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# Products Liability: Strict Liability in Tort Notes and

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# NOTES AND COMMENTS

## PRODUCTS LIABILITY: STRICT LIABILITY IN TORT

"In California, a manufacturer will be held strictly liable, if the article he manufactures proves defective, causing injury to life or limb. Recovery of damages is in no way dependent upon proof of negligence or knowledge of the defect."[1] So held the court in *Vandermark v. Ford Motor Co.*[2] in reversing the trial court's non-suit against the manufacturer and remanding the case for a new trial. The Ford Motor Company and its retail dealer[3] were held strictly liable in tort for injuries sustained when a new Ford automobile Vandermark had just purchased suddenly veered to the right on the freeway and crashed into a light pole. The court based its ruling on *Greenman v. Yuba Power Products, Inc.*[4]

In the *Greenman* case the plaintiff was injured while operating a shopsmith combination power tool, when a piece of wood on which he was working suddenly flew out of the machine and struck him on the head inflicting serious injuries. A unaminous court held, affirming the lower court decision, that a consumer could sue a manufacturer for breach of warranty. The argument that statutory notice was not given by the consumer to the manufacturer was rejected by the court. It held such notice was not needed where there is a breach of warranty that arises independently of a contract of sale between the parties. In addition an express warranty need not be shown. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspecting for defects, proves to have a defect that causes injury to a human being."[5]

There was and still is a question whether this latter rule enunciated in *Greenman* was dictum or an alternative holding.[6] The supreme court has not had occasion since *Greenman* to clarify this issue.

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[1] Vandermark v. Ford Motor Co., 221 A.C.A. 685, 695, 34 Cal. Rptr. 723, 729 (1963).

[2] *Id.* at 685, 34 Cal. Rptr. at 723.

[3] This article will not concern itself with the dealer's liability.

[4] 59 Cal. 2d 57, 377 P.2d. 897, 27 Cal. Rptr. 697 (1963).

[5] *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

[6] 15 STAN. L. REV. 381, 388 n.27 (1963). See pp. 224-25 *infra*.

The importance of the *Vandermark*[7] decision is that it is a very strong indication that *Greenman* has established in California that liability of a manufacturer no longer need rest on contract warranty, but will be imposed as strict liability in tort. This note will trace the history of the manufacturer's liability to a user in California and attempt to determine the effect *Greenman* will have on this liability.

## MANUFACTURER'S LIABILITY FOR NEGLIGENCE

Originally the manufacturer was not liable for injuries sustained by reason of defects in articles unless there was a contractual relationship between him and the injured party.[8] However, because the privity requirement proved so unsatisfactory in its application, exceptions to the general rule arose. If the article produced was inherently dangerous or noxious, a negligence action could be brought by a stranger to the contract.[9] Until 1932 the California cases tended to limit the exception to the privity doctrine to abnormally dangerous articles, without definitely so holding.[10]

In *Dahms v. General Elevator Co.*,[11] however, the court extended this exception beyond inherently dangerous articles to those articles which were reasonably certain to place life and limb in peril if negligently manufactured, thus impliedly adopting the *McPherson v. Buick*[12] rule. Two years later California in *Kulash v. Los Angeles Ladder Co.*[13] officially adopted this rule when the supreme court held that a negligently-manufactured ladder is likely to be imminently dangerous, and therefore the injured party had a remedy in tort regardless of his lack of privity

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7 Another case decided subsequent to *Greenman* using it as authority in holding a manufacturer strictly liable in tort is Crane v. Sears Roebuck & Co., 218 A.C.A. 896, 32 Cal. Rptr. 754 (1963). See p. 225 *infra*.

8 Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013 (1932). This case recognizes this rule as the general rule governing the negligence of manufacturers and first espoused as dictum in Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

9 Fidelity & Casualty Co. v. Paraffine Paint Co., 188 Cal. 184, 204 Pac. 1076 (1922); Morris v. Toy Box, 204 Cal. App. 2d 468, 22 Cal. Rptr. 572 (1962).

10 See, *e.g.*, Means v. Southern California Ry., 144 Cal. 473, 77 Pac. 1001 (1904) where the court held that sulphuric acid is not such a dangerous instrumentality that one handling it does so at his peril.

11 214 Cal. 733, 7 P.2d 1013 (1932).

12 217 N.Y. 382, 111 N.E. 1050 (1916). This rule, referred to as the imminently dangerous product exception to the privity rule, 74 A.L.R.2d 1111, 1158, which extended the inherently dangerous exception to any product whose nature is such that it is reasonably certain to place life and limb in peril when negligently made.

13 1 Cal. 2d 229, 34 P.2d 481 (1934).

with the negligent manufacturer.[14] This case extended the *McPherson* rule, which did not go beyond liability to the ultimate purchaser himself, to the purchaser's employees, and the rule has subsequently been extended to any user of such a product.[15] That a manufacturer of such a negligently-made product is liable, regardless of lack of privity with the injured user, has been recently reaffirmed.[16]

Prior to the *Greenman* decision, in 1963, California had not rejected the privity requirement *in toto*. Privity was still required when the product causing the injury was of such a nature that it carried no threat of probable damage.[17] If a third person wished to hold the manufacturer liable for injuries suffered by him in the use of such an article, he had to show that the maker knew it was dangerous and either concealed the defects or represented that it was safe.[18]

An injured party bringing a negligence action against a manufacturer had to show, in addition to privity with the manufacturer, that the manufacturer was negligent and that this negligence was the legal cause of his injury. With modern methods of production and marketing negligence was often difficult to prove. In California the injured party was aided by a liberal view of the doctrine of *res ipsa loquitur*.[19] Yet, because products pass through numerous hands, it would often be impossible to show that the manufacturer was negligent[20] and easy for the manufacturer to rebut the inference raised by *res ipsa*. While there was a remedy in contract against the immediate vendor, the privity requirement was again a requisite and prohibited recovery to any user except the vendee.[21]

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[14] Another exception to privity doctrine was recognized in cases involving injuries caused by products intended for internal use. See, *e.g.*, Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P.2d 833 (1938).

[15] Varas v. Darco Mfg. Co., 205 Cal. App. 2d 246, 22 Cal. Rptr. 737 (1962).

[16] *Ibid.*

[17] Catlin v. Union Oil Co., 31 Cal. App. 597, 605, 161 Pac. 29, 33 (1916).

[18] Morris v. Toy Box, 204 Cal. App. 2d, 468, 472, 22 Cal. Rptr. 572, 574 (1962).

[19] See, *e.g.*, Dryden v. Continental Baking Co., 11 Cal. 2d 33, 77 P.2d 833 (1936).

[20] For a discussion of the problems of a consumer holding the manufacturer liable see Prosser, *The Assault on the Citadel*, 69 YALE L.J. 1099, 1114-20 (1960) and PROSSER, TORTS 497 (2d ed. 1955).

[21] See discussion pp. 221-22, *infra*. The Uniform Commercial Code in section 2318 extends the retailer's warranty to all members of the buyer's household. California has adopted the Uniform Commercial Code to take effect in January 1, 1965, but has deleted section 2318. For an extensive collection of authorities on the privity problem in a negligent action, see 74 A.L.R.2d 1111.

## WARRANTY

Strict liability can be placed on the manufacturer by either an express or implied warranty.[22] But, here again, privity must be proved. In California, with certain exceptions, privity between the injured party and the manufacturer has been essential for recovery in warranty actions.[23] This, for all practical purposes, excluded recovery by a consumer from the manufacturer, since the dealer who sold to the consumer probably bought from a wholesaler who in turn purchased from the manufacturer. Because of the hardship worked by the privity requirement, California had recognized exceptions in cases dealing with food[24] and where the purchaser of a product relied on representations made by the manufacturer on labels or advertising materials.[25] The rationale of these exceptions was that the right of a consumer who is injured by an unwholesome food product should not depend upon the intricacies of the law of sales. In these exceptional cases a warranty by the manufacturer to the consumer did not depend on privity, but rested on public policy and was imposed by operation of law.[26]

In recent years the privity requirement has been attacked and the manufacturer held strictly liable to the ultimate consumer in warranty for injuries caused by a variety of products, besides food, which create a hazard if defective: grinding wheel,[27] bottles,[28] vaccine,[29] dog food,[30] and airplanes.[31] Although a federal case[32] interpreting California law indicated an end to the privity doctrine in activities other than food, the cases still impliedly ac-

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22 CAL. CIV. CODE. §§ 1731, 1732, 1734, 1735.

23 Burr v. Sherman Williams Co., 42 Cal. 2d 682, 695, 268 P.2d 1041, 1048 (1954).

24 Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Vaccarezza v. Sanguinetti, 71 Cal. App. 2d 687, 163 P.2d. 470 (1945). Both cases held that an implied warranty of fitness for human consumption ran from the manufacturer to the ultimate consumer regardless of privity of contract.

25 Free v. Sluss, 87 Cal. App. 2d 933, 187 P.2d 854 (1948).

26 Ketterer v. Armour & Co., 200 Fed. 322 (S.D.N.Y. 1912); Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939). See generally 2 JAMES & HARPER, TORTS § 28.16 (1956).

27 Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 823 (1961).

28 Vassallo v. Sabatte Land Co., 212 Cal. App. 2d 11, 27 Cal. Rptr. 814 (1963); Vallis v. Canada Dry Ginger Ale, Inc., 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (1961).

29 Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960).

30 McAfee v. Cargill Inc., 1212 F. Supp. 5 (S.D. Cal. 1954).

31 Hinton v. Republic Aviation Corp., 180 F. Supp. 31 (S.D.N.Y. 1959) (California Law).

32 *Ibid.*

cepted the general rule by speaking of exceptions to the rule[33] or finding privity by different theories.[34] Hence the status of California warranty law prior to the *Greenman* case indicated a weakening of the privity doctrine, but a general recognition that in the absence of an exception a contractual relationship between the parties had to be shown.

### Privity Requirement Questioned

A helpful introduction to *Greenman* are two concurring opinions of Justice Traynor which lay a foundation for the decision in that case.

In *Escola v. Coca Cola Bottling Co.*[35] the court invoked the doctrine of *res ipsa loquitur* to affirm a judgment for damages caused by an exploding coke bottle. Justice Traynor concurred, but stated that the manufacturer's negligence should not be singled out as the basis for an injured party's right to recover. Rather, the rationale should be 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."[36] After tracing the history of the manufacturer's liability through negligence and strict liability in contract warranty, Justice Traynor stated that the manufacturer's liability should be severed from the contract of sale and based instead on strict liability in tort.[37] His precedents for imposing strict liability on the manufacturer were two California cases[38] which imposed absolute liability on one using his property in such a way that it injured another's property.

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[33] Gottsdanker v. Cutter Laboratories, 182 Cal. App. 2d 602, 6 Cal. Rptr. 320 (1960), where the court equated vaccine with food and classified the former under the food exception to the privity requirement.

[34] Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 347, 348, 353 P.2d 575, 581, 5 Cal. Rptr. 863, 869 (1960), where the court defined privity as denoting a mutual or successive relationship to the same thing or property. It held that because an employee had the successive right to the use and possession of the grinding wheel which was furnished by his employer, and which injured him, he was in privity with the vendor-manufacturer and an implied warranty ran to him. Vallis v. Canada Dry Ginger Ale, Inc., 190 Cal. App. 2d 35, 11 Cal. Rptr. 823 (1961) used *Peterson* and its privity rationale in holding an implied warranty ran from a bottle manufacturer to a vendee's employee. Dryden v. Continental Baking Co., 11 Cal. 2d 33, 37, 77 P.2d 833, 835 (1938), in a dictum pronouncement held that wife of the vendee husband might urge she was a third party beneficiary of the contract between the husband and bakery.

[35] 24 Cal. 2d 453, 150 P.2d 436 (1944).

[36] *Id.* at 461, 150 P.2d at 440.

[37] *Id.* at 466, 150 P.2d at 442, 443.

[38] Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac. 952 (1928); McGrath v. Basich Bros. Construction Co., 7 Cal. App. 2d 573, 46 P.2d 981 (1935).

Justice Traynor pointed out that an action for breach of warranty originally sounded in tort. Since this original tort theory of warranty is still used today in such actions as wrongful death actions, it would not be out of character to extend the strict liability of a warranty action beyond the buyer to the ultimate consumer. By employing the tort theory the strict liability of a warranty could be imposed on the manufacturer regardless of privity. "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 intermediaries."[39]

This was the first indication in California cases of the "risk spreading" argument as regards the manufacturer-consumer relationship. Briefly this argument is that since the manufacturer is usually financially better able than the consumer to bear the risk of loss that arises from his products and to spread that loss among consumers, he should be held to a strict liability.[40]

In *Gordon v. Aztec Brewing Co.*[41] the court allowed the doctrine of *res ipsa loquitur* to be used against the brewer, where an exploding beer bottle had been handled by two intermediaries before reaching the plaintiff. Justice Traynor would have held the manufacturer bottler strictly liable on the rationale of his concurring opinion in the *Escola* case. In rejecting the *res ipsa* approach of the majority, which he believed was inapplicable because too many parties handled the bottle before it injured the consumer, Justice Traynor argued:

> By approving the *res ipsa loquitur* instructions given in this case, the majority opinion leaves it to the jury to hold the defendant strictly liable not only for defects in its bottles but also for defects that develop in the normal course of marketing procedures. If such liability is to be imposed it should be imposed openly and not by spurious application of rules developed to determine the sufficiency of circumstantial evidence in negligence cases.[42]

Again Justice Traynor stressed that a manufacturer's liability should not be made to rest on negligence or warranty, but should be based on a tortious strict liability imposed by law. As long as the product had been put to normal use "public policy requires that a manufacturer should assume the risks and hazards" of injury incident to such use.[43]

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[39] Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 467, 468, 150 P.2d 436, 443 (1944).

[40] *Id.* at 462, 150 P.2d at 441. See 23 CALIF. L. REV. 621, 625 (1935).

[41] 33 Cal. 2d 514, 203 P.2d 522 (1949).

[42] *Id.* at 530, 203 P.2d at 532.

[43] *Id.* at 532, 203 P.2d at 534. Traynor presented this argument in two other

Against this background the *Greenman*[44] decision appeared in 1963. Justice Traynor, writing for a unanimous court, affirmed the lower court's ruling that Yuba Power Products, the defendant, was liable to plaintiff-consumer under an express warranty; that plaintiff need not give notice of breach of warranty to defendant; that regardless of warranty a manufacturer could be held strictly liable in tort.[45] This liability which was once governed by the law of warranty should now be governed by the law of strict liability in tort because

> the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law [citations] and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . . [Citations.][46]

Sales warranties will be invoked only to the extent that they serve the purposes for which such liability was imposed.[47]

## GREENMAN: LAW OR DICTUM?

The question arises whether this statement in *Greenman* is an alternative holding or mere dictum. There is an argument that since the case turned on the warranty-notice issue in the lower court and the supreme court affirmed the decision, it was merely a statement concerning a rule of law not necessarily involved nor essential to the determination of this case and thus lacked the force of an adjudication.[48]

On the other hand, there are strong indications that this was an adjudication of law.[49] The first indication that the statement was not dictum is found in the case itself. Justice Traynor, who had espoused just such a theory for twenty years, wrote a unanimous opinion for the court. Although he alone had adhered to the strict liability concept for so long, no justice wrote a concurring or dissenting opinion distinguishing or rejecting the strict liability argument.

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concurring opinions prior to *Greenman*, Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960); Trust v. Arden Farms Co., 50 Cal. 2d 217, 324 P.2d 583 (1958).

[44] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

[45] *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.

[46] *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[47] *Ibid.*

[48] 15 STAN. L. REV. 381, 388 n.27 (1963).

[49] This will probably be Vandermark v. Ford Motor Co., 221 A.C.A. 685, 34 Cal. Rptr. 723, which was decided in October of 1963 and which is now pending hearing before the California Supreme Court. The court held the manufacturer strictly liable in tort based on the *Greenman* decision.

Secondly, this theory follows the trend of the court thinking as evidenced by its attacks on the privity doctrine.[50]

Lastly, and the most important indication that the court discarded the traditional concepts of negligence and warranty and now holds the manufacturer strictly liable in tort, are two recent decisions of California appellate courts.

In *Crane v. Sears Roebuck and Co.*[51] the district court of appeal was concerned with the liability of a manufacturer who had produced a surface preparer for Sears. The consumer-plaintiff had purchased the compound from Sears and was injured when it ignited while being put to normal use. Citing *Greenman* as authority, the court stated that an express warranty need not be proved, since the manufacturer was strictly liable in tort. "Liability of the manufacturer in cases of this nature is not created by contract, but is imposed by law and is governed by the law of strict liability in tort. [Citation to *Greenman.*]"[52]

In *Vandermark v. Ford Motor Co.*[53] the district court of appeal countered Ford's argument that it had never given any express or implied warranties with a cite to *Greenman* "wherein the following rule was enunciated" and then quoted verbatim the entire rule regarding strict liability. Then the court stated this rule: "Thus, in California, a manufacturer will be held strictly liable, if the article he manufactures proves defective, causing injury to life or limb."[54] *Greenman's* theory of strict liability seems to be the law in California.

## EFFECT OF GREENMAN

The rule enunciated in *Greenman* is not all-inclusive, as the injured party must present certain evidence to fall within its scope.

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] 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 [product] unsafe for its intended use.[55]

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50 See, *e.g.*, Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575, 5 Cal. Rptr. 863 (1960); Jones v. Burgermeister Brewing Corp., 198 Cal. App. 2d 198, 18 Cal. Rptr. 311 (1961). Cases in footnotes 27-34 all show this tendency.

51 218 A.C.A. 896, 32 Cal. Rptr. 754, 757 (1963).

52 *Id.* at 900, 32 Cal. Rptr. at 757.

53 221 A.C.A. 685, 34 Cal. Rptr. 723 (1963).

54 *Id.* at 695, 34 Cal. Rptr. at 729.

55 Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

Perhaps most difficult for the injured consumer to prove will be a defect in design and manufacture. One court adopting the *Greenman* rule has allowed the establishment of such evidence by the doctrine of *res ipsa loquitur*.[56] Another problem follows from the requirement that there must be knowledge that the product is to be used without inspection.[57] What type of inspection? Inspection by whom? Only subsequent cases will clarify these requirements.

Under *Greenman*, although there are possible problem areas, the injured consumer's burden of establishing a cause of action against a manufacturer has been significantly eased in California. The decision is an indication that the California courts will impose absolute liability on the manufacturer for injuries resulting from defective products, regardless of the nature of the product. Plaintiff need no longer resort to the fiction of *res ipsa loquitur* or show privity with the manufacturer since the latter is now strictly liable in tort.

### Basis of Greenman Liability: "Warranty" or Tort?

Although there seems to be a question as to the basis of the strict liability imposed on the manufacturer in *Greenman*, Justice Traynor in his earlier concurring opinions seems to espouse liability based on a tort "warranty" imposed as a matter of public policy for the protection of the public and is not dependent on any provision of a contract express or implied. In the *Escola* case Justice Traynor discussed the theories courts were using to extend the privity doctrine to the injured consumer:

> Such fictions are 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 . . . as a strict liability.[58]

He then sets a broad base for the imposition of this strict liability by referring to two California cases[59] which imposed absolute liability on the basis that "*sic utere tuo ut abenum non laedas*"—one must so use his own property as to not infringe upon the rights of another. The law review articles he cited speak of a growing tendency to use the idea of liability without fault "in

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[56] Vandermark v. Ford Motor Co., 221 A.C.A. 685, 695-97, 34 Cal. Rptr. 723, 729-31 (1963).

[57] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

[58] Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 466, 150 P.2d 436, 442-43 (1944).

[59] Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac. 952 (1928); McGrath v. Basich Bros. Construction Co., 7 Cal. App. 2d 573, 46 P.2d 981 (1935).

placing upon an enterprise the burden of repairing injuries without fault of him who conducts it, which are incident to the undertaking,"[60] and to distribute the loss when harm results to consumers injured by a defective product by placing it on the one best able to bear and distribute the loss—the manufacturer.[61]

To use the word "warranty" in relation to imposition of strict liability in tort presents many difficulties and disadvantages[62] because of warranty's association with contracts. It has been suggested that it is used by the courts simply to enlarge the area of products liability.[63] Whatever the reason for its use, because of problems and second meanings which naturally associate with such use, it is suggested that if a court wishes to impose an absolute liability on the manufacturer in tort rather than contract, it should not employ "warranty" as the vehicle.

Hence it is not surprising that in the *Greenman* decision the court does not speak of a "warranty" independent of the contract, as did *Escola*. The court alludes to a tort "warranty" when it states that rules governing sales warranties cannot be applied to govern the manufacturer's liability to the injured user, which might suggest that the court is still thinking in terms of warranty.[64] However, the court's specific language that the liability sounds in tort and is not governed by the law of contract warranties indicates that California has taken the final step in eliminating the contract overtones in the manufacturer-consumer relationship. The manufacturer's liability resulting from this relationship now seems to be a matter of strict liability in tort which does not depend upon a contract between the parties. Liability arises because the manufacturer in producing and marketing his goods has been deemed to assume responsibility to all consumers who may be injured by a defect in these goods.

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60 Pound, *The End of Law*, 27 HARV. L. REV. 195, 233 (1914).

61 Feezer, *Capacity to Bear Loss in Tort Cases*, 78 U. PA. L.REV. 805, 811 (1930).

62 Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1127-33 (1960).

63 43 B.U.L. REV. 576 (1963).

64 Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).