Products Liability - Strict Liability in Tort - Both the Manufacturer and the Retailer Are Strictly Liable in Tort for Personal Injuries Caused by a Defect in a Product Marketed with the Knowledge that It Is to Be Used Without Inspection for Defects. Vandermark v. Ford Motor Co. (Cal. 1964)

Edward V. Brennan

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PRODUCTS LIABILITY — STRICT LIABILITY IN TORT — BOTH THE MANUFACTURER AND THE RETAILER ARE STRICTLY LIABLE IN TORT FOR PERSONAL INJURIES CAUSED BY A DEFECT IN A PRODUCT MARKETED WITH THE KNOWLEDGE THAT IT IS TO BE USED WITHOUT INSPECTION FOR DEFECTS. Vandermark v. Ford Motor Co. (Cal. 1964).

Plaintiff purchased a new Ford automobile from the defendant retailer. A defect in the brakes of the car caused an accident in which the purchaser and a passenger sustained injuries. They brought actions for negligence and breach of implied warranties against both the auto manufacturer and the retail dealer. The trial court granted a nonsuit in favor of the manufacturer, and a verdict for the retailer. The Supreme Court of California reversed, holding that if a manufacturer markets a product with the knowledge that it is to be used without inspection for defects, both the manufacturer and the retailer are strictly liable in tort for personal injuries caused by a defect in the product. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

In factual situations such as that presented by Vandermark, the negligence of either the manufacturer or the retailer is very often extremely difficult to prove. When negligence cannot be established, the victim is without a remedy unless strict liability can be imposed upon the defendant in an action for breach of warranties, either expressed or implied. However, a suit for breach of warranty is replete with difficulties created by the fact that a warranty, being contractual in nature, is governed by contractual considerations. One such contractual sine qua non, which has constantly presented an obstacle to recovery, is the requirement that the injured party be in privity of contract with the person from whom he seeks to recover. In their attempts to circumvent this requirement, the courts have submerged the warranty theory in a morass of fictions, exceptions and extensions.

At early common law, breach of warranty was a tort sounding in deceit. It was not until the 18th Century that the contract action was recognized, and then only with respect to breaches of express warranties. Later, from the action for breach of an implied war-

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1 In such cases proof of negligence is usually based upon the doctrine of res ipsa loquitur. This theory is likely to be insufficient when the product has been subject to the control of a number of parties. See Prosser, Torts 225-28 (3d ed. 1964).
4 Prosser, supra note 3, at 119-20.
ranty of title, which had been recognized as a tort as early as the 18th Century, there evolved the action for breach of an implied warranty of quality. But since the enforcement of any warranty had by then come to be regarded as an action in assumpsit, strict contractual rules were applied. Not the least of these was the requirement of privity.

The doctrinal stranglehold of the privity requirement was first loosened in actions involving personal injuries caused by the consumption of unfit food and food products. The early cases sought to surmount the privity obstacle by finding some relationship between the parties which would bring the victim within the contractual framework. But the utilization for this purpose of theories of agency, assignment, or third party beneficiary contracts produced results which were sometimes startling. For example, in one case a woman purchased pork chops for herself and her husband. The chops were tainted, and both became ill after eating them. In order to establish privity of contract between the husband and the retailer, it was alleged that the wife was her husband’s agent. This theory was accepted, and the husband was allowed recovery. But it was held that the wife, on the other hand, being merely an agent, was not in privity with the vendor and recovery for her was denied. In another case, where the purchaser consumed a soft drink containing a decomposed mouse, Missouri held the manufacturer liable. Although the entrenched law limited recovery in such circumstances to an assignee of the warranty, the court stated that, “[U]nder the situation and circumstance of modern merchandise [sic] in such matters, privity of contract exists in the consciousness and understanding of all right-thinking persons.” In 1928 the Ohio Supreme Court employed the theory of third party beneficiary contracts to hold a baking company liable for injuries caused by a pin baked into one of its cakes. The court stated that the company knew that the retailer was not purchasing for its own consumption, and since the retailer purchased such goods for ultimate resale to customers, any warranty arising from the sale by the company to the retailer was for the benefit of the consumer.

California first relaxed the privity requirement in a case involving a packaged sandwich which contained maggots. Consumption of the

5 Id. at 120.
6 Ibid.
10 Id. at 475, 161 N.E. at 559.
sandwich caused the purchaser's wife to become violently ill. The court, permitting the wife to recover against both the manufacturer and the retailer, stated that although privity is usually required to maintain an action for breach of warranty, an exception to this requirement exists when the product involved can be classified as food or drug.11 Other states followed this exception, and by 1955 it was recognized by at least 15 states.12 Not content with this development, the courts expanded the scope of the original exception to permit recovery without privity for a wide spectrum of products designed for intimate bodily use, such as vaccine,13 tobacco,14 soap,15 detergent,16 hair dye,17 permanent wave solution,18 and clothing.19 The expansion of the exception in California has encompassed dog food,20 milk bottles,21 and food cartons.22

Many courts have also allowed consumers to recover for breach of express warranties created by representations made on labels, in sales literature, and other advertising media.23 Another prevalent exception to the privity requirement has been applied in those cases where the product, if defective, would be inherently dangerous to the consuming public. Under this doctrine recovery has been granted

14 Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3d Cir. 1961) (by implication); Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963) (tobacco classified as within food and drink category).
for injuries resulting from defects in airplanes, hot water heaters, bottles, and tires.

Not only have exceptions been based on the type of product involved, but there has also been an augmentation of the class of plaintiffs allowed to recover for a breach of either an express or implied warranty. In recent years the courts have amplified the cause of action for breach of warranty to include members of the purchaser's family, members of his "industrial family," his household guests, and foreseeable users in general. This trend is exemplified by section 2-318 of the Uniform Commercial Code which extends a seller's warranty whether express or implied to, "... any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty."

There has been a definite contemporary trend toward the imposition of strict liability in tort upon the manufacturer. The concepts, the language, and the emphasis of the courts have been increasingly those of tort. Dean Prosser has stated that the warranty theory is a, "freak hybrid born of the illicit intercourse of tort and contract," and has appealed for a blanket rule which would make any supplier in the chain liable directly to the ultimate consumer. California, it would appear, adopted most of Dean Prosser's suggestion in the case of Greenman v. Yuba Power Products Inc. In Greenman the

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34 Prosser, supra note 22, at 1126.
35 Id. at 1124.
plaintiff's injury resulted from a defect in a lathe which had been purchased for him by his wife. The court transcended most of the traditional contractual restrictions which had encrusted actions for breach of warranty and held that, "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 which causes injury to a human being."\(^7\) Greenman expressly states that the manufacturer's liability is to be governed not by the law of contract warranties, but by the law of strict liability in tort.\(^8\) Accordingly, it was held that the notice requirement of the California Civil Code\(^9\) was inapplicable because the liability arises independently of a contract of sale between the parties.\(^10\)

The *Vandermark* case is the cap-stone of the evolutionary process. In a brief opinion written by Justice (now Chief Justice) Traynor, the court held that if a manufacturer markets a product with knowledge that it is to be used without inspection for defects, there is strict liability in tort for personal injuries caused by a defect in the product and that this liability will be imposed not only on the manufacturer but also on the retailer. A disclaimer of any or all warranties in the sales contract will not avoid the liability of either the manufacturer or the retailer; nor will failure of the buyer to give timely notice of the breach of any warranty, whether express or implied. Undoubtedly, strict liability in tort is now the rule in California.

The doctrine of strict liability laid down by *Vandermark* is expressly intended to be independent of any reliance on theories of breach of warranty. It will be interesting to observe the extent to which the California courts, in applying the rules of strict liability in tort, will limit or extend the doctrine. Until now, the plaintiffs (including those in *Vandermark*) who have been permitted to recover have been limited to foreseeable users who sustained personal injuries. Recovery for property damage on a strict liability basis has since been denied in *Seely v. White Motor Co.*\(^41\) which pointed out that the *Vandermark* court, while granting recovery for personal injury, failed to mention the property damage to Vandermark's automobile. Although the status of innocent bystanders is doubtful,\(^42\) it is conceivable that they may in the future be allowed to recover for personal injuries which are proximately caused by a defective prod-

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\(^{37}\) Id. at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
\(^{38}\) Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.
\(^{39}\) Cal. Stat. 1931, ch. 1070, § 1769, at 2249 (now CAL. COMM'L CODE § 2607 (3)); cf. UNIFORM SALES ACT § 49.
\(^{40}\) 59 Cal. 2d at 61, 377 P.2d at 900, 27 Cal. Rptr. at 700.
\(^{42}\) Prosser, supra note 22, at 1142.
uct because the rules of strict liability in tort do not discriminate between purchaser, consumer, and bystander as do the contractual rules of breach of warranty. With regard to defenses, the nature of strict liability would exclude ordinary contributory negligence since such an action is not one based upon negligence. Moreover, recent indications are that the affirmative defense of assumption of the risk will also be inapplicable.

Although there is reason to believe that the court in *Vandermark* assumed negligence, the basis of the liability is not culpability but public policy; i.e., the public interest in preserving human life and health which justifies the imposition of full responsibility upon the supplier for the harm caused by his product, despite his lack of negligence. In our highly developed state of industry and marketing, strict liability is necessary to protect those who are unable adequately to protect themselves against products which are dangerously defective. Industrialists and businessmen, by virtue of the rule expounded in *Vandermark*, are forced to accept risks and responsibilities which are concomitant with the products they make and sell. The court, in recognizing the added burdens and expenses which will be the lot of the manufacturer and retailer as a result of its decision, did not overlook the fact that the added costs can be adjusted and absorbed as a business expense. The notable achievement of *Vandermark* is the directness with which it affords increased protection to the consumer in an area where in the past he was without a remedy. Other jurisdictions would do well to make the same forthright leap.

Edward V. Brennan


44 Lascher, *Strict Liability in Tort for Defective Products: The Road To and Past Vandermark*, 38 So. CAL. L. Rev. 30, 54 (1965); see Alvarez v. Felker Mfg. Co., 230 Adv. Cal. App. 1060, 1069, 41 Cal. Rptr. 514, 519 (1964) which states that in order to establish a *prima facie* case of strict liability in tort, the plaintiff must show that he was unaware of a defect in the product. Plaintiff therefore has the burden of proving his own lack of knowledge. Assumption of the risk, on the other hand, would require the defendant to prove that the plaintiff knew of the particular danger involved; yet any showing of such knowledge would destroy the plaintiff’s *prima facie* case, and would obviate the presentment of assumption of the risk as a defense.

45 “Moreover, since it could reasonably be inferred from the description of the braking system in evidence and the offer of proof of all possible causes of defects that the defect was owing to negligence in design, manufacture, assembly, or adjustment, it must be taken as established that the defect was caused by some such negligence.” 61 Cal. 2d at 260, 381 P.2d at 170, 37 Cal. Rptr. at 898.