particular fault of each of the defendants the plaintiff attributes the accident. In *Butt* v. *Pepsi-Cola*,[31] as a result of an accident occuring when a bottle of pepsi-cola exploded, the plaintiff sued both the Dominion Glass Co., who manufactured the bottle, claiming that the bottle was of insufficient strength to withstand the pressure therein contained, and that it did not have an adequate test made of the bottle, and the Pepsi-Cola Co., alleging that the fault of said defendant consisted of bottling its product under improper and excessive gas pressure and without allowing for due regard to the dictates of public use and safety. Denis, J., held that the plaintiff had not proved the alleged fault in either instance, and concluded that the sole fact that the accident occurred cannot create any

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25 (1869-70), L.R. 5 Exch. 3.
26 *Supra*, n. 18.
27 *Supra*, n. 23, at p. 126.
28 *Ross* v. *Dunstall*, (1922), 63 D.L.R. 63, at p. 64.
29 *G. H. Hanson & Co.* v. *J. Christin & Co.*, *supra*, n. 22, at p. 126.
30 *Ibid.*
31 *Supra*, n. 23.

presumption of fault against the defendants, jointly or severally, because outside of the reasons alleged in plaintiff's declaration which might have caused the accident, there are other reasons which might also have caused the accident of which plaintiff makes no mention.

Perhaps the case most illustrative of the burden imposed on a plaintiff-purchaser in an action under Article 1053 C.C. was *Ferstenfeld* v. *Kik Co.*[32] Mr. Justice McDougall stated [33] that plaintiff alleged fault and negligence of the defendant in failing to exercise proper care and diligence in bottling its product, thus permitting foreign matter to enter the bottle in question, but that the defendant had gone far to repel such liability by showing the care taken in the handling, bottling and merchandising of its product.

The slightest break in the chain of distribution between the manufacturer and the consumer gives rise to the possibility that the defect arose after it left the hands of the manufacturer. Since, in a delictual action under Article 1053 C.C., the burden of establishing the case is on the plaintiff, he must show that the defect could not have arisen at any time subsequent to the time the product left the manufacturer. Yet, even if such an inference could be arrived at by the Court, McDougall, J., seems to imply that if the manufacturer is able to show that its process is carried out in a diligent manner, no liability will lie on his part.[34]

Why should the third-party consumer have a more difficult time collecting from the manufacturer for damages suffered than the party who is in privity? It is fitting at this point that a study of the evolution of the American jurisprudence in this area be made. This may help us to appreciate the significance of the most recent Supreme Court judgment [35] dealing with manufacturer's liability in Quebec.

It is apparent that many of the states in the United States have reached the point of strict liability in this area of the law. Now, eighteen states accept strict liability without negligence and without privity of the manufacturers of all types of products. Six have adopted it by statute. In four, federal courts, guessing at the law, have concluded that the rule would be accepted. Two have intimated that a change in their law is imminent. Pennsylvania has accepted

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[32] *Supra*, n. 1.

[33] *Ibid.*, at p. 166.

[34] That negligence has been considered to be an essential element to be proved by the Plaintiff-purchaser in a delictual action was also illustrated in *Richard* v. *La France, supra*, n. 22, at p. 285.

[35] *Cohen* v. *Coca Cola, supra*, n. 22.

the rule with a limitation as to the plaintiffs it protects. Two have not yet gone beyond products for intimate bodily use. Six have not gone beyond food and drink. Ten have rejected all strict liability without privity of contract. There is no law on the matter in three.[36] However, the American courts have had to go through the growing pains of groping with different techniques until they finally reached this point.

In an early American case,[37] it was held:

> A manufacturer is not liable to an ultimate consumer or subvendee upon a warrantee of quality or merchantability of goods which the ultimate consumer or subvendee had purchased from a retailer or dealer to whom the manufacturer had sold. for there is no contractual relationship between the manufacturer and such consumer or subvendee...
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> In this case the evidence fails to show privity of contract between the plaintiff and defendant. Without such privity there is no warranty liability.

This was illustrative of the difficulty which both the common and civil law have experienced in finding ways of imposing direct liability on the manufacturer in favour of the ultimate consumer.

Negligence liability started with the landmark case of *Winterbottom* v. *Wright*.[38] The philosophy underlying the extension of negligence liability was forcefully expressed by Mr. Justice Jackson in his dissenting opinion in *Dalehite* v. *United States*: [39]

> This is a day of synthetic living, when to an ever increasing extent our population is dependant upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. These no longer are natural or simple products but complex ones whose composition and qualities are often secret. Such a dependant society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. Purchasers cannot try out drugs to determine whether they kill or cure. Consumers cannot test the youngster's cowboy suit or the wife's sweater to see if they are apt to burst into fatal flames. Carriers, by land or by sea, cannot experiment with the combustibility of goods in transit. Where the experiment or research is necessary to determine the presence or the degree of danger, the product must not be tried out on the public, nor must the public be expected to possess the facilities or the technical knowledge to learn for itself of inherent but latent defects. The claim that a hazard was not foreseen is not available to one who did not use foresight appropriate to his entreprise.

Thus, to free themselves from the intricacies of the law of sales, most progressive systems have accepted the notion that a person's conduct may at once constitute non-performance of a contractual

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[36] Prosser, W.L., *The Fall of the Citadel*, (1966), 50 Minn. L. Rev. 791.
[37] *Terry* v. *Double Cola Bottling*, (1965), 138 S.E. 2d 753, (1965), 263 N.C. 1.
[38] *Winterbottom* v. *Wright*, 10 M. & W. 108, 152 E.R. 402.
[39] (1953), 346 U.S. 15, at pp. 51-52.

duty and the creation of an unreasonable risk to others not in privity.[40] But many systems have been unable to break with the classic prerequisite of establishing negligence on the part of the defendant.[41]

Many legal systems have been able to afford the consumer protection by an inference or presumption of negligence in the form of *res ipsa loquitur* or otherwise. Yet many consumers are met with defeat because they are unable to overcome the burden of establishing negligence, or by the defendant manufacturer successfully rebutting any presumption against him by showing he took all reasonable care in the manufacture of his product. To overcome these shortcomings, which often result in an anomaly in the law, the courts in the United States began to move in the direction of strict liability.

The leading case [42] upon which the notion of strict liability was based provided the following dicta:

> Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life or limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer... Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new auto in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate consumer. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.[43]

The courts in the United States began by developing exceptions to the general rule of non-liability to persons not in privity. At the beginning, the most important involved goods which were inherently or imminently dangerous. To protect the consumers not in privity, the notion of the duty of reasonable care to make it safe was applied.[44] Cardozo, J., in *McPherson* v. *Buick Motor Co.* buried the general rule under the exception:

> If the nature of the 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.[45]

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[40] Kessler, *loc. cit.*, at 895; *Chysky* v. *Drake Bros. Co.*, (1923), 139 N.E. 576, at p. 578, (1923), 235 N.Y. 468, at p. 473; *Peters* v. *Johnson*, (1902), 41 S.E. 190, (1902), 50 W. Va. 644; *Donaghue* v. *Stephenson*, [1932] A.C. 362; Pollock, F., *The Law of Torts*, 13th. ed., (London, 1929), pp. 567-568.

[41] *Donaghue* v. *Stephenson, supra*, n. 40.

[42] *Henningsen* v. *Bloomfield Motor, Inc.*, (1960), 161 A. 2d 69, at p. 81.

[43] *Ibid.*, at p. 84.

[44] Prosser, W.L., *Assault Upon the Citadel (Strict Liability to the Consumer)*, (1959-60), 69 Yale L.J. 1099, at p. 1100.

[45] *McPherson* v. *Buick Motor Co.*, (1916), 111 N.E. 1050, at p. 1053 (1916), 217 N.Y. 382, at p. 389.

What then resulted was an extension by degrees of the rule in the *McPherson* Case. It was extended to property damage; it was extended beyond the purchaser so as to include his employees, members of his family, casual bystanders, subsequent purchasers, other users of the chattel, and others in the vicinity of its probable use. On the defendants' side, it was extended to include makers of component parts and assemblers of parts, and those who put their names upon goods made by others, and sellers who were not, and did not purport to be manufacturers at all. The rule has long since been extended to repairmen who do work on the chattel, and in many states, to building contractors. Therefore the broad general rule has come to be that the seller of a chattel is always liable for his negligence.[46]

In the early decisions, regarding food and drink, the courts gave very little in the way of reasoning for strict liability to the consumer without privity other than the protection of the public interest and an implied "representation" that the food was safe.[47] Many ingenious theories to justify the rule were evolved by the courts, but presently there are indications that some of the courts are about ready to throw away the crutch, and to admit what they are really doing when they say that the warranty is not the one made on the original sale, but is a new and independent one made directly to the consumer,[48] that it does not arise out of, or depend upon, any contract, but is imposed by the law, in tort, as a matter of policy.[49]

It has already been noted that in Quebec law, the courts have required that negligence be proved before they will impose liability on the manufacturer. However, even in parts of the law dominated by the negligence requirement, strict liability has been approached, if not achieved, by a constant tightening of the standards of care.[50]

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[46] Prosser, *Assault Upon the Citadel, loc. cit.*, at p. 1100.

[47] *Ibid. See also, Mazeth* v. *Armour & Co.*, (1913), 135 P. 633, (1913), 17 Wash. 622; *Jackson Coca Cola Bottling Co.* v. *Chapman*, (1914), 64 So. 791, (1914), 106 Miss. 864; *Parks* v. *C.C. Yost Pie Co.*, (1914), 144 P. 202, (1914), 93 Kan. 334.

[48] *Madouros* v. *Kansas City Coca Cola Bottling Co.*, (1936), 90 S.W. 2d 445, (1936), 230 Mo. App. 275.

[49] *Graham* v. *Bottenfield's Inc.*, (1954), 269 P. 2d 413, (1954), 176 Kan. 68; *La Hue* v. *Coca Cola Bottling Co.*, (1957), 314 P. 2d 421, (1957), 50 Wash. 2d 645.

[50] *Trowbridge* v. *Abrasive Co. of Philadelphia*, (1951), 190 F. 2d 825 (3rd. Cir.); *La Plante* v. *E. I. Du Pont de Nemours & Co.*, (1961), 346 S. W. 2d. 231 (Mo.); Also by a liberal if not over-generous application of the doctrine of *res ipsa loquitur*: *Escola* v. *Coca Cola Bottling Co. of Fresno*, (1944), 150 P. 2d. 436, (1944), 24 Cal. 2d. 453; *Evangilio* v. *Metropolitan Bottling Co.*, (1959), 158 N.E. 2d 342, (1959), 339 Mass. 177.

It is submitted that this is the course now being followed in Quebec.

The most recent pronouncement in Quebec on manufacturers' liability for defective products in a delictual action was that of *Cohen* v. *Coca Cola.*[51] The action was taken by a restaurant employee for damages caused when a carbonated beverage bottle exploded in his hand while he was removing it from its case and a piece of glass injured his eye. Respondent, Coca Cola Co., defended the action by stating that an accident such as that described by the appellant was impossible, and in support of that contention brought evidence which was largely a description of the type of bottle used by it, the procedure in inspecting and filling bottles as well as expert evidence as to what happens when bottles filled with its product were heated, struck with a hammer or banged together. In the Superior Court, Collins, J., after stating that it was reasonable to infer that it was a defective bottle which resulted in the injury to the appellant, held:

> On the evidence as a whole the Court finds that the defendant was negligent in not having an inspection system adequate to prevent defective bottles reaching customers. It was the fault of the defendant that the bottle exploded because the bottle provided by the defendant was not strong enough to withstand the pressure of the gas put into it by the defendant.[52]

The Quebec Court of Appeal reversed this decision on grounds that the plaintiff's version of the accident required some form of corroboration, and that he had failed to discharge the burden of establishing that the bottle of Coca-Cola was not damaged in some way after the delivery to the restaurant. This decision on appeal is more in line with the previous jurisprudence which required that the plaintiff establish fault on the part of the manufacturer, or at least present evidence from which the court could infer that the product was defective and had been defective when it left the manufacturer's plant. Yet, even if the plaintiff were able to establish this presumption, it could be rebutted by proof that the manufacturer took all reasonable care in his manufacturing process. Fault is the basis of liability under Article 1053 C.C., and if it is not proved, the defendant cannot be held liable. This is to be distinguished from the situation where a contractual relationship exists and the plaintiff has the benefit of the presumption of Article 1527 C.C. In such a situation, the plaintiff is not required to prove fault on the part of the manufacturer but rather must show that he suffered damages as a result of a latent defect in the manufacturer's product which existed at the time it left the manufacturer's hands.[53] It is almost

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[51] *Supra*, n. 22.

[52] *Ibid.*, [1967] S.C.R. 469, at p. 472, (1967), 62 D.L.R. (2d) 285.

[53] *Bélanger* v. *Coca Cola, supra*, n. 3.

impossible to do this by direct evidence; as a result the Court may be asked to infer from the facts presented that the most probable conclusion is that the defect did exist at the time it left the manufacturer. Once this is established, the presumption of 1527 C.C. is applied and this presumption of knowledge is irrebutable.[54] As a result, even though in the case of *Bélanger* v. *Coca-Cola Co.* the defendant presented evidence to show that its bottles were washed, cleaned and inspected with the greatest of care, and that it was absolutely impossible that the bottles contained the deleterious substance complained of, Boulanger, J., held that the company was liable for the damages suffered by the plaintiff.

> (L)'organisme humain n'est pas infaillible. Il est évident que des accidents dus au facteur humain sont possibles et sont attribuables, par exemple, à l'erreur de jugement, l'entraînement insuffisant, la désobéissance aux ordres, l'insouciance.[55]

As a result, it would seem that the only means open to defending an action under Article 1527 C.C. would be to prove *cas fortuit, force majeure,* the fault of a third party or of the plaintiff himself. Hence, the burden falls heavily on the manufacturer. However, such has not been the case in an action based on Article 1053 C.C. The criterion of this article being fault, the defendant must be able to exculpate himself by showing that he acted as a *bon père de famille.*

This is where the anomaly in Quebec law arises. Why should the manufacturer be able to avoid liability simply because the injured party is not in privity?

It has already been noted that one of the means employed in the United States is that of tightening the standard of care requirement.[56] It is submitted that this is the course that was taken in the Supreme Court decision in *Cohen* v. *Coca Cola.*[57] Abbott, J., speaking for the court, held that "the bottler of carbonated beverages owes a duty to furnish containers of sufficient strength to withstand normal distribution and consumer handling." He later stated:

> (I)n my opinion, evidence which was accepted by the learned trial Judge created a presumption of fact under Article 1238 C.C., that the explosion of the bottle which caused injury to appellant was due to a defect for which appellant is responsible and that the later failed to rebut that presumption.[58]

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[54] *Ibid.*
[55] *Ibid.*, at p. 160.
[56] Kessler, *loc. cit.*, at p. 899.
[57] *Supra,* n. 22.
[58] (1967), 62 D.L.R. 2d 285, at 289.

The respondent led proof to show that all due care had been taken in its manufacturing and inspection process.[59] It had previously been held, in a similar case, that the defendant had gone far to repel liability by showing the care taken in the handling, bottling and merchandising of its product.[60] The precautions taken by manufacturers of bottled drinks surely have not deteriorated over the past thirty years. It is, therefore, submitted that the notion of strict liability has been introduced into our law by means of a tightening of the required standard of care. Of course, the only application of it so far has pertained to beverages. However, the United States also introduced this concept in the field of food and drink, and later extended it to other areas. The "attack upon the citadel" is underway in Quebec. It is now open for us to discuss the policy considerations involved as to the merit and extent of its application.

Policy Considerations

It may be argued in some circles that the criterion of Article 1053 C.C. being fault, it is sufficient for the manufacturer to demonstrate that he has carried out his process as a *bon père de famille.* It could also be argued that by imposing strict liability upon manufacturers it will deter those who seek to improve their products from adopting new methods. Another argument that could be raised against the imposition of strict liability is that it will expose manufacturers to a deluge of false claims based upon fictitious defects and false injuries.[61] In rebuttal, it could be said that with the growth of technology and mass production, the hazards that might beset an unenlightened society have created a need for some sort of protection. The introduction of Workmen's Compensation is illustrative of this fact. It is, therefore, submitted that this position is out of date in this day and generation. As far as the possibility of the manufacturer being faced with a deluge of actions is concerned, in as much as it is he who sets the price of his goods, he is in a position to spread the cost of these contested claims among the persons who buy from him. This increased cost will, in turn, be spread out among the consumer-public. Finally, as far as strict liability deterring producers from engaging in new methods is concerned, if they are not already deterred from so doing by existing liabilities,[62] it is unlikely that they will be.

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[59] *Ibid.*, at p. 287.
[60] *Ferstenfeld* v. *Kik Co., supra,* n. 1, at p. 166.
[61] Prosser, *The Assault Upon the Citadel, loc. cit.,* at p. 1122.
[62] *E.g.,* Art. 1527 C.C.

Dean Prosser [63] questions the increasing demand among plaintiffs for strict liability. He points out that when a negligence action is brought against a manufacturer, the plaintiff is faced with two initial tasks. One is to prove that his injury has been caused by a defect in the product; the other is to prove that the defect existed when the product left the hands of the defendant. On neither of these issues is strict liability beneficial to him. It cannot prove the causation, and it cannot trace that cause to the defendant. The third task facing the plaintiff, that of proving negligence on the part of the manufacturer, is, according to Dean Prosser, the easiest of the three, since he is aided in just about every jurisdiction by the doctrine of *res ipsa loquitur*, or by its practical equivalent. According to Dean Prosser, even though it is open to the defendant to rebut the inference of negligence by proof of his own due care, with very rare exceptions, the courts are agreed that such evidence does not entitle the defendant to a directed verdict, and raises only an issue for the jury.

While this argument may be valid in the American legal setting, it does not hold true for the situation in Quebec. Civil actions of this sort are heard by judge alone, and, as a result, the plaintiff is unaided by the presence of a sympathetic jury. While proof of due care on the part of the manufacturer may be unheeded by a jury composed of individuals who prefer to see the small man win his claim, the situation has proven to be quite different in Quebec. Judges, trained in the past, are not eager to dismantle principles which they have adhered to for many years. For a judge who has always regarded fault as a prerequisite to finding liability on the part of a defendant in an action in delict, proof of reasonable care by the manufacturer would greatly influence the outcome of the action.

However, why should the courts be asked to deprive the manufacturer of this means of exculpating himself? Why should more be demanded of manufacturers than the proverbial ordinary reasonable man?

Some of the commonly accepted considerations for imposing strict liability in tort were that the manufacturer would exercise a greater degree of care in preparation; that the risk of loss could more easily be spread by the manufacturer than by the injured party or the dealer; that allowing the injured consumer to sue the manufacturer directly would avoid waste of time and circuity of suits; and that the plaintiff might not be able to sustain his case for lack of proof in a cause of action based upon common law

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[63] Prosser, *The Assault Upon the Citadel, loc. cit.*, at p. 1114.

negligence, even though negligence may well have been present, due to the inability of the plaintiff to know what went on in the manufacturer's plant and to evaluate the defects in the manufacturer's process.[64]

An interesting statement as to the merits of strict liability was made by Mr. Justice Traynor in *Escola* v. *Coca Cola Bottling Co.:* [65]

> Even if there is no negligence, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards of 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 the 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 a general and constant protection and the manufacturer is the best situated to afford such protection.

This risk-spreading argument which maintains that the people in the best position to absorb the inevitable losses, which result from the use of their products, are the manufacturers, who in turn, through their prices are able to pass them on to the community at large, has gained support in many different circles.[66]

There is also another course of argument which developed in the United States and also received favorable attention from those propounding strict liability. It is argued that the supplier, by placing goods on the market, represents to the public that they are suitable and safe for use; and by packaging, advertising or otherwise, he does everything he can to induce that belief. He intends and expects that the product will be purchased and used in reliance upon this assurance of safety; and it is in fact so purchased and used. The middleman is no more than a *conduit,* a mere mechanical device,

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[64] Noel, D. W., *Manufacturers of Products. — The Drift toward strict Liability,* (1957), 24 Tenn. L. Rev. 963, at p. 1009.

[65] (1944), 150 P. 2d 436, at p. 440-441.

[66] Prosser, *The Assault Upon the Citadel, loc. cit.,* at p. 1120; Kessler, *loc. cit.,* at p. 927, Schuwerk, P. E., *The Products Liability Explosion,* [1967] Ins. L.J., 517, at p. 520, No. 536; Noel, *loc. cit.,* at p. 1009; Sandler, *Strict Liability and the Need for Legislation,* (1967), 53 Va. L. Rev. 1509, at p. 1512.

through whom the thing sold is to reach the ultimate consumer. The supplier has invited and solicited the use, and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he made no contract with the consumer. It would be acknowledging a weakness in the law to say that he could thus create a demand for his products by inducing a belief that they are suitable for human consumption, when, as a matter of fact, they are not, and reap the benefits of the public confidence thus created, and then avoid liability for the injuries caused thereby merely because there was no privity of contract between him and the one whom he induced to consume the food.[67]

In both the risk-spreading and implied warranty arguments there are, of course, inherent flaws. The basis of the risk-spreading theory is found in two significant factors: control of prices, costs and profits, and the right to a share in the profits, determined as a percentage of total profits earned by the particular industry, without any absolute limit on the amount. Using these factors as an indication of the ability to prevent risk and spread its cost, it would lead to the conclusion that the cost of product failures should be borne by the manufacturers rather than the consumers of the product.[68] However, problems arise when the manufacturer is on a purely competitive basis. In such a situation he cannot control costs and prices to the degree that the user can. Also, what about the situation where the market for the product is restricted? In such a situation it is the user of the product who can control costs; the user can also control the risk by demanding better quality control, and paying a higher price for the product (*e.g.*, airlines). Another inherent difficulty is the fact that the economic data necessary to determine the degree of control exercised by a single element in the chain of distribution is simply not available to the courts. Furthermore, the analysis assumes a static economy. In reality, a company which has been enjoying a monopolistic position may lose it with the appearance of new producers in its area; a company in a competitive field may be faced with having to compete with another offering a new and better product, *etc.* [69]

As regards the concept of implied warranty the first major drawback is the fact that while, because of the implied warranty that is being read into the relationship between the manufacturer and

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[67] Prosser, *The Assault Upon the Citadel, loc. cit.*, at p. 1122; *Seely* v. *White Motors Co.*, (1965), 403 P. 2d 145.

[68] Weaver, *loc. cit., supra*, n. 20, at p. 1037; Douglas, W. D., *Vicarious Liability and Administration of Risks I*, (1929), 38 Yale L.J. 584, at p. 603.

[69] Weaver, *loc. cit., supra*, n. 20, at pp. 1038-1039.

the consumer, the manufacturer is considered to be the one on whose shoulders the burden should lie, in many instances, he is fully able to push forward the costs in his selling price. Another drawback is that, traditionally, warranty requires that the plaintiff shall act in reliance upon some representation or assurance, or some promise or undertaking given to him by the defendant.[70] In the face of this requirement, the plaintiff would have to prove that he had cognizance of what was being advertised by the manufacturer, and not merely that the manufacturer had made representations to the public. Also, if as a good many courts have declared, it is those warranties which run with the goods to the consumer, then he must be denied recovery from, for example, the manufacturer, if the warranties do not arise on the initial sale to the wholesaler. Moreover, warranty may be subject to disclaimer. Finally, if warranty is to be regarded as running with the title to the goods, then it can protect no one who does not acquire the title. Therefore friends, employees, etc. cannot recover.[71]

While either or both of these policy arguments may have an important bearing on the approval of our courts to the application of strict liability, it is submitted that both these attempts to justify the rule of strict liability carry far too many draw backs and undesirable complications.

> If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask. Such strict liability is familiar enough in the law of animals, abnormally dangerous activities, nuisance, workmen's compensation and *respondeat superior*.[72]

The Role of Disclaimers

It was mentioned above that one of the draw backs to the implied warranty argument was that it may be subject to a disclaimer. This could arise by merely enclosing in the product a notice that the manufacturer will not be responsible for certain mishaps. If, however, the courts were to base the liability of the manufacturer in law, on the grounds of public policy, how could the manufacturer escape from this legally imposed liability? Should it not be the burden of the judiciary to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer? The relationship between the manufacturer and the consumer must be distinguished from that which allows two parties to contract and bargain as to the allocation of risks. In commercial

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[70] Prosser, *The Assault Upon the Citadel, loc. cit., supra,* n. 44, at p. 1126.
[71] *Ibid.*, at pp. 1131-1133.
[72] *Ibid.*, at p. 1134.

life the basic tenet of competent parties being bound to their contract is a factor of importance. But in the framework of modern commercial life and business practices such rules cannot be applied on a strict, doctrinal basis. Perhaps one area in which an argument may be strongly put forth for the permissability of a disclaimer would be in the sale of experimental products in a commercial setting.[73] But, in general, would not the permissability of disclaimers defeat the purpose of strict liability? It is, therefore, submitted that the disclaimer of an implied warranty of merchantibility by the dealer, as well as the attempted elimination of all obligations other than replacement of defective parts, are violative of public policy and void. Judicial pronouncement to this effect was made in *Greenman* v. *Yuba Power Products Inc.*[74]

> 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...
>
> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law..., and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products..., make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

Prospects for the future

> We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.[75]

The Supreme Court of Canada has seen fit to apply strict liability to a manufacturer in the case of a consumable product.[76] How far will the courts be willing to extend the concept of strict liability? To which manufacturers will it attach? In the United States the application of strict liability also began with food and drink. It was then carried over to something reasonably resembling such products, for example, animal food; it was then extended one step further to articles for intimate bodily use which was external rather than internal, for example, hair dye, soap. A late addition has been

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[73] Kessler, *loc. cit.*, at p. 932; Prosser, W. L. & Young B. Smith, *Cases and Materials on Torts*, 4th. ed., (Brooklyn, 1967), p. 84.

[74] (1963), 377 P. 2d 897, at p. 900.

[75] *Henningsen* v. *Bloomfield Motors, Inc., supra*, n. 42, at p. 83.

[76] *Cohen* v. *Coca Cola, supra*, n. 22.

cigarettes.[77] It has now reached the point where there is virtually no indication of any limitation to things that are extremely or inherently dangerous in themselves, in spite of all precautions. It is enough that the product, if defective, will be recognizably dangerous to the user or to his property.[78]

It would seem that the courts in Quebec will follow this step by step development, for as it was stated in *Henningsen* v. *Bloomfield Motors Inc.*,[79] it would not be plausible to differentiate between products, which involve dangers to life and limb, on the basis of internal and external use, *etc.*

However, it would seem appropriate at this time to present several problems which the courts may be forced to deal with in the future.

First of all, one difficulty concerns products that are expected to be further processed, or otherwise altered before they reach the hands of the consumer. For example, the manufacturer of a product which is suitable for a good many purposes is not likely to be held to strict liability when it turns out to be unsafe for the purposes it was used by a remote buyer. Then, of course, there is the problem of balancing the utility of a product and the risk it creates, for example, rabies vaccine.[80]

Perhaps the courts should adopt the view taken in a number of American cases which held that the warranty of merchantable quality does not extend to defects and dangers which are "natural" to the product, and may be expected to be found in it. It must be borne in mind that "merchantable quality" does not mean a perfect product; it means only one free from serious and unusual defects.[81]

Another problem to be decided is whether strict liability should be imposed in the advent of economic loss being suffered by the user of a product. While the courts in the United States have generally accepted the notion of strict liability when it pertains to personal or property damage caused by a defective product, the question of pecuniary loss is now being hotly debated.

Protection of economic interests has not been advanced by the American courts.[82] Other avenues, of course, are open to the injured

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[77] Prosser, *The Assault Upon the Citadel, loc. cit.*, at p. 1112.

[78] Prosser, *The Fall of the Citadel, loc. cit.*, at p. 805.

[79] *Supra*, n. 42.

[80] Prosser, *The Fall of the Citadel, loc. cit.*, at pp. 806-807.

[81] *Ibid.*, at p. 809; *Wilson* v. *Lawrence*, (1885), 1 N.E. 278.

[82] Kessler, *loc. cit.*, at p. 908; *T.W.A.* v. *Curtis-Wright Corp.*, (1955), 148 N.Y. 2d 248 (Sup. Ct.); *Inglis* v. *American Motors Corp.*, (1965), 209 N.E. 2d 583, (1965), 30 Ohio 2d 132.

consumer, but it has been assumed that warranty liability for economic losses presupposes privity, and liability for misrepresentation, justifiable reliance.[83]

Two recent cases in the United States are representative of this policy conflict. In *Santor* v. *A. & M. Karagheusian, Inc.*,[84] the New Jersey Supreme Court, in a unanimous decision, held the manufacturer of a defective carpet directly liable to the ultimate consumer for loss of his bargain. The court saw no reason why products liability to remote purchasers should be limited to physical injuries caused by defective goods. In the court's view, the manufacturer under modern marketing conditions is the "father of the transaction", the dealer from whom plaintiff bought a mere way-station. To insist that the only addressee of plaintiff's recovery should be the dealer, who, in turn, could recover from the manufacturer, would be unnecessarily wasteful and frustrating, all the more since the dealer had gone out of business. Rationalizing direct recovery in terms of implied warranty, characterized as a hybird of contract and tort law, the court permitted plaintiff to recover the difference between the price paid for the carpet marketed as "grade 1" and its actual value at the time when plaintiff knew or should reasonably have known that it was defective.[85]

In *Seely* v. *White Motor Co.*,[86] a majority of the California Supreme Court, in a strong *dictum*, took issue with this position. In the absence of an express warranty the manufacturer will not be held strictly accountable for mere economic losses. Otherwise, the court felt, the manufacturer would be responsible for damages of "unknown and unlimited scope." Replying to the opinion in the *Santor* case the court had this to say:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be liable for the level of performance of his products in the consumer's business unless he agrees that the product was destined to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a

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[83] Kessler, *loc. cit.*, at p. 908.
[84] (1965), 207 A. 2d 305, (1965), 44 N.J. 52.
[85] Kessler, *loc. cit.*, at p. 909.
[86] *Supra*, n. 67.

> product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries alone and there is no recovery for economic loss alone.[87]

It is submitted that the *ratio* of the former decision will prevail in the future. The purpose of strict liability has been grounded in the policy consideration of protecting the consumer-public from hazards beyond its control, and placing the burden of cost where it can best be allocated. Furthermore, it is a means of protecting the public from misrepresentation on the part of the manufacturers. Should not the consumer's reasonable expectations with respect to a product be fulfilled? Should not the manufacturer be liable for damages, whether physical or pecuniary, when his product proves to be unfit for the purposes for which it was sold? Moreover if injury is suffered by a consumer as a result of a defective product, whether the damages be physical or monetary, the same policy considerations apply. "Defect" has been defined in the following terms: (a) fails to match the average quality of like products, (b) a deviation from the norm, and (c) 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.[88] If the injury is in no way attributable to a defect there is no basis for strict liability; however, if damages are suffered, whether they be pecuniary or physical, as a result of a product which falls within any one of the definitions mentioned above, it is submitted that strict liability should apply.

Conclusion

It is hoped that this brief encounter with the evolution of the law respecting manufacturers liability in the United States, the policy considerations that have developed for applying strict liability, and the problems which strict liability has both erased, at least partially, and brought on itself, will help the courts in Quebec in such matters in the future. The term "strict liability" has a very ominous ring to it. In many American cases it has been applied in seemingly very strong language. However, this should not obscure the fact that, typically, the defective product is caused by somebody's fault; there was either a faulty design, or the manufacturing process

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[87] Kessler, *loc. cit.*, at p. 910.

[88] Traynor, R.J., *Ways and Meanings of Defective Products and Strict Liability*, (1965), 32 Tenn. L. Rev. 363, at pp. 366-367; Freedman, W., *The Necessary Basis for Products Liability in Tort and in Warranty*, (1966), 33 Tenn. L. Rev. 323, at p. 324.

was not up to required standards of care. Strict liability, therefore, is frequently vicarious liability of the manufacturer to whose plant the defect can be traced.[89] While we have long recognized the strict liability imposed on the employer for faulty acts of his employee while in the course of his duty,[90] the Quebec courts have refused to deal with defective products in the same light. However, with the recent decision in *Cohen* v. *Coca Cola*,[91] it would seem that the trend in the future will be towards the imposition of strict liability.

Stephen HELLER*

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[89] Kessler, *loc. cit.*, at p. 898.
[90] Art. 1054 C.C.
[91] *Supra*, n. 22.
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