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THE PRODUCT LIABILITY OF MANUFACTURERS: AN UNDERSTANDING AND EXPLORATION

by Donald M. Jenkins*

I. INTRODUCTION

Early in 1955 the United States Public Health Service selected five pharmaceutical manufacturers to produce Salk Polio Vaccine. Quality control procedures applicable to every step of the vaccine's preparation were established by the Public Health Service. The Salk process was expected to inactivate the live virus used in the preparation of the vaccine but in this instance it failed to do so. One of the firms selected, Cutter Laboratories, followed the prescribed safety tests which were deemed adequate on the basis of the experience at that time. These tests were intended to preclude the release of any vaccine with activated virus. Nonetheless, a faulty vaccine was produced resulting in seventy-three cases of polio and three deaths. Sixty damage suits were filed. Fifty-four of them totaling claims of $11,813,000 were settled for $3,049,000. Cutter's insurance covered $2,000,000 of the loss.¹ The dominant theories for imposing liability on Cutter would be either breach of warranty or negligence. The warranty theory would raise the issues of whether or not a sale of goods was involved and whether or not the injured persons were the beneficiaries of any warranties since they were not in privity of contract with the manufacturer. The negligence theory would require a showing that Cutter failed in some respect to exercise the standard of care of a reasonable person under the same or similar circumstances, a difficult burden of proof since Cutter had scrupulously followed the government specified procedures. When Cutter was pursued to a final judgment the basis of recovery was on neither theory but on the theory of a breach of an implied warranty sounding in tort resulting in Cutter's being held strictly liable for the defective vaccine.² An estimated 401,000 children were vaccinated with the Cutter product.³ The potential liability of a

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³ Report on Poliomyelitis Vaccine.
careful producer employing procedures founded upon the most advanced knowledge and experience is alarming.

A manufacturer reads in *The Wall Street Journal* that a jury decided the question of liability in favor of a plaintiff in a suit where it was alleged that the rear axle and suspension design of the 1956 Volkswagen was defectively designed causing the car to roll over under certain steering conditions. The automobile in question was five years old when the accident occurred, had been driven 50,000 miles and was purchased as a second-hand car. The design of the 1956 Volkswagen was similar to that of the cars made as early as 1945 and the rear axle and suspension system of the 1968 model Volkswagens were similar in their basic concept. At the time of the California suit, approximately 3,000,000 Volkswagens were on the highway in the United States. The manufacturer is impressed with the magnitude of his potential liability and wonders if there are any limitations.

The impact of the above two examples is the enormity of the potential liability of manufacturers to the users of products. A significant development in the law of product liability is the expansion of the classes of persons to whom the manufacturer may be liable. The direction of the law in this respect is dramatically illustrated in *Mitchell v. Miller*, a 1965 Connecticut decision. An executrix brought an action for damages for the death of the decedent. The decedent was playing golf when he was run over and killed by an unattended, runaway automobile. The automobile had rolled out of the parking lot of the golf course, down an incline and onto the golf course striking the decedent. It was alleged that the park position of the hydramatic transmission was defective allowing the car to move. The charge against the manufacturer was that it had expressly and impliedly warranted the automobile to be safe and fit for its intended use and contained no defects that would endanger the public. The manufacturer demurred to the complaint on the ground that no privity existed between the decedent and the manufacturer. The court noted that the deceased was not within the distributive chain of any sale originating from the manufacturer nor could the deceased reasonably have been anticipated by the manufacturer to have been one who would use, occupy or service the automobile. In overruling the demurrer, the court asserted that the public policy that protects the user or consumer should also protect the innocent bystander. Are the persons to whom a manufacturer may be liable for injuries caused by his product limitless?

The evolution and application of product liability law in the past fifteen years represents one of the most dynamic developments in law. Dean Prosser proclaims,

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PRODUCT LIABILITY

Since the year 1900 there has been no other set of cases which have so rapidly and violently overthrown the existing law as those which involve products liability.⁶

The result of these rapid and violent developments has been to substantially increase the susceptibility of producers to suits by members of the public in direct actions. It was assumed the crest of the wave of expanded product liability was reached with the formulation of the legal principles set forth in Section 402A of the Restatement (Second) of the Law of Torts. However, subsequent court actions proved this assumption to be invalid.

What are the legal theories imposing product liability on manufacturers or producers? Has the law expanding the potential liability of manufacturers reached its crest? That is, have the courts begun to describe limitations of liability? To what extent are the expansive developments being effectively employed? The pursuit of these questions, and related questions, is the purpose of this article.

The beginning point will be an examination of the existing theories of manufacturer's liability namely, negligence, contract warranty and strict liability. For example purposes, Ohio law will be used to illustrate the interpretative development of the law and its application. Ohio is a legitimate jurisdiction for this purpose. It has been a pace-setting jurisdiction in the development of the law and has arrived at the point of accepting the concept of strict liability for defective products. Furthermore, the evolution of product liability law in Ohio typifies the pattern that has occurred or is occurring in a majority of the other states. A benchmark in this article will be the decision of the Supreme Court of Ohio in Lonzrick v. Republic Steel⁷ in which the concept of strict liability for defective products emerged. The major emphasis of the article will be an analysis of the developments in the law within and without Ohio since the decision in Lonzrick. The purpose of this analysis will be to determine the current direction and effect of the law of product liability in those jurisdictions that subscribe to the concept of strict liability. Of primary concern will be the identification, if any, of the limitations on manufacturers' liability. In conclusion, a summary of findings and recommendations for clarification of the law of product liability will be offered.

II. THE THEORIES OF PRODUCT LIABILITY

A manufacturer may be held legally accountable to a person who has been injured by his product on several possible theories. He may have violated a statute, such as a pure food statute, which imposes a strict

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⁷ 6 Ohio St. 2d 227, 218 N.E. 2d 185 (1966).
duty on a manufacturer not to sell contaminated food and provides remedies to one injured by violation of the act's provisions. There are several statutes of this nature dealing with specific products. On the other hand, his liability may be founded upon broader principles of law; namely, negligence, breach of warranty or strict liability in tort. These broader principles of liability represent the rapidly developing and changing areas of the law of product liability. Therefore, as a point of departure, an understanding of the specific attributes of each of these theories is essential.

**Negligence Liability**

A person who has sustained injury to his person or property by reason of the use, storage or consumption of a product may recover damages from the manufacturer pursuant to the usual principles of negligence law. That is, the plaintiff in a products liability case may recover if he can establish the three essential elements of negligence liability: (1) the existence of a duty owing by the manufacturer to the plaintiff; (2) the failure of the manufacturer to discharge that duty; and (3) injury or damage to the plaintiff proximately resulting from the breach of duty. Allegations of negligence may charge the manufacturer with the failure to carefully design, manufacture, process, inspect, test, disclose known defects, warn of known dangers, or adequately instruct in the use of the product. The right to recover on the theory of negligence is based on the common law right not to be injured through the fault of another.

In a products liability suit founded on negligence, the plaintiff has the burden of proving the elements of liability. This is often a difficult burden for the plaintiff. Allegations of failure to carefully design, reveal known defects, warn or adequately instruct may be sustained by proof readily available to the plaintiff. However, suits alleging negligence in manufacturing, processing, inspecting, or testing often present momentous problems in obtaining the necessary evidence. The doctrine of *res ipsa loquitur* may be pleaded to assist in carrying the burden of proof but the need to resort to this doctrine reflects the desperate nature of the plaintiff's ability to produce the evidence. In order to invoke *res ipsa loquitur*, the accident causing the injury must be of a kind which ordinarily does not occur in the absence of someone's negligence; the accident must be caused by an agency or instrumentally within the control of the manufacturer; and the accident must not have been due to any voluntary action or contribution on the part of the plaintiff. Thus, the plaintiff's opportunity to invoke the doctrine is limited and in the alternative he is put to his proof of negligent conduct.

The common defenses to a negligence action are contributory negligence, assumption of risk and abnormal or unintended use. Thus,
even though the plaintiff may be able to sustain his burden of proof, the manufacturer may be able to avoid liability by asserting and proving any of these defenses.

An important factor in a products liability suit based on negligence is defining to whom the manufacturer owes the duty of reasonable care. Originally, the courts held that a manufacturer who had not actually sold the product to the consumer, or user, had no duty to exercise reasonable care relative to the product’s safety. The case generally cited as establishing this early rule of law is *Winterbottom v. Wright.* The plaintiff in that suit was injured when a mail-coach broke down from latent defects in its construction. He pressed his action against the party who had supplied it and a third person under a contract of supply and maintenance. The English court denied the suit on the basis that there was no privity of contract between the injured party and the defendant supplier. Lord Abinger expressed his concern over a party not in privity being subject to suit by every passenger in the coach or by any bystander who might be injured by the upsetting of the coach.

Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. 9

Ten years later New York’s highest court altered this privity rule in negligence actions. In *Thomas v. Winchester,* a dealer in drugs carelessly labeled a deadly poison and sent it into the market. The court held that the dealer was liable to all persons who were injured by using the mislabeled medicine. The liability of the dealer, said the court, arises not out of any privity between him and the person injured but out of the duty the law imposes upon him to avoid acts in their nature dangerous to the lives of others. Present is the concept that one who sells a defective product that is imminently dangerous is liable to any person injured as a natural and probable cause of its use. The privity requirement is nullified when a defective product is imminently dangerous.

*MacPherson v. Buick Motor Company* fortified the premise that privity was not an essential element of a negligence action. A manufacturer supplied an automobile with a defective wheel. The evidence indicated that the defect could have been discovered by reasonable inspection. The injured plaintiff had purchased the automobile from a dealer. Judge Cardozo defined the issue to be whether the manufacturer owed a duty of care to anyone but his immediate purchaser. It was held that if the nature of a product is such that it is reasonably certain to endanger life and limb if negligently made, it is then a thing of danger. If

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9 Id. at 405.
10 6 N.Y. 397 (1852).
to this element of danger is added knowledge that the product will be used by persons other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer is under a duty to make it carefully. The manufacturer's liability to non-privity parties is determined by his knowledge that the imminently dangerous product will be used in the normal course of events by persons other than the buyer. Hence, a manufacturer who is negligent and markets an imminently dangerous product may be liable to non-privity parties whose association with the product is foreseeable. The same liability has been placed upon manufacturers who market inherently dangerous products. That is, products that by their nature are or may be dangerous, such as poisons or dynamite.

*The Restatement of the Law of Torts* takes the position that privity of contract is a concept that is entirely inappropriate to tort litigation. Nevertheless, a number of jurisdictions still subscribe to the privity requirement in negligence actions. These jurisdictions have engrafted so many exceptions on the rule, such as privity not being required when the defective product is inherently or imminently dangerous, that the privity requirement is extremely limited.

### Warranty Liability Arising from Contract

To understand recent court decisions dealing with warranties and product liability, it is important to note that originally in common law a warranty action was viewed as a tort action in the nature of a deceit action against the vendor. No contract elements were associated with the warranty suit. The first reported case characterizing warranty as contractual in nature was *Stuart v. Wilkens*. Wilkens, the vendor, expressly warranted that a mare was sound. The plaintiff asserted he relied on this assertion and that the seller knew that the animal was diseased. The issue for resolution was whether or not an express warranty action was a proper form for the case. Lord Mansfield held that the giving of a warranty at the time of a sale creates an obligation in the nature of an assumpsit and when the promise has been executed, an express warranty arising from a contractual transaction is a proper form of action to press against a promisor. In such an instance, consideration must be shown to maintain the warranty action.

Both forms of warranty actions survived the *Stuart v. Wilkens* case. In a warranty action, as opposed to an action in deceit, it was determined early that scienter was immaterial. The gist of the recovery right is the noncompliance with the terms of the promise, express or implied. The

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12 *Restatement (Second) of Torts*, Sections 388, 394, 395, 396, 397 and 497 (1965).
same case that established the privity requirement for a negligence action also set down the ironclad requirement that privity of contract is necessary to maintain a cause of action *ex contractu*. Hence, under the early law, requiring privity in both negligence and warranty actions, the manufacturer's potential liability to the ultimate consumer, user or bystander was limited indeed.

Commercially, the warranty has been viewed as an implied or express promise, contractual in nature. The manufacturer's warranty obligations arise upon sale of his product by virtue of the statutory provisions contained in the Uniform Commercial Code. The express warranties arise from affirmations of fact made by the seller which serve as material considerations in entering the bargain. The implied warranties are placed in the bargain by operation of law. The Code describes two implied warranties, one of fitness for a particular purpose and one of merchantability. The former arises whenever the manufacturer has reason to know his products are required for a *special purpose* and the buyer relies on his skill and judgment in selecting or furnishing the product. The merchantability warranty appears whenever the sale is by a merchant. This includes a manufacturer. This warranty assures the product sold is of merchantable quality or fit for the *ordinary and usual purpose* for which the goods are intended. These warranties are identified with a contract for the sale of goods.

Considering warranty liability as contractual in nature, it would seem that a manufacturer's liability could be limited quite readily. First, as to express warranties, he need not make any. This conduct, of course, has commercial limitations. Second, as to implied warranties, he should be able to disclaim or exclude them by language in the contract. The Uniform Commercial Code provides for such exclusions. However, such exclusions must not be unconscionable. The Code permits the manufacturer who elects not to disclaim the implied warranties to limit the remedies available to the beneficiary of the warranties. Specific provisions allow the manufacturer to alter the measure of damages. He may limit the buyer's remedies to return of the goods and repayment of the price or to the repair and replacement of non-conforming goods or parts. Of significance is the provision permitting the limitation or exclusion of consequential damages unless the limitation or exclusion is unconscionable. The limitation of consequential damage for injury to the person in

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18 Uniform Commercial Code, §§ 2-312, 2-313, 2-314, 2-315.
19 Uniform Commercial Code, § 2-316.
21 Uniform Commercial Code, § 2-719.
22 Id. § 2-719 (1) (a).
the case of consumer goods is prima facie unconscionable but limitation of damages when the loss is commercial is not. In total, it would appear that the manufacturer's attempt to either negate the implied warranties or limit damages for personal injuries resulting from a breach of warranty might offend the requirement of conscionability.

A contract warranty action against a manufacturer differs significantly from a negligence suit. The plaintiff's first concern is to insure compliance with the notice requirement of the Code. Beyond that, he must prove the warranty, that he is a beneficiary of the warranty, and the injuries proximately caused the breach. However, the reason for the breach or the conduct of the manufacturer contributing to the condition of the product need not be alleged or proved. Thus, the plaintiff's burden of proof is lightened somewhat in a warranty action as opposed to a negligence suit where he must allege and prove the culpable conduct of the defendant.

The characterization of warranty as ex contractu raises the question of who are the beneficiaries of any warranties made or implied. The privity question arises when warranty is viewed as a covenant. The Uniform Commercial Code extends the warranties of a seller beyond the immediate purchaser even though it consistently classifies warranty as an element of a sales contract. The courts have seen fit to limit any privity defense particularly when the product is intended for human consumption or could present a threat to the safety of a person. Some states have even precluded the privity defense where the only loss was monetary or to property. Nevertheless, in warranty actions the question of privity still appears reflecting the traditional view of the action as one arising in contract. The method used most frequently by the courts to overcome the privity defense is to redefine the warranty action in its original tort

23 Id., § 2-719 (3).
24 Uniform Commercial Code, § 2-607.
25 Uniform Commercial Code, § 2-318. This section offers three alternatives. Alternative A extends a seller's warranties to any natural person who is in the family or household of the buyer or who is a guest in the buyer's home if it is reasonable to expect that such person will use, consume or be affected by the goods and such person is injured in his person by breach of a warranty. Alternative B extends the warranties to any natural person who may be reasonably expected to use, consume or be affected by the goods and who is injured in his person by breach of warranty. A seller may not limit the operation of this Alternative. Alternative C extends the warranties to the same persons as Alternative B but encompasses all injuries resulting from a breach of warranty. However, the seller may limit the operation of Alternative C except with respect to injuries to the person.
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sense thereby imposing a duty on the manufacturer outside the contract of sale and preempting the privity defense. 28

Strict Liability in Tort

The most recently developed theory on which manufacturer liability may rest is that described in section 402A of the Restatement (Second) of the Law of Torts. The section is entitled, "Special Liability of Seller of Product for Physical Harm to User or Consumer" and provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
   (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
   (a) the seller has exercised all possible care in the preparation and sale of his product, and
   (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller. 29

It is apparent from subsection (2) that this theory of liability is intended to be differentiated from the theories of negligence and warranty. The plaintiff's burden is to prove that he was a user or consumer, that the product was defective, that such defect existed at the time the manufacturer sold or transferred the product, that the defective condition rendered the product unreasonably dangerous, and that the defective condition was the proximate cause of the physical harm or injury to his person or property. Privity of contract or degree of care is not in issue.

The Restatement takes no position with reference to whether the stated rules apply to injuries incurred by other persons than users or consumers or to manufacturers who supply their product to other manufacturers for assembly into a finished product. 30 These aspects will be examined later.

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30 Restatement (Second) of Torts (1965), Caveat to 402A.
One of the key interpretive problems with the section is ascribing meaning to the words “defective condition.” The comments to section 402A indicate “defective condition” includes improper packaging, improper directions and inadequate warnings.

Also of importance is the explanation the comments offer of the term “user.” The term is defined to include those who are passively enjoying the benefits of the product, as passengers in automobiles or airplanes, or those who may be performing work on the product, as a mechanic working on an automobile.

The comments to the section also make it clear that its provisions are not governed by the provisions of the Uniform Commercial Code. Hence, this liability is not affected by any contractual limitations affecting the scope or content of warranties or by any disclaimers. However, the observation is made in the comments that a number of courts have treated the rule stated in the section as a matter of “warranty.” The implication is that when “warranty” is used in a tort sense the elements of liability are those appearing in section 402A. Unfortunately, such is not necessarily the case. It is true that where courts have characterized “warranty” as tortious in nature, a concept of strict liability is present. However, the elements of the liability differ, at least theoretically, from section 402A. These differences must be kept in mind. When warranty sounding in tort is in issue, resort is often made to the Uniform Commercial Code to define the nature of the warranties. The plaintiff must allege more than just a defective product. He must allege facts which give rise to the warranty and describe the type of warranty, either express or implied. If the action is based on an express warranty or the implied warranty of fitness for a particular purpose, the reliance on the warranty must be shown as an inducement for the sale. The defect, again in theory, need not be unreasonably dangerous but must merely reflect a breach of the warranty. Thus, a warranted product may be unmerchantable or unfit for a particular purpose and give rise to a cause of action based on warranty sounding in tort but if the product is not unreasonably dangerous in its defective condition no cause of action would exist under section 402A. The remainder of the plaintiff’s burden is to show the breach of warranty, its casual connection to the injury, and the injury.

Summary

A manufacturer’s product liability may be based on negligence,

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31 Id., Comment g.
32 Id., Comment j.
33 Id., Comment l.
34 Id., Comment m.
warranty arising from contract or a concept of strict liability. These theories differ in their underlying policy and in the elements necessary for the imposition of liability. An insight into their application and development may be gained by examining the evolution of the law in a given jurisdiction. Ohio has been selected for this purpose. It is an industrial state and the Supreme Court of Ohio has formulated significant product liability decisions.³⁵

III. THE MANUFACTURER AND PRODUCT LIABILITY IN OHIO

The law as it existed in the mid 1920's, some forty years prior to the decision in Lonzrick v. Republic Steel,³⁶ has been selected as the point of departure for a review of the developments of the law of product liability in Ohio. The concept of strict product liability was nonexistent at that time. Negligence and warranty were the operable theories upon which a manufacturer's liability might rest. Warranty liability rested upon the provisions of the Uniform Sales Act which had been enacted by the state in 1908.³⁷ This act provided that any affirmation of fact or any promise relating to the goods created an express warranty if the natural tendency of such affirmation or promise was to induce the buyer to purchase the goods. Sales by description or sample gave rise to the implied warranty that the goods would correspond with the description or sample. The act described the conditions that would give rise to the implied warranties of quality or fitness for a particular purpose. The beneficiaries of these warranties were those persons in privity of contract with the manufacturer. The general rule at that time was that a negligence suit also required that the plaintiff be in privity of contract with the tortfeasor. With this state of the law the manufacturer was well insulated from direct actions by consumers or users.

A major change in the law emerged from a decision by the Court of Appeals for Lucas County in 1927.³⁸ A sewing machine was sold to the mother of the plaintiff. The plaintiff was allegedly injured through a defect in the insulation of an electric cord. The defendant asked for a directed verdict in the trial court on the basis of the general rule that a manufacturer is not liable for negligence to a third person with whom

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³⁵ Lonzrick v. Republic Steel Corporation, 6 Ohio St. 2d 227, 218 N.E. 2d 185 (1966); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E. 2d 583 (1965); Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612 (1958).
³⁶ 6 Ohio St. 2d 227, 218 N.E. 2d 185 (1966).
³⁷ 99 Ohio Laws 413 (1908), repealed and superceded on July 1, 1962 by Ohio Revised Code sections 1302.01 through 1302.98, Ohio's version of the Uniform Commercial Code Article 2.
he has no contractual relations. The court cited the decision in MacPherson v. Buick Motor Company as the applicable law. In so doing, it declared that privity of contract was not necessary to hold a manufacturer liable for negligence when the manufactured product was "inherently" or "imminently" dangerous and the manufacturer knows that the product will be used by persons other than the purchaser. Foreseeability and the nature of the product became determinants of liability for negligence rather than privity of contract.

Three months later the Court of Appeals of Cuyahoga County reviewed a suit against a bakery brought by a purchaser from a retail store for injuries caused by a needle imbedded in a cake. The bases of the suit against the manufacturer were negligence and implied warranty of wholesomeness. The negligence cause of action could be sustained without privity following the rationale of the White Sewing Machine Company case. With reference to the implied warranty cause of action and the privity issue, the court observed,

...there being no direct authority in Ohio covering a case exactly like the case at bar, we find ourselves on virgin territory and are free to resort to our own processes of reasoning and consideration of the demands of justice.

The court proceeded to hold that the manufacturer of the food product, by delivering it for sale to the public, impliedly represented to the public that the cake was free of injurious substances and fit for consumption. Further, the manufacturer knew the product was intended for the consumer and not the retailer, and the implied obligation running to the retailer must also have been intended to benefit of the consumer. In other words, the consumer was a third party beneficiary of the contract between the manufacturer and the retailer and the manufacturer's warranty with reference to food products runs in favor of the ultimate consumer. Although the plaintiff was allowed to pursue the warranty without being directly in privity, the contractual nature of warranty liability was preserved by characterizing the consumer as a third party beneficiary. Also of interest in this case was the court's holding that the presence of the needle in the case was an evidential fact from which negligence might be inferred. Anticipating future developments, the court may have been saying that the same evidence was proof of a "defective product."

In a similar food case reaching the Supreme Court of Ohio in 1935, the plaintiffs pressed their case on the basis of negligence rather than a

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41 Id., at 481, 161 N.E. at 559.
42 Canton Provision Company v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935).
third party beneficiary concept. The Supreme Court specifically asserted that privity of contract is not an essential element of liability where unwholesome food is involved. Such a product would be “imminently dangerous” and within the rule laid down in the White Sewing Machine Company case. The Supreme Court again emphasized the contract nature of warranty liability in its dicta by stating that an implied warranty requires a meeting of the minds the same as does an express contract, and since there was no privity of contract in this case, any liability must therefore be in tort not contract.

Approximately three years later, the Supreme Court had the opportunity to express itself again concerning the relationship between the contract and tort liability of a seller of goods. The product involved was hair dye which proved injurious to the purchaser. The plaintiff asserted her claim on the theories of breach of warranty and negligence. The lower court ruled the evidence insufficient to support a breach of warranty suit and proceeded to try the case on the basis of negligence. The court of appeals reversed the lower court for the reason, among others, that the lower court charged on the issue of negligence instead of confining the case to the issue of implied warranty. To reconcile this dilemma, the Supreme Court held that in selling a product the seller owes a duty beyond the mere contract. There is an obligation that the goods will be fit for the particular purpose intended and a further duty to refrain from including therein any danger unknown to the buyer. The first duty is imposed by contract and the second, by tort law. Circumstances which constitute a breach of warranty may also constitute negligence. The Supreme Court ruled the plaintiff could have introduced evidence of a breach of warranty or negligence and since a charge of negligence alone was not prejudicial to the defendant the finding for the plaintiff was allowed to stand. If the breach of warranty issue had been pursued the privity question was attacked by an allegation that the immediate seller was the agent of the defendant-distributor.

Another method of satisfying the privity of contract requirement was through statutory construction of the word “buyer,” as in 

\[tennebaum v. pendergast,^{44} a case decided in the common pleas court of franklin county in 1948. a carbonated beverage bottle exploded and injured the wife of the buyer. as a defense to the implied warranty allegation, the manufacturer pleaded lack of privity. the court looked to the definition of “buyer” appearing in the uniform sales act as adopted by ohio. the statutory definition of “buyer” included the person who buys or any legal successor of such person. the court ruled that the legislature intended to benefit not only the buyer but also his successor\]

\[sicard v. kremer, 133 ohio st. 291, 13 n.e. 2d 250 (1938).\]

\[55 ohio l. abs. 231, 90 n.e. 2d 453 (ohio c.p. 1948).\]
in interest and in this case there was at least a "gift by implication" of the product to the wife. Therefore, she was within the class intended to be protected by the implied warranty.

The contractual nature of a warranty action and the requirements of privity of contract were well-entrenched principles in Ohio law. The Court of Appeals for Hamilton County in reviewing a case in which a subpurchaser brought suit against a manufacturer on the basis of a breach of an express warranty\footnote{45} asserted unequivocally,

There is no privity between the plaintiff and the defendants, and such privity is necessary to sustain an action based upon an express warranty.\footnote{46}

The court noted that there were limited exceptions to this rule appearing throughout the states where injury to the person was involved but not where property damage was the only claimed injury. Without privity, pursuit of the manufacturer must be on the basis of negligence.

Judge Mathews dissented to the privity holding. The express warranty was on the cans of antifreeze and were relied on by the ultimate consumer. His contention was that it was logical to assume that the warranties were made to the ultimate consumer who would be the only person to suffer from any breach. This affirmation of facts made directly to the consumer by the manufacturer created privity between them. Of interest is the insistence on the contract nature of warranty and the efforts made to supply privity.

The privity requirement under the negligence theory in Ohio came to the attention of the Sixth Circuit Court of Appeals in 1946.\footnote{47} The defendant had manufactured an ash hopper and an ash grate for use with a large boiler. The failure of this equipment produced personal injuries to an employee of the purchaser. The federal court stated that although generally the manufacturer of an article is not liable in negligence to third parties who have no contractual relations with him, an act of negligence "imminently dangerous" to life or health is actionable. The court found lacking evidence that the product involved was "imminently dangerous" at the time of fabrication and installation or that it was "inherently dangerous"; therefore, the general rule requiring privity precluded liability.

The privity requirement in product liability cases was troublesome for the trial courts. The Common Pleas Court of Cuyahoga County decision in \textit{Mahoney v. Shaker Square Beverage, Inc.}\footnote{48} reflects the conflict

\footnote{46} \textit{Id.} at 511, 93 N.E. 2d at 52. The court cited 46 Am. Jur. Sales § 306 as the basis for this position.
\footnote{47} Schindley v. Allen-Sherman-Hoff Co., 157 F. 2d 102 (6th Cir. 1946).
\footnote{48} 64 Ohio L. Abs. 200, 102 N.E. 2d 281 (Ohio C.P. 1951).
between the desire of the court to protect the innocent plaintiff and the privity rule. A personal servant, an employee of the purchaser, was injured by an exploding bottle of ale. The issues in the case were whether or not the implied warranty of the seller extended to the bottle and whether or not, if such warranty existed, it extended to the employee of the purchaser. Although the defendant in this case was not a manufacturer, any extension of warranty protection beyond the purchaser would be relevant to the manufacturer's position in a sales transaction. The court resolved the first issue by holding that the implied warranty of merchantability extended to the bottle, not just the ale, since there was such a close relationship between the package and the product. Further, the defect in the bottle was construed as creating an adulterated product under the Ohio pure food laws. As to the privity issue, the court reviewed the decisions under the Ohio pure food laws wherein the term “buyer” was interpreted to include members of the buyer's family and guests in his household. The conclusion was reached that an action for breach of implied warranty is available to a member of the household of the purchaser. At the time of this trial court decision, there was no precise precedent for the omission of privity in an implied warranty suit.

The same trial court, the day after its decision in the above case, was called upon to rule on a motion to strike a cause of action based on warranty where an employee of the purchaser was fatally injured by a disintegrating grinding wheel. The specific issue was whether or not the warranty extended to the employee. The court reasoned the product's defective construction made it imminently dangerous for its intended use and this constituted a violation of the duty owed by the manufacturer to the public. The dicta in the opinion reflected confusion surrounding the various theories of liability. Again, at the time, the Supreme Court of Ohio had not overruled the general rule requiring privity in implied warranty suits.

In 1952, in an action by a purchaser against a soap manufacturer for injuries sustained from a wire embedded in a bar of soap, the Court of Appeals for Cuyahoga County ruled directly on the availability of an implied warranty action without privity. The court observed,

The cases dealing with the right of an ultimate consumer to maintain an action for breach of warranty against the manufacturer when the

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goods are brought from a retail dealer are in hopeless confusion. The ground usually advanced for not permitting such an action is because there is no contractual relations between the ultimate consumer and the manufacturer. 52

The court then held,

The question of privity should not protect one who sells unmerchantable goods where inspection will not disclose the defect. 53

Therefore, according to the appellate court, at least the ultimate purchaser should be permitted to bring a warranty action directly against the manufacturer. On review, the Supreme Court preempted this determination by finding that the trial court had charged the jury on negligence and the appellate court improperly addressed itself to the issue of implied warranty. 54 The trial court had permitted the jury to consider the issue of negligence where the only evidence of the negligence of the defendant was the partly used bar of soap, the piece of wire, and a discolored slit in the soap the size of the wire. The issue was submitted under the doctrine of res ipsa loquitur. The Supreme Court held that the operative facts did not support invoking the doctrine of res ipsa loquitur since the product had been out of the control of the defendant for an appreciable time and had been handled by several persons after it left the control of the defendant. Final judgment, therefore, was rendered for the manufacturer.

In 1953, the Supreme Court ruled directly on the need for privity in an implied warranty action in Wood v. General Electric Co. 55 Although some trial and appellate courts in Ohio had either ruled or expressed in dicta that the implied warranties should run for the benefit of the ultimate consumer, the high court ruled otherwise. The plaintiff had purchased an electric blanket manufactured by the defendant. The allegations were that defects made the blanket inherently dangerous and that General Electric breached the implied warranty of merchantability proximately causing extensive property damage and loss of rental income. Negligence in manufacture was also alleged. The court ruled that although a subpurchaser of an inherently dangerous article may recover from its manufacturer for negligence, no action may be maintained against such manufacturer by a subpurchaser for damages based upon an implied warranty. To support such an action there must be privity of contract between the seller and the buyer. The court was not impressed with the sympathy of the lower courts for the ultimate consumer. Four years later in a suit against a retailer, the Supreme Court reaffirmed its position that the implied warranties are not available to a person who is not in privity of contract

52 Id. at 607.
53 Id. at 608.
55 159 Ohio St. 273, 112 N.E. 2d 8 (1953).
with the seller. In that instance, the wife of the purchaser was precluded from recovering on the theory of implied warranty.

Before proceeding, a summary of the Ohio law as it had developed to 1957 would be appropriate. The two theories of manufacturers' liability were negligence and warranty. The warranty action could not be pursued without privity of contract. Negligence suits were permissible without privity of contract when the product involved was inherently dangerous or imminently so as a result of the negligence of the manufacturer. Otherwise, in negligence cases, privity was also necessary. Thus, at the time, a manufacturer could be pursued by the ultimate consumer only on the basis of negligence and this cause of action required that the product be inherently or imminently dangerous because of the acts of the manufacturer.

It was against this background that the Supreme Court of Ohio issued its landmark decision in Rogers v. Toni Home Permanent Co. This opinion began the erosion of the legal insulation provided manufacturers against suits by ultimate consumers and other members of the public.

The plaintiff had suffered personal injuries from the use of a home permanent. Suit was initiated against the manufacturer on the theories of negligence, breach of express warranty, and breach of implied warranty. In the form the case reached the Supreme Court, the issue presented was whether an ultimate consumer could proceed directly against the manufacturer on the theory of express warranty or whether the action must be based on negligence. Wood v. General Electric was cited for the necessity of privity in a warranty action.

The court carefully explained that the term "warranty" historically had its foundation in tort law and was in the nature of a deceit action which presents no privity obstacles. Attention was directed to current marketing practices whereby manufacturers make extensive use of media to advertise their products, ship their products in sealed packages, and utilize the retailers as mere conduits to the ultimate consumer. The court observed that members of the public often rely exclusively on the representations of the manufacturer in determining their purchases. The warranties made by the manufacturer in his advertisements and on his product's label serve as inducements. Therefore, reasoned the court, the consumer who buys relying on such representations should have recourse to the manufacturer if the product is not as represented and causes injury. Privity, it was held, is not required in an action for breach

56 Welsh v. Ledyard, 167 Ohio St. 57, 146 N.E. 2d 299 (1957).
57 167 Ohio St. 244, 147 N.E. 2d 612 (1958).
58 159 Ohio St. 273, 112 N.E. 2d 8 (1953).
of an express warranty sounding in tort. The express warranty action was characterized as tortious in nature not contractual.

The court drew a distinction between an express and an implied warranty observing that the latter arises by implication of law, rather than from any affirmations of the manufacturer. By so doing, it was not necessary to overrule Wood v. General Electric Co.\(^{59}\) Hence, privity remained a requirement where implied warranties were in issue but not if express warranties sounding in tort were alleged. The opportunity for direct actions against manufacturers increased accordingly.

Three of the seven justices took exception to the imposition of tort liability on a manufacturer through the vehicle of a warranty when the manufacturer was innocent of any dishonesty, bad faith, negligence or other fault in making the affirmation constituting such warranty. If the manufacturer was careless in his declarations or knew of any deficiencies, the necessary scienter could be found to support a deceit action. On the other hand, if the malfeasance consisted of not being aware of what he should be aware of, the manufacturer's liability should be founded in negligence. The majority opinion decided that scienter was not necessary to impose express warranty liability.

Three months later the Court of Appeals for Cuyahoga County reviewed a case wherein the trial court had awarded a directed verdict after the plaintiff's presentation of his evidence.\(^{60}\) The plaintiff based the suit on negligence, breach of an express warranty and breach of an implied warranty. The product was a home permanent whose use produced personal injuries. The appeal placed in issue the appropriateness of the trial court's conduct in preempting the jury. One determination by the Court of Appeals was that under the rationale of the Rogers v. Toni Home Permanent Co. case,\(^{61}\) the express warranty issue should have gone to the jury. Of more significance was its finding with reference to the negligence and implied warranty issues. As to negligence, the court observed that when a manufacturer markets an inherently dangerous product and the purchaser's evidence shows that use of the product according to directions proximately caused the injuries, it is sufficient to permit the case to go to the jury on the issue of negligence. The court did not mention res ipsa loquitur or the necessity of showing how the defendant may have failed to exercise ordinary care under the circumstances. Such evidence would not seem to present any issue of negligence to the jury.

The second significant ruling in the case was the court's conclusion

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\(^{59}\) 159 Ohio St. 273, 112 N.E. 2d 8 (1953).


\(^{61}\) 167 Ohio St. 244, 147 N.E. 2d 612 (1958).
that the issue of implied warranty could go to the jury without the need
of showing privity as required by the Supreme Court decision in Wood v. General Electric\(^62\) and Welsh v. Ledyard.\(^63\) In Rogers v. Toni Home Permanent Co., the Supreme Court had indicated a willingness to
reexamine the Wood v. General Electric\(^64\) decision if a similar case was
brought to it. The Court of Appeals cited the original tort nature of
warranty and asserted that where a manufacturer makes express
representations the intent is not to contract *eo instanti*. Rather, the intent
is to induce a bargain and it is the inducing representations that serve as
the basis of liability, not the contract. Further, where the manufacturer
induces the sale of a product by advertisements urging its use, there is an
implied warranty that such product is of merchantable quality and privity
should not be a bar to an action based on this implied warranty.

Subsequent to the Markovich v. McKesson and Robbins decision,\(^65\)
an interesting application of Ohio law was made by the Court of Appeals
for Lucas County.\(^66\) A purchaser of a new automobile brought suit on the
basis of an implied warranty that the automobile was fit and proper for
transportation purposes. It was alleged that the manufacturer represented
and implicitly warranted the product was in good condition, mechanically
fit, free from defects and would give proper service. Monetary damages
only were sought. To cope with the legal dilemma presented by the
Rogers v. Toni Home Permanent Co., Wood v. General Electric, and the
Markovich v. McKesson & Robbins cases, the court liberally
construed the pleadings as stating a cause of action for breach of an
express as well as an implied warranty. This interpretation was given
even though counsel for the plaintiff asserted the plaintiff was relying
for recovery on breach of an implied warranty. The court's interpretation
enabled it to overrule the demurrer of the manufacturer on the basis
of lack of privity, thereby avoiding the issue of whether or not privity
was required where an implied warranty was in issue.

Six months later, the Court of Appeals for Cuyahoga County ruled
directly on the issue of privity in implied warranty actions and held
that Wood v. General Electric Co. “completely settled” the question.\(^67\)
This same court reaffirmed its position in 1962 in Miller v. Chrysler
Motor Corporation,\(^68\) specifically rejecting the argument of the plaintiff
that privity was not necessary since historically a warranty action is
one in tort, not in contract.

\(^{62}\) 159 Ohio St. 273, 112 N.E. 2d 8 (1953).
\(^{63}\) 167 Ohio St. 57, 146 N.E. 2d 299 (1957).
\(^{64}\) 159 Ohio St. 273, 112 N.E. 2d 8 (1953).
\(^{68}\) 90 Ohio L. Abs. 317, 183 N.E. 2d 421 (1962).
At this point, Ohio enacted the Uniform Commercial Code containing the previously discussed provisions regarding types of warranties, their exclusions and limitations, and the beneficiaries of these warranties. The Code left the judiciary free to develop the law regarding the extension of warranties beyond the immediate purchaser, his family, members of his household or guests in his home.

Early in the same year, 1962, Justice Traynor speaking for the Supreme Court of California issued his landmark opinion in Greenman v. Yuba Power Products, Inc. This case is recognized as the first to expound the theory of a manufacturer's strict liability in tort. The case influenced the ultimate provisions of section 402A of the Restatement (Second) of Torts.

In Greenman, the manufacturer was pursued by a user of a power tool who had received it as a gift from his wife. The evidence indicated defective design and construction. The theories of liability against the manufacturer were negligence, breach of express warranty and breach of implied warranties. The defendant contended that the injured person had not given it notice of any warranty breach within a reasonable time after the injury as required by the Uniform Sales Act of California. The court asserted that the warranties involved were not those arising from the sales contract but were those arising from the common law decisions imposing warranties independently of the contract of sale. Hence, the statutory notice requirement was not applicable. Of greater significance in the case, however, was Justice Traynor's pronouncement:

Moreover, to impose strict liability on the manufacturer under the circumstances of this case, it was not necessary for plaintiff to establish an express warranty. . . . 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.

Anticipating confusion with the use of the word "warranty" to define such liability Justice Traynor continued:

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

69 129 Ohio Laws 13 (1961) effective July 1, 1962 and appearing in the Ohio Revised Code as Chapters 1301 through 1309.
70 At the time of its adoption by Ohio, the Uniform Commercial Code, § 2-318, did not offer alternatives. Hence, Ohio incorporated the then Uniform provision extending the warranties to members of the buyer's family or household or guests in his home if it was reasonable to expect that such persons would use, consume or be affected by the goods. In this form, this section is mainly applicable to retailers not manufacturers. Ohio Rev. Code, § 1302.31 (1962).
72 Id. at 60, 377 P. 2d at 900, 27 Cal. Rptr. at 700.
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contract between them, the recognition that the liability is not assumed by agreement but imposed by law (citing cases), and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products (citing cases) make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.\(^73\)

The Ohio courts and the federal courts applying Ohio law, however, continued to require privity in implied warranty cases.\(^74\)

In 1964, the American Law Institute approved the present text of section 402A of the Restatement (Second) of Torts\(^75\) and the section was published in 1965.\(^76\) Its publication and the judicial reinforcement\(^77\) of the concept that followed, placed the theory on the horizon of the law of product liability in Ohio.

The Ohio Supreme Court spoke again in Inglis v. American Motors.\(^78\) The purchaser of an automobile alleged he was induced by the express warranties of the manufacturer to make the purchase. The warranties were made via mass communications and represented that the manufacturer's cars were free from defects. A claim under the implied warranties of fitness and merchantability was also asserted as well as negligence in not discovering the defects. The manufacturer demurred to all three causes of action and was supported by the trial court. Significantly, the plaintiff was asking for only monetary damages measured by the diminution in the value of the car. Citing the Rogers v. Toni Home Permanent Co. case, which involved personal injury, the court overruled the demurrer to the express warranty allegations. The effect was to hold that such an action will lie without privity where the only loss is monetary. The implied warranty allegations were found to be congruent with the express warranty claim and therefore no need to rule specifically on the implied warranty issue was present. The demurrer to the negligence claim was sustained with the holding that mere pecuniary loss of bargain must be recovered on contract not tort.

Summary

In Ohio, as the law developed through 1965, the manufacturer was susceptible to being pursued by at least the purchaser on the theory of

\(^{73}\) Id. at 61, 377 P. 2d at 901, 27 Cal. Rptr. at 701.
\(^{75}\) 41 A.L.I. Proceedings 349 (1964).
\(^{76}\) Restatement (Second) of Torts (1965).
\(^{78}\) 3 Ohio St. 2d 132, 209 N.E. 2d 583 (1965).
negligence or breach of express warranty. To pursue the negligence suit the non-privity plaintiff would have to show that the product was either inherently or imminently dangerous in the condition it was in when it left the manufacturer. Suits founded on negligence were allowed in cases involving a variety of products, e.g., those intended for personal use or consumption, machinery, electric products and automobiles. Persons whose association with the product had been foreseeable, e.g., the purchaser, the subpurchaser, a family member of the purchaser, or employee of the purchaser, were permitted to bring an action alleging negligence. Personal injury losses or injury to property were recoverable.

An action based on express warranty, where it was characterized as sounding in tort, no longer required a showing of privity where the injury was to the person or when a diminution in the value of the product was the injury. Although no cases appeared on the point, it could reasonably be concluded that damage to property would also be recoverable in such an action. Such a suit was available at least to the purchaser, a sub-purchaser, or a user. The Uniform Commercial Code extended the express contractual warranty benefits described in the Code to the family members of the purchaser, members of his household or guests in his home. The express warranty action encompassed the whole spectrum of products.

The implied warranty action required privity except to the extent of those beneficiaries enumerated in the Uniform Commercial Code. The lower courts' willingness to eliminate the privity requirement was rejected by the Supreme Court. The plaintiff had to be in privity with the seller or successfully urge a legal theory that would place him in privity. For example, the plaintiff might show that he was intended to be third party beneficiary of the sales agreement, that the seller was an agent of the manufacturer, or that he was a successor in interest of the buyer. The implied warranty action also encompassed the whole spectrum of products and recovery could be had for personal injuries or damage to property.

Thus, the product liability law of Ohio evolved with an aspect of "pigeonholing." In order to determine the basis for a product liability action, certain elements in the facts had to be "pigeonholed." What is the nature of the product? In what category is the plaintiff? Is he a purchaser, user, employee of the purchaser, family member or bystander? What type of injury is alleged? What theory or theories of liability may be supported?

Yet to appear in Ohio was the concept of strict liability in tort.

IV. LONZRIICK V. REPUBLIC STEEL CORPORATION

The Supreme Court of Ohio subscribed to the imposition of strict product liability on manufacturers in Lonzrick v. Republic Steel Corp.79

79 6 Ohio St. 2d 227, 218 N.E. 2d 185 (1966).
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decided in June of 1966. This case is selected as a benchmark in this article since it represents the most recent expansion of the law in Ohio. Following an analysis of this case and its effect on Ohio law, observations of recent developments outside of Ohio affecting the liability of manufacturers will be made. Of particular interest will be the identification of any tendency to limit this liability.

In the Lonrzick case, the plaintiff was an employee of a steel erector firm. While engaged in his usual employment, steel roof joists manufactured by the defendant collapsed causing personal injuries. The manufacturer was pursued on an alleged breach of the implied warranty that the roof joists were of good and merchantable quality. When the cause was filed in the Common Pleas Court of Cuyahoga County, the defendant demurred to the petition. The trial court sustained the demurrer on the rationale of Wood v. General Electric80 which required privity in an implied warranty action. The plaintiff was an employee of a subcontractor. The joists were purchased by the general contractor. The plaintiff elected to stand on his pleadings and the matter came before the Court of Appeals for Cuyahoga County for review.81

The Court of Appeals, noting the change in marketing techniques and citing cases from other jurisdictions, reversed the trial court. The issue as the Court of Appeals described it was whether or not a duty, apart from a contractual duty, had been breached. The manufacturer's duty, in its view, was imposed by tort law. The duty the manufacturer owes is to see that when the goods are used as intended there will be no injury to others. Under this concept, the class to whom the manufacturer owes this duty is quite broad. Greenman v. Yuba Power82 was cited for the explanation of why the implied warranty is one sounding in tort. Several cases were cited as standing for the proposition that anyone, apparently anyone, who is injured as a result of the use of a defective product may look to the producer for redress without privity.83 The court then characterized the case as based upon the theory of strict tort liability and observed,

While the words "implied warranty" are used, they are intended to mean and describe the duty and representation of a producer of chattels to the buying public that the goods may be used for the purposes intended without danger to the purchaser from latent defects making their use dangerous to the user. The use of the word

80 159 Ohio St. 273, 112 N.E. 2d 8 (1953).
"warranty" is probably improper; however, the courts in describing causes of action for strict tort liability in product cases, seem to have continued to use it for want of a better word, not intending it to mean anything more than the manufacturer putting his goods into the stream of commerce, thereby representing that they are of merchantable quality, unless a different intention is clearly expressed.84

The Court of Appeals adopted the principles of section 402A. In its decision the court enumerated three possible causes of action in a products liability case—negligence, breach of warranties sounding in contract, and strict liability in tort.

On review, the Supreme Court also enumerated three possible causes of action in Ohio—negligence, breach of warranties sounding in contract, and breach of implied warranties sounding in tort. It did not accept strict tort liability in the same substantive form as the Court of Appeals. Rather it described the third possible cause of action as one in tort based upon the breach of a duty assumed by the manufacturer of a product, a duty which arises from the implicit representation that the product is of merchantable quality and fit for its intended use. This duty is breached when a defect in the product causes injuries to a person whose presence could reasonably be anticipated. To recover, the plaintiff must allege and prove that a defect existed in the product manufactured and sold by the defendant, that the defect existed at the time the product was sold by the defendant, that the defect was the direct and proximate cause of the plaintiff's injuries, and that the plaintiff, at the time he was injured, was in a place where his presence was reasonably to be anticipated by the manufacturer.

The court acknowledged the confusion caused by using the word "warranty" to describe a tort obligation. Although a warranty action originally sounded in tort, the commercial world associates warranties with contract. The Supreme Court, while taking due notice of this fact, observed that this tort concept of warranty does not supersede or replace any warranties arising from a contract of sale. The duty of the manufacturer imposed by tort now exists side by side with any contract warranties. The beneficiaries of the warranties created by contract may proceed on either the contract or tort aspect of the warranties, whereas other persons must base their remedy on the tort concept of warranty.

Lonzrick was described as a "user" of the product. Since he was working on the building utilizing the roof joists he might reasonably be classified as a "passive user" within the context of Comment 1 to section 402A, rather than a bystander. The court identified assumption of risk and intervening cause as possible defenses. Four members of the court joined in the majority opinion overruling the demurrer of the manufacturer; three dissented.

84 1 Ohio App. 2d at 384, 205 N.E. 2d at 99.
The dissent expressed the concern that the implied warranty in tort theory of the majority made the manufacturer an unlimited insurer of any damage proximately caused by a defect in his product. This would be true, according to the dissent, even though no amount of care could have eliminated the defect and even though no representations were made and relied upon. Further, the majority emphasized the importance of a defect and the petition did not allege a defect, but simply that the product was "not of good and merchantable quality." These are not necessarily identical conditions of the product. The roof joists could have been of less weight bearing capacity than specified by the buyer and as a result the implied warranty of merchantability, as defined in the Uniform Commercial Code, would have been breached. However, the roof joists would not have been "defective." If the petition had alleged a defective condition existing when the product was sold by the defendant and proximately causing the injury of the plaintiff, then a cause of action in negligence could be sustained and the plaintiff would have the help of the doctrine of res ipsa loquitur. Also, the prior Ohio cases, Rogers v. Toni Home Permanent and Inglis v. American Motors, had stressed reliance as a factor in warranty actions sounding in tort. No reliance was alleged or apparent in this instance.

The minority emphasized the fact that the authorities cited by the majority to sustain the implied warranty in tort theory were authorities describing the strict liability concept in other jurisdictions. The concept of strict product liability exists in Ohio, according to the minority, by statutory declaration as in the case of food products. The minority recommended that any extension of strict product liability should be made by the legislature.

The minority questioned the qualification of the court to fully evaluate the factors involved in imposing strict liability on a manufacturer. The usual argument in favor of the doctrine is to spread the risks of loss over the community through the pricing policies of the producer. The legislature, as opposed to a court, is in a position to conduct hearings to

85 167 Ohio St. 2d 244, 147 N.E. 2d 612 (1958).
86 3 Ohio St. 2d 132, 209 N.E. 2d 583 (1965).
determine the availability of insurance to producers to protect against this
liability or to determine other means of distributing the costs among the
public. The legislature could also evaluate the potential adverse affect on
desirable activity and how a manufacturer might afford such protection.

The dissent also noted that since the decisions in Rogers v. Toni Home Permanent,90 Wood v. General Electric,90 and Welsh v. Ledyard,91 the Ohio Legislature had enacted the Uniform Commercial Code. Section 2-31892 of the Code extended the seller's warranties to any natural person who is in the family or household of the 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. The effect of this legislation, argued the minority, was to overrule Welsh v. Ledyard93 involving a retailer but approve Wood v. General Electric Co.94 case requiring privity with a manufacturer. The dissent referred to Comment 3 to section 2-318 which indicates that a seller's warranties shall not extend to a person who is not "in the distribution chain."

Judge Schneider, a dissenting Justice, noted that the basic difference between the majority and the minority of the court was the acceptance of the concept of imposing legal liability without consideration of any standard of care. Judge Schneider concluded,

If the plaintiff should succeed in laying the defect which proximately caused his injury at the door of defendant's place of business, the defendant will be permitted no explanation of any transaction occurring therein, including that which might tend to show that every precaution known to man was exercised to prevent the occurrence of the claimed defect.95

In Lonzrick, did Ohio adopt the concept of strict product liability described in section 402A? The Court of Appeals expressly approved the section as the basis for its decision. The dissenting Justices of the Supreme Court suggested the majority by reference had adopted the doctrine although the cause was characterized as arising from warranty. However, the majority opinion did not mention the doctrine but deliberately eliminated it in the enumeration of the legal theories available in Ohio substituting instead the theory of breach of implied warranty sounding in tort. Is this a meaningful distinction?

Some differences are apparent. Section 402A liability is imposed

89 167 Ohio St. 244, 147 N.E. 2d 612 (1958).
90 159 Ohio St. 273, 112 N.E. 2d 8 (1953).
91 167 Ohio St. 57, 146 N.E. 2d 299 (1957).
93 167 Ohio St. 57, 146 N.E. 2d 299 (1957).
94 159 Ohio St. 273, 112 N.E. 2d 8 (1953).
95 6 Ohio St. 2d at 252, 218 N.E. 2d at 201.
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upon a seller who sells a defective product in the ordinary course of business. The Lonzrick opinion repeatedly limits the liability described therein to a seller who is a manufacturer. The legal position of the intermediaries under the implied warranty theory is not defined. The liability of the retailer, wholesaler or distributor must remain on the basis of contractual warranties, negligence or breach of an express warranty sounding in tort where reliance is an essential element.

Another variance relates to the type of injury for which recovery may be had. Section 402A extends its provisions to users or consumers whose person or property is injured. The implied warranty in the Lonzrick decision was applied to permit recovery for personal injuries. However, it can be expected that the Supreme Court will parallel its decisions in regard to express warranties and extend the manufacturer's liability to property damages and, perhaps, to monetary losses.

Section 402A is available to a consumer or user, the latter term being broadly defined. The Supreme Court decision permits suit by a person whose presence was in a place the manufacturer could reasonably anticipate. On the surface, an implied warranty action appears to be available to a larger class of persons.

The major deviation from section 402A occurs in the type of defect that must exist. The Restatement provides that the defective product must be unreasonably dangerous whereas the Lonzrick opinion imposes liability where the product is not fit for its ordinary intended purpose. It would appear that the burden of proof regarding the defect would be greater under section 402A. A product that is defective under section 402A would also be defective in the sense that it would not be fit for its ordinary intended purpose. However, a product that is not fit for its intended purpose and thus defective under Lonzrick, would not necessarily be unreasonably dangerous. Hence, it would seem that a manufacturer's liability may be broader in scope under the warranty theory.

The other elements of section 402A are similar to the elements of the implied warranty theory described in Lonzrick. The common aspects are (1) all products are encompassed, (2) the product must be defective, (3) the defect must have existed at the time the product left the control of the defendant, (4) the product must have been being used as intended, (5) the defect must have proximately caused the injury, (6) liability may result although all possible care has been exercised in the preparation and sale of the product, and (7) privity of contract need not be present.

Even though the Supreme Court of Ohio refrained from adopting in total the legal principles of section 402A, the above comparison indicates that Ohio subscribes to a concept of imposing strict liability on a manufacturer. Indeed, in a subsequent case, an appellate court cited Lonzrick as introducing strict product liability in Ohio.\footnote{96 Groves v. Petroleum Co., 22 Ohio App. 2d 25, 257 N.E. 2d 759 (1969).} Irrespective of

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its historical correctness, the court would be well advised to abandon the use of the term “warranty” to describe this liability. The recent use of the word has been associated more closely to contract liability. For clarity “warranty” should be reserved to describe the contractual liabilities imposed by the Uniform Commercial Code. These contractual warranties could be extended, if deemed appropriate, to other members of the distributive chain by judicial decision or legislative enactment.

The Lonzrick decision represents the furthermost reach of the law of product liability as it applies to manufacturers in Ohio. For understanding purposes, the law of Ohio has been briefly traced from the time the manufacturer was shielded by the need for privity in both tort and contract actions. What has occurred in Ohio is representative of the development of product liability law in those jurisdictions that presently subscribe to strict liability. Section 402A was published in 1965 and Lonzrick decided in 1966. What has occurred in the past few years? Has section 402A been controlling and significant in strict liability jurisdictions? Have new principles appeared? Has the recent trend been to broaden or limit a manufacturer’s liability?

To this point, achieving an understanding of the theories of product liability, their development and interrelationship has been the objective. With this background, the intent is to explore the above questions and others as reflected by the decisions appearing throughout the United States since Lonzrick.

V. PRODUCT LIABILITY DEVELOPMENTS SINCE LONZRICK

The development of the law of product liability in Ohio is representative of the developmental pattern in the several states. Initially, lack of privity precluded warranty or negligence actions directly against the manufacturer. Privity as an essential element was eliminated first in negligence proceedings. Subsequently, privity disappeared in warranty actions where the seller had made representations in the nature of express warranties to the purchasers of his product. Eventually, privity disappeared in suits based upon implied warranty as defined in the statutory law of contracts for the sale of goods. As the injured party became further removed from the sales contract, the courts became uncomfortable with the extension of contract rights to remote parties and commenced to characterize warranty actions as sounding in tort. A theory of manufacturer’s liability to remote parties sounding in tort evolved divorced from warranty and its contractual aspects. This theory of liability was described as strict liability for the sale of defective products. The elements of this theory were set forth in section 402A of The Restatement (Second) of the Law of Torts. The several states are in various stages in the development of this rapidly changing area of the law. Some states have yet to subscribe to imposing tort liability on
the manufacturer without some degree of fault and impose tort liability on the basis of negligence.\textsuperscript{97} Four states, including Ohio, subscribe to the concept of strict liability, employ the rationale of section 402A, but treat the basis of liability as "warranty" sounding in tort.\textsuperscript{98} Tennessee favors section 402A but still uses warranty terminology and distinguishes implied warranties as envisioned by section 402A\textsuperscript{99} from the implied warranties described in the Uniform Commercial Code. Currently, courts in twenty-one states have accepted the concept of strict tort liability as defined in section 402A.\textsuperscript{100} In addition, four federal district courts and four federal courts of appeal, in the absence of precedent in six states, applied section 402A as the probable state law governing the case.\textsuperscript{101} Thus, courts affecting thirty-one state jurisdictions have accepted a

\textsuperscript{97} For example, Myers v. Montgomery Ward & Co., 253 Md. 471, 252 A. 2d 855 (1969).


\textsuperscript{99} This rule (referring to sec. 402A) of course, places a much heavier burden of proof upon the purchaser than does the rule which allows recovery by the purchaser from his immediate seller under T.C.A. sections 47-2-314 and 47-2-315 of the Uniform Commercial Code." Leach v. Wiles, 58 Tenn. App. 286, 429 S.W. 2d 823 at 295 (1968), 429 S.W. 2d at 832. The court is referring to the additional required proof that the defective product was \textit{unreasonably dangerous} to the user or his property.


concept of strict liability. It is reasonable to conclude that further acceptance will ensue.

With such widespread acceptance manufacturers must be concerned with the interpretation and application of the elements establishing strict liability. A review of court decisions throughout the United States since the Lonzrick\textsuperscript{102} decision follows to examine the interpretative trends.

Who May Be a Defendant?

One of the principal justifications asserted for the adoption of strict liability was to place the burdens resulting from the use of defective products on the manufacturers and other sellers of goods where they could be more readily absorbed. This policy permits any loss to be distributed throughout the economy through the seller's prices. It is well established that direct actions can be brought against manufacturers on either theory of tort liability, negligence or strict liability.\textsuperscript{103} In contrast to negligence, strict liability has been generally imposed only on those who are engaged in the business of supplying goods of a particular kind. This is consistent with the rationale of section 402A.\textsuperscript{104}

Of interest to the manufacturer is the availability of strict liability against distributors and retailers. If it is not available as to these members of the chain of distribution, the manufacturer would be the only one against whom strict liability could be pressed. Section 402A encompasses all sellers engaged in the business of selling a particular product and courts who have determined the issue have included these intermediaries as proper defendants.\textsuperscript{105} Where a retailer solicits orders which are shipped directly from the manufacturer to the purchaser, it may be difficult to prove negligence on the part of the retailer. If the product were in fact

\textsuperscript{102} Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E. 2d 185 (1966).


\textsuperscript{104} Restatement (Second) of Torts (1965), § 402A, Comment f.

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defective, however, the retailer could be reached under the strict liability doctrine. Such a result, coupled with the fact that generally the wholesaler and retailer are often mere conduits of packaged products without any ability to control their condition, has prompted severe criticism of the policy imposing strict liability on these intermediaries.¹⁰⁶ An Oregon court was prompted to comment, "If both privity and fault are irrelevant, the wholesaler would be liable, not for a duty he failed to perform, nor for the breach of a contract he never made, but because he happens to lie in the stream of commerce.”¹⁰⁷ Some states have yet to rule directly on this issue.

If the seller is a brand name distributor, however, such as Montgomery Ward or Sears Roebuck and Company, the courts hold, and probably should hold, the seller to the same legal accountability as a manufacturer.

The manufacturer may incur liability not only by placing his finished goods in the stream of commerce but also by supplying component parts to other manufacturers of finished goods or by purchasing component parts for his own product. Early limitations on the strict liability of component part manufacturers are disappearing. In the leading New York case of Goldberg v. Kollsman Instrument Corporation,¹⁰⁸ the court in limiting the plaintiff, a passenger in an airliner, to recourse against the manufacturer of the finished product commented that access to the finished good manufacturer under strict liability concepts provided sufficient remedy to the injured passenger. In a subsequent case, a federal court applying New York law was careful not to open the component part manufacturer generally to suit but suggested that where the manufacturer of the finished product was not susceptible to suit the component part manufacturer could be reached.¹⁰⁹ In that case the primary defendant was the United States government which was immune from suit.

Other jurisdictions, however, are setting the pattern of holding the component part supplier accessible. The leading case casting strict liability on a component part manufacturer is Suvada v. White Motor Company.¹¹⁰ At least Oklahoma, Connecticut, Louisiana, Pennsylvania, Minnesota, 


¹¹⁰ 32 Ill. 2d 612, 210 N.E. 2d 182 (1965).
and Michigan agree. Indeed, Connecticut apparently would extend strict liability to the manufacturers of sub-component parts. Of course, the plaintiff must allege and prove that the component part was expected to and did reach the injured party without substantial change in its condition as sold.

A significant recent expansion in the class of eligible defendants affects manufacturers in their testing and promotional activities. Section 402A imposes liability on "sellers" of products, and, indeed, this has been the focus of the courts. The Supreme Court of Texas, in its decision adopting section 402A, held that one who delivers an advertising sample to another with the expectation of profiting therefrom through future sales is in the same position as one who sells a product. In this case, samples were supplied to a beauty parlor and the owner suffered personal injury when an employee gave her a permanent. More recently, an Indiana court suggested redefining the category of persons on whom strict liability should be imposed. A paint company supplied unsatisfactory paint to its customers and to remedy the situation furnished a paint remover to them free of charge. The plaintiff's decedent was fatally injured when the remover caught fire and suit was initiated under the strict liability doctrine. The problem facing the court was that the product had not been sold. The court may have fictionalized that the remover was "sold" as part of the original sale of the paint but instead elected to define as a proper defendant one who places a product in "the stream of commerce." Manufacturers of such products as drugs or cosmetics where promotional or test samples are employed in marketing their goods would be reachable without the presence of a sale under the "stream of commerce" rationale. At this point, it should be noted that strict liability has been imposed on other than sellers, e.g., lessors, builders, licensors, and suppliers of services.

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How long may the manufacturer be exposed to strict liability after the original sale of his product? The answer, where the product was defective when it left the manufacturer's control, is as long as a defective product exists and its defective condition is the cause of the loss. This posture of the law is especially crucial where the alleged defect is in the design of the product. It requires a manufacturer who discovers a latent defect in the goods after their sale to take steps to correct or warn of the deficiency. *Roseneau v. City of New Brunswick*119 illustrates the extended period of exposure a manufacturer may endure. Water meters were defectively manufactured and sold to the city in 1942. The meters were installed in 1950 and the injury to the property of the plaintiff occurred in 1964. The court ruled that the statute of limitations commenced when the damage occurred and a suit filed within the statutory period after the injury was timely brought. Furthermore, the original sale of the product to the consuming public does not terminate the manufacturer's liability. The manufacturer of an automobile sold as a used car has been held amenable to suit.120 The automobile was manufactured in 1959, purchased as a used car in 1961 and the collision occurred, allegedly due to a design defect, in 1963.

The manufacturer must also anticipate that whenever a seller downstream in the distributive chain is pursued on the theory of strict liability, he may be impleaded as a defendant.121

What Products?

In the promulgation of section 402A it was initially suggested that the doctrine should be limited to the sale of food.122 Extension was then recommended to include products for "intimately bodily use."123 As it was finalized the section was intended to apply to any product. The courts have given effect to this intention. The Nevada Supreme Court recently announced, "We now extend that doctrine (strict liability) to the design and manufacture of all types of products."124 The plaintiff must establish that his injury was caused by a defect in the product, that such defect existed when the product left the hands of the manufacturer, and that the product in its defective condition was "unreasonably dangerous to the user.

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119 51 N.J. 130, 238 A. 2d 169 (1968). See also, Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W. 2d 672 (Iowa 1970), where strict liability recovery was allowed for a defective brake drum on a truck that was 21 months old and had been driven 30,000 miles.

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or consumer." A review of the cases arising in the past five years on which this article is based reveals that the automobile and truck manufacturers are by far the most frequently pursued. Other frequent defendants are the producers of power machinery and tools, the tire manufacturers, the manufacturers of chemical products such as cleaners and fertilizers, and the manufacturers of drugs, cosmetics, food and beverages. The appearance as defendants of manufacturers of products with rather high coefficients of safety illustrate the applicability of strict liability to any product. Producers of shoes,125 shower mats,126 baking dishes,127 tarpaulins,128 vacuum cleaners,129 and catchers' masks130 have defended strict liability suits.

What Is a Defective Condition?

Proof of the elements associated with the concept of a defective product is the focal point for the establishment of strict liability. The injured party must allege and prove the existence of a defect that is unreasonably dangerous, that the defect existed when it was delivered by the seller,131 and that the defect was the proximate cause of injury. This concept implies that products may be defective but not unreasonably dangerous and strict liability would not apply. Further, it suggests that latent defects are of concern since a patent defect in manufacturing would preclude the product from being unreasonably dangerous. This evaluation is substantiated by the cases allowing recovery on a theory of strict liability.132

The observation has been made that the elements of a defective product under the strict liability doctrine do not differ materially from the elements that must exist in an action based on negligence.133 This practical evaluation is essentially valid since the establishment of the

elements of a defective product under strict liability would permit invoking *res ipsa loquitur* to take a negligence issue to the jury. However, as will be developed later, there is a theoretical difference in the two theories that have caused courts in a given case to allow the case to go to the jury on the basis of strict liability but not on the theory of negligence. This difference is that in a negligence action the plaintiff must trace the defect to a negligent act of the defendant whereas under strict liability the plaintiff must show only the defective condition. What conduct of the defendant produced the defect is not a strict liability issue.

There are two significant evidentiary rules appearing regarding proof of the defective condition. First, the courts are permitting the issue of a defective condition to go to the jury where the only evidence of a defect is inferential and not direct. Second, the cases reveal a tendency by the courts to accept the premise that the injured party need not prove any particular defect but only that the product was defective in the sense that it was not fit for its intended use. Thus, when the power steering fails on an automobile the plaintiff need not show what was defective but that the automobile itself was not fit for its intended use.

This view raises the issue of what a consumer should reasonably expect with reference to the intended use of the product. In the Oregon case adopting strict liability, the evidence indicated that before the wheel of a truck failed the wheel struck a five-inch rock. The court asserted that the question for the jury was what consumers reasonably may expect from a product not what they should expect. Evidence of this nature was not produced. To be unreasonably dangerous the product must be dangerous beyond the degree ordinarily contemplated by the consumer. The court accepted the argument that a defect can be shown by proof that the product did not perform in keeping with the reasonable expectations of the user rather than requiring proof of a specific defect.

A manufacturer's liability will not necessarily be preempted by the fact that the product was in use for a substantial period of time. Decisions favorable to plaintiffs have been received where an automobile was driven eight months and three thousand miles before accident,

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138 American Motors Corp. v. Mosier, 414 F. 2d 34 (5th Cir. 1969).
truck was in use for four months and over five thousand miles, and a hammer was in use for eleven months before it chipped.

If the product is defective and proximately causes the injury the fact that the injured person acted negligently, unless his negligent conduct is in the nature of assumption of risk, will not preclude liability. Where the injured person is unaware of the defect and is negligent in the use of the product, the careless conduct is not available as a defense. For example, liability cannot be avoided where the plaintiff drives a defective automobile at an excess speed, while intoxicated, or in some other careless manner and is injured as a result of the defect.

The manufacturer's primary concern must be with the design of his product. When a design is defective it is incorporated in all the products produced. Furthermore, the injured party has better evidence available to him to prove the defect and the fact that the product was used safely for an extended period of time by others is of little help to the defendant. The establishment of defective design in strict liability cases is similar to the process developed in the negligence cases. The plaintiff must allege and prove a duty to design in a certain manner, a failure of that duty, and an injury proximately caused by that failure. In a strict liability case, a defect in design makes the manufacturer's conduct an issue, while a defect arising in the production of the article does not.

In the past, the courts were reluctant to impose design liability. Special competency, judgment and knowledge are involved in the design of products and courts were hesitant to substitute their standards for those possessing this competency. In recent years this reluctance has retreated. The courts now firmly assert that defects include design defects.

The basic duty of the manufacturer is to design the product so that it is not unreasonably dangerous when employed in its normal foreseeable use. The salient elements are "unreasonably dangerous" and "foreseeable use." As to the latter, it has been held that use without mishap over a long period of time does not necessarily negate the finding

139 Ford Motor Co. v. Cockrell, 211 So. 2d 833 (Miss. 1968).
of foreseeability of a particular use that may be dangerous.\textsuperscript{144} Thus, a piece of machinery without adequate safety devices may be carefully used for a long period before an injury occurs but this safe use would not preclude a finding of unreasonably dangerous design for a foreseeable use. Not only must the manufacturer be concerned with the use of his product and its design, but in designing he must also anticipate hazards associated with its maintenance or care.\textsuperscript{145}

A major expansion in the design responsibility of manufacturers has recently occurred. This increase in design responsibility has been associated primarily with the automobile industry but the principles established encompass all other products.

A suit alleging negligent and defective design was decided against General Motors Corporation in 1966 which produced a definition of the standard of care a manufacturer owed in the design of an automobile.\textsuperscript{146} The automobile in which the decedent was riding had what was described as an "X frame" which, it was alleged, did not provide adequate protection to the occupants of the car as did the more conventional perimeter frames. As a result, in a collision in which the decedent's car was struck broadside, fatal injuries were incurred. The personal representative of the decedent asserted that the event causing the death was a foreseeable event and the design created an unreasonable risk to the occupants. The District Court dismissed the complaint as not stating a cause of action. The Circuit Court of Appeals to decide the case had to define the design duty owed to users by the manufacturer. The court held that a manufacturer is not under a duty to make his product accident proof nor must he make his product "more safe" where the danger to be avoided is obvious.\textsuperscript{147} His duty is to make the product reasonably safe for its intended use. It was further emphasized that the intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur.

The rationale of the above care was followed by a federal district court in \textit{Shumard v. General Motors Corporation}.\textsuperscript{148} An automobile burst into flame following a collision causing fatal injuries to the plaintiff's


\textsuperscript{145} Richey v. Sumoge, 273 F. Supp. 904 (D. Or. 1967), where strict liability issue was given to the jury and the plaintiff recovered. The court asserted that the need to remove debris from parts of the machine while it was running was foreseeable.

\textsuperscript{146} Evans v. General Motors Corporation, 359 F. 2d 822 (7th Cir. 1966).

\textsuperscript{147} To the same effect, Royal v. Black and Decker Mfg. Co., 205 So. 2d 307 (Fla. Ct. App. 1967), where it was alleged that an electric plug could have been designed "more safely."

\textsuperscript{148} 270 F. Supp. 311 (S.D. Ohio 1967).
decedent. The plaintiff, emphasizing the foreseeability factor, charged that the manufacturer had the duty to design its automobile to be fireproof when involved in collisions with other objects. The court described the responsibilities of the manufacturer as the duty to design the car to be reasonably fit for its intended purpose, its normal and proper use, and not for an unintended use.

The principles expounded by those cases were shortlived. Approximately one year later, the Eighth Circuit Court of Appeals issued its precedent breaking decision in *Larsen v. General Motors Corporation.*

The plaintiff alleged that the design of the steering column assembly constituted an increased hazard to the occupant of the automobile when it was involved in an accident. The alleged defective design did not cause the collision. The accident was a head-on collision. The District Court granted summary judgment for the defendant. The Circuit Court asserted that the manufacturer's duty is to design a product that is reasonably fit for its intended use and free of hidden defects that could render it unsafe for such use. It then turned its attention to the "intended use" of the automobile. The court ruled that it is foreseeable that an automobile will be involved in some type of injury-producing accident and the manufacturer cannot say that such use is not intended. When the manufacturer's design causes an unreasonable risk to the users of its products, liability should follow. Such injuries, according to the court, are readily foreseeable as an incident of the normal and intended use of the automobile. The duty of reasonable care must be viewed in light of the risks involved. The court continued, "While all risks cannot be eliminated nor can a crash-proof vehicle be designed under the present state of the art, there are many common sense factors in design, which are or should be well known to the manufacturer that will minimize or lessen the injurious effects of a collision." The decision made it clear that this duty applies to all manufacturers with the customary limitations of intended or unforeseeable use. The court, while emphasizing that its holdings were relevant to the issue of negligence, indicated it anticipated no obstacle to employing these principles when the claim was based on strict liability.

The *Larsen* case represents a major change in the law concerning the design liability of manufacturers and has been accepted by other courts.

The obviousness of the design peril will not necessarily preclude
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design liability. In *Pike v. Frank G. Hough Company*, the defendant contended that the danger of being struck by a paydozer was a patent peril and therefore it had no duty to install safety devices to protect against an obvious danger. The California court disagreed stating that the peril was not obvious to bystanders and the obviousness of the defect is a matter of defense for jury consideration generally.

Although the design of the product must not present an unusual risk of harm, its design need not insure that an injury could not occur under any condition.

Turning to the duty of the manufacturer to warn, the law requires that the manufacturer must warn of any latent dangerous conditions. This includes conditions resulting from defective design. Where the danger is obvious and known to the user, no warning is required. Also, the duty to warn arises only when the product presents a danger in the course of intended use. It is understandable that the failure to exercise care to discover defects and warn as to their existence should give rise to actionable negligence when an injury occurs. However, to the extent that “failure to warn” is viewed as a defect under the concept of strict liability, the manufacturer could experience liability in those cases where he made all reasonable efforts to discover any defects but such defects were not discoverable within the current state of the art. Many cases in strict liability jurisdictions involving failure to warn are brought on a negligence theory. This reflects the uncertainty as to whether or not “failure to warn” is a defect under the rationale of section 402A.

Cases do appear treating “failure to warn” as a defect. A California appeals court, reversing a lower court’s judgment for the defendant notwithstanding the jury’s verdict for plaintiff, suggested that “failure to warn” could be a defect under the theory of strict liability. An Illinois appellate court, affirming judgment for the plaintiff on the theory of strict liability, specifically asserted that “defective product” encompasses a

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153 Schneider v. Chrysler Motor Corp., 401 F. 2d 549 (8th Cir. 1968), where an automobile window vent was open and, in a dark garage, the plaintiff was cut by the protrusion.
154 Tomicich v. Western-Knapp Engineering Co., 423 F. 2d 410 (9th Cir. 1970).
product without suitable warnings for its foreseeable use. In litigation concerning the Sabin polio vaccine, a federal appellate court asserted, "We regard failure to warn where the circumstances of sale imposed that duty, as exposing the vendor to strict liability in tort...." It can be anticipated that the courts will follow this rationale and give full effect to the principles set forth in comment j to section 402A.

In the negligence suits, the duty to warn has been interpreted generally to require warning as to consequences reasonably to be anticipated from a "foreseeable use" of the product. There is evidence that manufacturers may also have to anticipate "foreseeable misuse." In Simpson Timber Co. v. Parks, a stevedore was injured when he fell through a package in which doors were packed for shipment. The doors were stacked in such a way that a well was formed where the glass was to be installed prior to use. While adjusting the ship's load, the stevedore stepped on the package in the area of the well and fell through. The instructions given by the court permitted recovery if the manufacturer knew before it delivered its goods to the dock that stevedores made a practice of walking on packages of cargo. Although the court asserted that the manufacturer did not have a legal duty to make inquiry as to the working practices of those who might handle his product, he would be held accountable when he knew of a "foreseeable misuse" and failed to warn.

The furnishing of instructions to avoid latent dangers may not satisfy the duty to warn. Directions are supplied to assure effective use of the product whereas warnings are necessary to assure safe use. Thus, where a manual was provided giving directions as to the operation of a trenching machine but no warnings were included as to the foreseeably dangerous positions an operator could take nor were instructions given as to where he should stand, the plaintiff was allowed strict liability recovery for defective design and failure to warn.

Who May Be a Plaintiff?

The comments to section 402A define a user of the product to include persons who are passively enjoying the product, such as

159 Restatement (Second) of Torts, § 402A, comment j reads, "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning on the container as to its use."
162 388 U.S. 459 (1967), vacating and remanding 369 F. 2d 324 (9th Cir. 1966).
passengers in automobiles or those doing work upon the product as in the case of an employee of a buyer. At the time the section was drafted the casual bystander had been denied recovery and the Restatement assumed a neutral position on further expansion of the class of plaintiffs. What has occurred in the interim?

Arguments urging limiting the liability to members of the distribution chain have been unsuccessful. The Uniform Commercial Code extends its warranties at least to family members, household members and guests in the home. To the extent that any person who is a beneficiary of the Code warranties is also a foreseeable user, a strict liability cause of action would also lie. It is well established that users are proper party plaintiffs. Under state wrongful death statutes, surviving spouses may proceed on the basis of strict liability. The husband of a user was permitted to recover on the basis of strict liability for injuries incurred by his wife from the use of hair bleach. The court commented that the negligence of the wife may have barred recovery on a negligence theory but this factor was no defense where strict liability was in issue. The donee of a buyer has been held to be a proper party plaintiffs include the employees of the purchaser, the son of an

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165 American Motors Corp. v. Mosier, 414 F. 2d 34 (5th Cir. 1969), son of purchaser; McDevitt v. Standard Oil Co. of Texas, 391 F. 2d 364 (5th Cir. 1968), wife and children of purchaser; McCormack v. Hankscraft, 278 Minn. 322, 154 N.W. 2d 488 (1967), daughter of purchaser; Wights v. Staff-Jennings, Inc., 241 Or. 301, 405 P. 2d 624 (1965), wife of purchaser.
employee of the purchaser,\textsuperscript{171} the employee of a bailee,\textsuperscript{172} the employee of a lessee\textsuperscript{173} and a lessee\textsuperscript{174} of the product as against the lessor on the basis of strict liability, and the buyer of a used automobile against the manufacturer.\textsuperscript{175}

The acceptance of bystanders as proper plaintiffs has produced the most significant expansion in this area of the law of product liability. Some courts have declined to designate the bystander as a proper party.\textsuperscript{176} These courts do not represent the prevailing trend. Generally, bystanders have been permitted to bring strict liability suits.\textsuperscript{177} Under the rationale of the \textit{Restatement} a passenger in an automobile is a "passive user" and can maintain an action.\textsuperscript{178} The plaintiff class has been expanded to include as foreseeable parties the passengers in the car struck by the defective automobile.\textsuperscript{179}

A dramatic extension of the policy toward bystanders appears in \textit{Mitchell v. Miller}, a case previously discussed.\textsuperscript{180} In that case, a golfer was fatally injured by an automobile that ran away allegedly due to a defect in the automatic transmission's "park" position. A demurrer filed by the defendant manufacturer challenging the ability of such a remote party to bring the suit was overruled.

The criteria of foreseeability is used by the courts to determine who is a proper party to bring an action. The question is whether or not it was foreseeable that the particular plaintiff would be affected by the product. One court observed, "A restriction on the recovery by bystanders is only the distorted shadow of a vanishing privity..."\textsuperscript{181} The same court reasoned,

\begin{itemize}
  \item Bengford v. Carlem Corp., 156 N.W. 2d 855 (Iowa 1968).
  \item McNally v. Chrysler Motors Corp., 284 N.Y.S. 2d 761 (1967).
\end{itemize}
If anything, the bystander should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunity.\textsuperscript{182}

Consistent with this reasoning, rescuers of a person in trouble because of a defective product have been allowed recourse to the manufacturer.\textsuperscript{183}

Foreseeability may be a term for which the phrase "public policy" could be reasonably substituted.

What Damages May Be Recovered?

The Uniform Commercial Code expressly provides for the recovery of consequential damages by a buyer.\textsuperscript{184} These damages could be in the nature of personal injury, property damage or commercial loss.\textsuperscript{185} Any disclaimer of liability for personal injuries to consumers is declared by the Code to be \textit{prima facie} unconscionable.\textsuperscript{186} Foreseeable damages resulting from the negligence of the seller with reference to his product are recoverable under the theory of negligence whether the loss be personal injury, property damage or ascertainable commercial loss. What factors of damage may be claimed from the manufacturer under the theory of strict liability?

Section 402A allows the user of consumer to recover for damages to his person or to his property. The courts consistently permit suits under the strict liability theory for personal injuries.\textsuperscript{187} An interesting development has appeared in the personal injury cases. Parallel with the extension of design liability there has been the problem of adducing to what extent the injury of the plaintiff was attributable to the defectively designed product. The problem arises whenever an injury results which is aggravated by a defectively designed product. In the \textit{Larsen} case,\textsuperscript{188} the defect

\textsuperscript{182} \textit{Id.} at 583, 451 P. 2d at 89, 75 Cal. Rptr. at 657.


\textsuperscript{184} Uniform Commercial Code, § 2-713 (1).

\textsuperscript{185} \textit{Id.} § 2-715 (2).

\textsuperscript{186} \textit{Id.} § 2-719 (3).


\textsuperscript{188} \textit{Larsen v. General Motors Corp.}, 391 F. 2d 495 (8th Cir. 1968).
was not alleged to be the proximate cause of the accident but a factor
causing greater injuries than should have been sustained. The principle
enunciated was that the defendant was not answerable for all the damages
resulting from the collision but only those injuries over and above what
would have been received without the design defect. The plaintiff must
carry the apportionment burden of proof. A similar problem will have
to be resolved in those jurisdictions subscribing to comparative negligence.
Wisconsin, for example, suggests that strict liability should be viewed
as negligence liability for the purpose of applying the comparative
negligence doctrine.\(^{189}\)

Damage to property is recoverable by a proper plaintiff,\(^{190}\) including
a bystander.\(^{191}\) When section 402A liability is in issue, disclaimers in
the sales contract are ineffective to preclude liability for property
damages\(^{192}\) as well as personal injury.

The aspect of monetary or commercial loss recovery on the basis of
strict liability is still undergoing development. In a recent federal appellate
court decision the court applying Pennsylvania law denied recovery of
commercial losses under strict liability.\(^{193}\) However, a federal district court
applying Tennessee law permitted consideration of the element of com-
mercial loss in a strict liability case.\(^{194}\) Another district court applying
Colorado law specifically ruled out commercial losses as an item of
damage under this theory.\(^ {195}\) It is anticipated that eventually the type
of damage experienced will be immaterial so long as the loss proximately
flows from the defect in the product.

Summary

This section has been devoted to exploring the trends of the past few
years in the interpretation of the law of strict liability. This theory of
liability has been stressed because it currently represents the most dynamic
theory of product liability. The theories of contract warranty and
negligence remain significant and available but neither have experienced

\(^{189}\) Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W. 2d 55 (1967).
\(^{190}\) Speyer, Inc. v. Humble Oil & Refining Co., 275 F. Supp. 861 (W.D. Pa. 1967);
Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966); Savage
v. Petersen Distributing Co., 379 Mich. 197, 150 N.W. 2d 804 (1967); Roseneau v.
City of New Brunswick, 51 N.J. 130, 238 A. 2d 169 (1968).
\(^{192}\) Arrow Transportation Co. v. Fruehauf, 289 F. Supp. 170 (D. Or. 1968); Seely
\(^{193}\) Southwest Forest Industries, Inc. v. Westinghouse Electric Corp., 422 F. 2d 1013
(9th Cir. 1970); to the same effect, Santor v. Karageusian, 44 N.J. 52, 207 A. 2d
305 (1965).
\(^{195}\) Miekle v. Smith-Brooks Printing Co., 303 F. Supp. 501 (D. Colo. 1969); to the
same effect, Seely v. White Motor Co., 63 Cal. 2d 9, 403 P. 2d 145, 45 Cal. Rptr. 17
(1965), containing a strong dissent supporting recovery of commercial losses.
in the past five years the expansion and change associated with strict liability. To this point, emphasis has been placed on the tendency to expand the application of strict liability through interpretation. Sellers have been defined to include not only the manufacturer of the finished product but the manufacturer of component and subcomponent parts. Strict liability has been imposed on brand name distributors, lessors, licensors, building contractors and suppliers of services. The exposure time for potential liability is measured from the date of the injury rather than from the date of the sale. Further, resale of the product does not preempt the manufacturer's liability.

Strict liability reaches the manufacturers of all products. True, some products by their nature are more apt to be defective and unreasonably dangerous but conceptually all products are encompassed and the courts have not excepted any type or class of product.

The defect may be shown by inferential evidence where direct evidence cannot be produced. Instead of requiring proof of a specific defect, proof that the product was not fit for its intended purpose has been accepted as sufficient evidence of a defect. The design duty of a manufacturer has been broadened and his failure to perform this duty may result in a defective product for the purposes of strict liability.

The manufacturer may now have to design a product "more safe" for its foreseeable uses and provide warnings of foreseeable "misuses."

The classes of permissible plaintiffs in a strict liability action has been expanded to include the bystander, going beyond the "passive user" class described in the comments to section 402A. Surviving spouses have successfully pursued wrongful death suits where state statutes allow such actions.

Finally, the elements of recoverable damages are being expanded to include commercial or monetary losses in addition to personal injuries and property damage. Although the law on this point is not well defined at the moment, the direction seems clear.

In view of these developments, the manufacturer might logically ask what the limits are to this liability. State legislatures have not defined any limits. The courts, therefore, must answer the question. What has been the response of the courts? A review of the selected cases follows exploring this question.

VI. A SEARCH FOR LIMITATIONS

The purpose of this section is to identify limitations on the liability of manufacturers, primarily strict liability, announced by the courts in recent years. No attempt is made to evaluate the practical limitations that may be encountered in the trial phase of a product liability suit.

The principles of negligence law are well established. A manufacturer pursued on this theory has available such defenses as contributory negligence, assumption of risk or the intervening negligence of another
party. In addition, the manufacturer is entitled to expect a normal use of his product.\textsuperscript{196}

In regard to liability founded on contractual warranty, the Uniform Commercial Code expressly provides a method to disclaim warranties\textsuperscript{197} and to limit consequential damages.\textsuperscript{198} As previously discussed, the disclaimers in a sales agreement do not operate to disclaim strict liability.\textsuperscript{199} Further, if the warranty is one sounding in tort, strict liability, there is no requirement of due notice.\textsuperscript{200} Of special importance are the provisions of the code prescribing unconscionable disclaimers\textsuperscript{201} or limitations of remedies which permit a court to refuse the enforcement of such provisions.\textsuperscript{202}

What limitations on recovery are emerging in the case law with respect to strict liability? The major limitation appearing is the failure of the plaintiff to make out his case. Proof of the defect and its causal relation to the injury are the focal points of the burden of proof. Another major element of the plaintiff's burden is proving the product was defective when it left the control of the manufacturer.\textsuperscript{203} Failure to carry the burden of proof constitutes the major limitation on the actual liability of manufacturers.

The comments to section 402A discuss certain limitations regarding an injured person's ability to recover.\textsuperscript{204} Contributory negligence is not a defense to the liability when such negligence consists mainly in a failure to discover a defect or to guard against the possibility of its existence. The recent cases sustain this position.\textsuperscript{205} The experience of the courts of

\textsuperscript{197} Uniform Commercial Code, § 2-316.
\textsuperscript{198} Id. § 2-719.
\textsuperscript{199} Supra, at 83.
\textsuperscript{200} Id. § 2-719 (3) makes limitations on damages for personal injuries, associated with consumer goods, \textit{prima facie} unconscionable.
\textsuperscript{201} Uniform Commercial Code, § 2-302.
\textsuperscript{202} Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 227 A. 2d 418 (1967); plaintiff failed to allege that product reached him without substantial change; Meche v. Farmers Drier & Storage Co., 193 So. 2d 807 (La. Ct. App. 1967), an elevator failed eleven years after delivery.
\textsuperscript{203} Restatement (Second) of Torts, § 402A, comment n.
Illinois illustrates the definitional difficulty encountered with contributory negligence as a defense to strict liability. In 1967, an appeals court in Illinois viewed contributory negligence as a proper issue in a strict liability suit.\(^{206}\) This position was followed in 1969 in *Taylor v. Carborundum Company*.\(^{207}\) In *Adams v. Ford Motor Company*,\(^{208}\) an appellate court reversed a judgment of a lower court on the basis that the court erred in its charge that to bar recovery the plaintiff's negligence must be the sole cause of the injury not just a contributory cause. Finally, the law of Illinois became consistent with the position of the *Restatement*.\(^{209}\)

The *Restatement* acknowledges that the form of contributory negligence which consists of voluntarily and unreasonably proceeding to encounter a known danger, commonly characterized as assumption of risk, is a defense to strict liability.\(^{210}\) The courts have followed this rule,\(^{211}\) especially where the hazard is obvious. Where the injured party has been properly warned,\(^{212}\) or has failed to follow proper instructions the defense of assumption of risk has been viewed as appropriate. The test used is a subjective one as to the particular plaintiff, that is, whether the specific plaintiff proceeded unreasonably to use the product after discovery of any defect.\(^{213}\)

Closely related to the assumption of risk rationale is the defense that the product was misused or used abnormally. Misuse or abnormal use has been viewed as similar to a defense of contributory negligence but permissible.\(^{214}\) In theory, the alleged defect must make the product unreasonably dangerous for its intended use and hence any misuse or abnormal use would be at the risk of the user. This principle has been


\(^{209}\) *See* VanDorpe v. Koyker Farm Implement Co., 427 F. 2d 91 (7th Cir. 1970).

\(^{210}\) *Restatement (Second) of Torts*, § 402A, Comment n.


\(^{212}\) Harris v. Belton, 258 Cal. App. 2d 595, 65 Cal. Rptr. 808 (1968), proper warning and plaintiff's injury was the result of a particular sensitivity.


\(^{214}\) McDevitt v. Standard Oil Company of Texas, 391 F. 2d 364 (5th Cir. 1968); Neusus v. Sponholtz, 369 F. 2d 259 (7th Cir. 1966).
applied by the courts. A recent interesting example of the facets of this defense appeared in *Schemel v. General Motors Corporation* wherein the plaintiff asserted that the defendant was negligent in designing an automobile that would travel 115 miles per hour. In affirming dismissal of the suit, the court equated *unlawful* use with unintended or abnormal use. Although the suit was brought in negligence the equation should transfer to strict liability.

A defense available to strict liability closely related to that of unintended use of misuse is intervening cause. Component part manufacturers may avail themselves of this defense whenever there has been a substantial change in their product in its incorporation into a finished product. The availability of intervening cause as a defense makes it advisable for the manufacturer to inform his customers of any known defects or dangers associated with the product whenever they are discovered. If he communicates this information to his customers and they fail to warn their customers, especially when the manufacturer is not in a position to identify and warn the ultimate consumer or user, a manufacturer may escape liability. Although this defense has been accepted where the manufacturer delegates servicing responsibilities to an intermediary, *Vandermark v. Ford Motor Company* places substantial limitations on the ability of a manufacturer to delegate certain responsibilities. In that case, the court refused to allow a manufacturer to delegate the responsibility for final inspections, connections, and adjust-

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217 384 F. 2d 802 (7th Cir. 1967).


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ments necessary to make the product ready for use, and avoid strict liability on the basis of intervening cause.

In addition to the above recognized defenses to strict liability, limitations on the liability of manufacturers could result from the interpretations placed on "unreasonably dangerous" and "foreseeability" of the danger or injury.

What is the nature of an unreasonably dangerous product? It has been defined as a product which a reasonable man would not sell if he knew of the risks involved with its intended use.221 A Florida court described a product as unreasonably dangerous when it is fraught with unexpected dangers.222 On these and similar tests manufacturers have escaped strict liability on the grounds that the product was not, even though technically defective, unreasonably dangerous.223

Similar holdings appear with reference to design responsibility. Generally, the design of a product must not cause unreasonable risk.224 The design responsibility does not require the creation of a product that is accident proof225 or "more safe" if its present state is reasonably safe.226 The Larsen case,227 however, suggests a reevaluation of the manufacturer's duty to design a product "more safe" with the result that a manufacturer may be required to design the product "more safe" for a foreseeable use.

An Oregon court expressed the view that strict liability should be applied consistently with tort law principles in regard to other conduct and, if it were, strict liability without fault would be invocable only when the product created an ultrahazardous condition.228 This position has not been accepted. However, the concept of "unreasonably dangerous" does

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221 Helene Curtis Industries, Inc. v. Pruitt, 385 F. 2d 841 (5th Cir. 1967).
226 Schemel v. General Motors Corp., 384 F. 2d 802 (7th Cir. 1967), ability of an automobile to travel at 115 m.p.h. does not make it unreasonably safe, strong dissent; Willis v. Chrysler Corp., 264 F. Supp. 1010 (S.D. Tex. 1967), design of automobile resulted in it breaking in two in a head-on collision, not unreasonably designed; Royal v. Black & Decker Mfg. Co., 205 So. 2d 307 (Fla. Ct. App. 1967), electric plug not unreasonably designed simply because it could have been made "more safe"; McNally v. Chrysler Motors Corp., 284 N.Y.S. 2d 761 (1967), ability to design a brake system "more safe" by installing a failure warning light does not render product unreasonably dangerous.
227 Larsen v. General Motors Corp., 391 F. 2d 495 (8th Cir. 1968).
provide a criteria capable of limiting the liability of producers. Current cases do not reveal a disposition in this direction.

Another possible interpretive limitation is the factor of foreseeability. Foreseeability is an operable consideration in determining whether or not the product is unreasonably dangerous for its intended use, whether or not there was a duty to warn, whether or not the plaintiff was a party who might be foreseeably injured by the product, and whether or not the particular damage was a foreseeable consequence of the defect in the product.

The manufacturer may avoid strict liability if he can show that the product, even though defective, was not being used in a foreseeable way. Recent cases relate that the manufacturer has no duty to warn of a hazard resulting from a nonforeseeable misuse of the product nor can he be held liable when the use itself is unforeseeable. A product is not necessarily unreasonably dangerous when it produces an allergic reaction nor is the manufacturer chargable with a duty to warn of possible allergic reaction. 229

However, the producer must exercise his wit to anticipate what consumers do reasonably expect from his product. 230

The marketing scheme of the manufacturer may be a factor in establishing his liability. A cosmetic producer was absolved of liability for injuries resulting from the use of a hair bleach when the product was intended to be supplied to professional cosmetologists for their use in preparing an end mixture. The injury resulted from an unauthorized mixture prepared by a nonprofessional cosmetologist. The court emphasized the fact that the nonprofessional was not a person who could reasonably be expected to use the product. 231 The marketing methods of the producer were cited as a factor bearing on the issue of foreseeability.

Other limitations appear in some jurisdictions which run against the current thrust of the law of product liability. New York insulated the

229 Helene Curtis Industries, Inc. v. Pruitt, 385 F. 2d 841 (5th Cir. 1967), use of the product by a non-professional person not foreseeable when the product was made especially for the professional cosmetologist; Littlehale v. E. I. duPont deNemours & Co., 380 F. 2d 274 (2nd Cir. 1967), a negligence suit holding that the defendant could not foresee its detonators manufactured for highly trained ordinance personnel would be used by a civilian employee of the Navy in a manner not intended; Preston v. Up-Right, Inc., 243 Cal. App. 2d 636, 52 Cal. Rptr. 679 (1966), pyramiding of ladder on top a scaffold not a foreseeable use of the scaffold; Westerberg v. School District No. 792, 276 Minn. 1, 148 N.W. 2d 312 (1967), a water extractor was used after its safety feature had failed. The court held there was no duty to warn of a use that could not be foreseen. This was a negligence suit but the principles should transfer to strict liability.


231 Heaton v. Ford Motor Co., 248 Or. 467, 435 P. 2d 806 (1967), the test for foreseeability purposes is what the customer expects from the product, not what they should expect.

232 Helene Curtis Industries, Inc. v. Pruitt, 385 F. 2d 841 (5th Cir. 1967).
component part manufacturer in the Kollsman case. A federal court construed Pennsylvania law as placing strict liability on sellers but not lessors. A California court suggested that it would not allow recovery of commercial losses on the theory of strict liability. These decisions do not reflect the present trends in product liability law.

Summary

As will appear later, the most effective limitation on a manufacturer's liability is the practical aspects of a plaintiff proving his case, especially the elements of a defective product and proximate cause.

It is apparent that few significant limitations are emerging in the legal theories of product liability. This is consistent with the current concern for the consumer. The most hopeful development for the manufacturer is the construction the courts may give to "unreasonably dangerous" and "foreseeable." The economic impact of the current trends and matters of public policy may encourage the courts to be more conservative in the future in the interpretation of these concepts. Presently, however, the tendency is to broaden their meaning.

VII. THE OPERATIVE EFFECTS OF STRICT LIABILITY

An exploration has been made of the recent interpretative developments in the law of strict product liability. The conclusion was reached that the courts are continuing to increase direct legal access to manufacturers through the interpretation of the elements of strict liability. Attention will now be shifted to the operative effects of strict liability. In making this analysis, no distinction was made between those jurisdictions which expressly subscribed to strict liability as conceived by section 402A of the Restatement and those which, as Ohio, characterize strict liability as a warranty action in tort. Both approaches impose a tort liability without fault and in this respect, are distinguishable from negligence. The cases for this analysis were selected from the 1969 and 1970 Cumulative Supplements to Hursh's American Law of Product Liability. Cases that did not involve a manufacturer or were concerned with peripheral issues were eliminated. For example, a decision by a federal court to the effect that maritime law permits product liability recovery was deleted since the case does not focus on the substantive aspects of strict liability. The remaining cases were classified according to whether or not the

235 Seely v. White Motor Co., 63 Cal. 2d 9, 403 P. 2d 145, 45 Cal. Rptr. 17 (1965), strong dissent on this point.
jurisdiction at the time of the suit subscribed to strict liability as a basis of product liability.

The cases appearing in strict liability jurisdictions were evaluated to determine the following:

1. In how many cases was a theory of strict liability asserted?

2. How many judgments were rendered for the plaintiff on the basis of strict liability? Would the plaintiff have received a judgment without the availability of strict liability? Why was strict liability essential to a favorable judgment for the plaintiff?

3. In how many cases did the plaintiff pursue his claim on grounds other than strict liability? How successful were the plaintiffs in these cases?

4. Where strict liability was in the suit and the case resulted only in a ruling, how many rulings were favorable to the plaintiff? Would the plaintiff have received the same favorable rulings without strict liability in the suit? If not, why not?

5. In how many strict liability cases did the manufacturer receive a favorable judgment and for what reasons?

6. In cases brought on other grounds than strict liability and won by the manufacturer, would the plaintiff have been successful if strict liability had been alleged?

The cases arising in non-strict liability jurisdictions were evaluated to determine how many were lost by the plaintiff, whether the availability of strict liability would have changed the result, and if so, why the result would have been altered.

As the above evaluations were made, a collateral attempt was made to determine any difference in tendencies between the state and federal courts.

The results of these evaluations must be tempered by significant qualifications. First, observations were limited to the cases as reported in the official state reports or the National Reporter System. No other records associated with these cases were utilized. Secondly, while some of the questions pursued could be answered quite objectively, others required a conclusion to be reached as a matter of judgment. The determination that a different result would have been achieved under strict liability is a judgment decision and the product of a degree of subjectivity.

The impact of strict liability on the law of product liability is evidenced by the ratio of cases arising in strict liability jurisdictions. Of the 264 cases selected for this analysis, 203 were litigated in strict liability jurisdictions or in federal courts applying the law of a strict liability jurisdiction. Of these 203 cases, 141 placed before the court the issue of strict liability or some element of this liability. Thus, in approximately 53.4% of the selected cases, wherein the defendant was a manufacturer, strict
product liability was in issue. Where strict liability was available to the plaintiff, it was placed in issue in approximately 69% of the product liability cases.

Why did the plaintiff not allege strict tort liability where it was available? The basic answer is that the doctrine does not encompass all possible aspects of a manufacturer's product liability. The majority of the cases where strict liability was not alleged concerned the manufacturer's failure to warn or to adequately warn. Negligence was frequently relied on in cases where the design of the product was in issue. In these cases, the product involved was not necessarily physically defective but the plaintiff alleged its design presented a degree of hazard or the product could have been designed more safely. A product that is suitable for its intended purposes and not unreasonably dangerous may produce a hazard. However, in such circumstances strict liability allegations would be inappropriate. Other cases, in which negligence was the basis of the suit rather than strict liability, had as their subject matter the testing of the product, improper selection of materials, failure to follow specifications, or the existence of foreign substances in the product. Other actions were based on express warranties where the product was not necessarily dangerous but it did fail to comply with the representations of the manufacturer. Nevertheless, the vast majority of cases in strict liability jurisdictions introduced the issue of strict liability either as the sole basis of the plaintiff's case or in conjunction with other allegations of negligence or warranty.


With respect to the 141 cases appearing in strict liability jurisdictions and presenting an issue of strict liability, 94 resulted in a final determination of the liability issue. In 38 cases the plaintiff was successful and in 56 instances the defendant-manufacturer received a judgment of no liability. In those cases where the plaintiff was successful, 14 apparently would have been resolved the same way if negligence had been the basis of the suit. These cases generally concerned a defect that was a result of negligent design or a failure of the duty to warn.\[245] In other cases negligence was entwined with the strict liability issue or the court held that *res ipsa loquitur* was operative.\[266] In 23 of the cases decided for the plaintiff, strict liability appeared essential to the decision. In some of these cases, the plaintiff succeeded by carrying the burden of proving the defect and its causal relationship to the injury. However, he was not required to prove how the manufacturer failed to perform its legal duty.\[247] Of course, if such proof had been necessary the plaintiff may have been able to carry the burden of linking the negligence of the defendant to the defect. Strict liability was also beneficial to the successful plaintiff in those cases where evidence of contributory negligence was disallowed as irrelevant.\[248]

In those cases where the manufacturer received a favorable judgment


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there did not seem to be any in which an alternate theory of liability would have changed the result. The most prevalent reason for the judgments for the manufacturer was failure of proof with respect to either a defect or the existence of the defect at the time the product left the control of the manufacturer. The manufacturer escaped liability in several instances because the plaintiff failed to prove proximate cause. The defenses of assumption of risk, unintended or misuse of the product and intervening acts of third parties were employed.
frequently and successfully by manufacturers. The courts rendered judgments for the manufacturer on holdings that the manufacturer did not have a duty to design a product more safely,\(^{254}\) that the injured party was not within the zone of foreseeability,\(^{255}\) and that the plaintiff failed to prove the product was that of the defendant.\(^{256}\) A judgment was given a manufacturer in one instance where the plaintiff alleged his injuries were the result of the defect in the product and the negligence of the retail seller but failed to prove the negligence of the retailer.\(^{257}\) It does not appear that the outcome of any of the above cases would have been changed had the manufacturer been pursued on the theory of negligence.

Of the cases surveyed in which strict liability was present, 47 were not finally determined. The courts ruled on matters of motions to dismiss, demurrers, or alleged errors in the trial proceedings. In 34 instances the plaintiff received a favorable ruling from the court allowing him to pursue his cause of action further. In 24 of these cases, the presence of strict liability in the suit was not essential to the ruling in favor of the plaintiff. In substantially all of the cases the negligence theory was available to the plaintiff and the court's ruling would not have been affected had the suit been initiated solely on that theory. In seven cases the plaintiff was permitted to continue on the basis of strict liability where he would have been precluded otherwise.\(^{258}\) In three instances the rulings were peculiar to strict liability.\(^{259}\)

In the 13 cases where the rulings of the court favored the manufacturer, the presence of strict liability was not a factor in the result. For example, a demurrer of a component part manufacturer was sustained where the plaintiff failed to allege that no substantial change occurred


\(^{258}\) Olson v. Royal Metals Corp., 392 F. 2d 116 (5th Cir. 1968), applying Texas law; plaintiff had lost on negligence theory and court sent it back for injection of implied warranty; Kridler v. Ford Motor Co., 422 F. 2d 1187 (3rd Cir. 1967), applying Pennsylvania law, court required no proof of negligence; Clary v. Fifth Avenue Chrysler Center, Inc., 454 P. 2d 244 (Alaska 1969), plaintiff lost on negligence issue and it was ruled strict liability was permissible; Hutchinson v. Revlon Corp. of Cal., 55 Cal. Rptr. 81 (1967), plaintiff lost on negligence in lower court but decision reversed since strict liability does not require proof of negligence; DeFelice v. Ford Motor Co., 28 Conn. Super. 164, 255 A. 2d 636 (1969), contributory negligence not relevant in strict liability suit; Hawkeye-Security Ins. Co. v. Ford Motor Co., 174 N.W. 2d 672 (Iowa 1970), proof of existence of defect sufficient and plaintiff need not show negligence; Ulmer v. Ford Motor Co., 75 Wash. 2d 522, 452 P. 2d 729 (1969), contributory negligence not relevant in strict liability suit.

in the product after it left the hands of the defendant. Manufacturers received favorable rulings where the plaintiff failed to show that the defect existed when it left the manufacturer's control. In such cases, strict liability was of no benefit to the injured party nor would he have been able to proceed successfully in negligence.

In those jurisdictions which recognize strict liability, the survey revealed a total of 62 cases that did not incorporate an allegation of strict liability. Twenty-one of these cases resulted in judgments for the plaintiff. In the twenty-seven cases held for the defendants the injection of strict liability into the case would have been either inappropriate or of no consequence.

In those jurisdictions which had not as yet adopted strict liability as described in section 402A or under a warranty concept, fifty-one cases resulting in a judgment appeared. The plaintiff was successful in fifteen instances producing a success ratio of approximately 30%. On analysis it appeared that four cases lost by the plaintiffs may have been decided otherwise if strict liability had been available thereby increasing the success ratio to approximately 36%.

In summary, it is observed that a substantial percentage of the product liability cases arise in jurisdictions that subscribe to strict liability. This should be anticipated since numerous states have accepted this concept and these states are among the more commercially active. From this survey, it is difficult to extract a meaningful statistic with regard to the impact of strict liability on the success of plaintiffs. A comparison between the success ratio of plaintiffs in strict liability suits and the success ratio of plaintiffs in non-strict liability jurisdictions reveals that the plaintiffs asserting strict liability against the manufacturer experience a 10.4% advantage. This conclusion must be highly qualified not only because of the subjectivity involved but because of the many variables present in a lawsuit. In any event, it does not appear that the emergence of strict liability has made an enormous impact on the success ratio of plaintiffs. The cases reveal the major effect of the concept has been to reduce the plaintiff's burden of proof by eliminating the need to prove how the defendant failed in his duty in producing the defective product.

Since evidence on this point is not required in strict liability cases, it is difficult to conclude from the case reports how many strict liability cases won by plaintiffs could have been successfully pursued on the basis of negligence. It is safe to assume that certainly some of the cases were capable of having the issues favorably resolved for the plaintiff. To that extent, the impact of strict liability on the manufacturer becomes less significant.

An analysis of the 193 total cases that proceeded to judgment reveals that the plaintiff was successful in 38.3% of the cases. The plaintiff's success ratio for all cases decided in the federal courts was approximately 39% and in the state court systems approximately 38%. In those cases where strict liability was present, the plaintiff's overall success ratio was 40.4%. In the federal courts it was approximately 40% and in the state courts approximately 41.6%. It does not appear that resort to the federal courts enhances the plaintiff's opportunity for success. There is a gratifying correlation between the decisions of the two systems.

In the non-strict liability jurisdictions the success ratio of the plaintiffs in all cases decided was approximately 30%. The federal courts and the state courts each produced a ratio of approximately 30%. Again no substantial advantage is gained by resort to the federal courts. There is an appreciable difference, however, between the success ratio of plaintiffs in all cases arising in the non-strict liability jurisdictions, approximately 30%, and the strict liability jurisdictions, approximately 40.4%.

Thus, the impact of strict liability on judgments favorable to the plaintiff, although noticeable in the cases observed, has not been as formidable as might be anticipated under a concept holding a manufacturer strictly liable for his defective product. Nevertheless, the emergence of this doctrine has been a contributing factor to the sharp increase in the number of product liability cases filed. The Final Report of the National Commission on Product Safety cites a threefold increase in product liability cases to 300,000 cases from 1968 to 1969.263 The expansive tendency of the law in this area would suggest even greater activity in the future. Even though the success ratio of plaintiffs may not increase substantially, the manufacturer will be faced with an increasing number of claims that must be settled or defended.

VIII. A CLARIFICATION OF THE THEORIES OF MANUFACTURERS' LIABILITY

The manufacturer is susceptible to suit on various theories, each of which have peculiar elements that must be alleged and proved to establish liability. Emphasis has been given to the concept of strict liability since this theory is of the most recent vintage, the most dynamic at the moment,

and is experiencing more attention from the courts as they attempt to apply its principles to achieve a policy of consumer protection. It is not, however, an all-encompassing basis for liability as evidenced by the continuing resort to the theories of negligence, express warranty sounding in contract, express warranty sounding in tort, implied warranties sounding in contract and implied warranties sounding in tort. A clarification and streamlining of the law of product liability would be advantageous to all parties, especially the producer. Suggestions and recommendations to achieve this clarification are the subject matter of this section.

Liability based on negligence exists in many other areas of the law. The elements of negligence liability are well defined and have experienced little change in the suits involving product liability. However, from the consumer's point of view, it has proven to be an inadequate theory to successfully reach the manufacturer and other sellers. This is one reason the concept of strict liability was formulated by the courts. In formulating the principles of strict liability, the courts left undisturbed the broad based principles of the law of negligence. In product liability litigation it is often employed as an allegation of last resort since the plaintiff must carry a relatively greater burden of proof. Negligence liability in the product area should remain available to injured persons in its present form. The theories requiring greater clarity are strict liability and warranty liability.

Since the publication of section 402A in 1965, new trends in the law of strict liability have emerged from the cases. Some of these new developments already have substantial precedent while others are just appearing. The imposition of this liability on others besides sellers is an example of the former while the inclusion of commercial losses as an element of injury is an example of the latter. In view of the developing law it is suggested that the section be updated as follows:

**Proposed Section 402A: Special Liability of One Who Places a Product in Commerce for Physical Harm to Persons.**

1. One who places in commerce any product in a defective condition unreasonably dangerous to a reasonably foreseeable person or to his property is subject to liability for physical harm thereby caused to such person or to his property, if
   - the one placing the product in commerce is engaged in the business of dealing in such a product, and
   - it is expected to and does reach a reasonably foreseeable person without substantial change in the condition in which it was placed in commerce.

2. The rule stated in Subsection (1) applies although
   - the one placing the product in commerce has exercised all possible care in the preparation and delivery of the product, and
   - the person suffering an injury has not bought the product from or entered into any contractual relation with the person placing the product in commerce.
The intention of the suggested changes is to align the Restatement with the developing law. The first suggested change is the broadening of the class of persons upon whom this liability is imposed. It is intended to encompass sellers as presently defined in the comments to section 402A plus lessors, suppliers of samples or persons who supply, without cost, products complementary to their own.

The qualification that the product be unreasonably dangerous in its defective condition is retained. The cases reviewed sustain this provision when the basis of the suit is strict liability under section 402A in contrast to the warranty approach. It is consistent with the tort law rationale which imposes strict liability only when the hazard is extreme. The comments in the Restatement on this point accurately describe the recent legal developments. However, the standards used in determining what is an unreasonably dangerous product, except where a latent defect is present, have not been precisely defined. Professor Corwin D. Edwards, in testimony before the National Commission on Product Safety, suggested the following criteria:  

Risks of bodily harm to users are not unreasonable when consumers understand the risks exist, can appraise their probability and severity, know how to cope with them, and voluntarily accept them to get benefits that could not be obtained in less risky ways. When there is a risk of this character, consumers have reasonable opportunity to protect themselves, . . .

But preventable risk is not reasonable (a) when consumers do not know that it exists; or (b) when, though aware of it, consumers are unable to estimate its frequency and severity; or (c) when consumers do not know how to cope with it, and hence are likely to incur harm unnecessarily; or (d) when risk is unnecessary in . . . that it could be reduced or eliminated at a cost in money or in the performance of the product that consumers would willingly incur if they knew the facts and were given the choice . . .

This viewpoint reasonably reflects the policy position described in the comments to section 402A.

The persons to whom the liability extends is restated to reflect recent judicial tendency. The bystander is being accepted as a proper plaintiff, if not by designation then by broadening the definition of "user." As with negligence, strict liability is moving in the direction of benefiting any reasonably foreseeable person and his property.

Although the argument has been advanced that there is no reason for allowing recovery for injuries to the person and to property and at the same time deny recovery for commercial losses, substantial precedent does not appear in the cases reviewed to so extend strict liability. For this

264 Restatement (Second) of Torts, § 402A, Comment j.
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reason and to be consistent with the recommendations below pertaining to warranty, strict liability recovery should be limited as it is presently.

Subsection 1(a) is designed to apply to persons other than sellers but preserve the necessity of a commercial background for the transaction whatever form it takes.

In its other aspects, section 402A sufficiently reflects the recent developments in the common law. However, one aspect of this liability needs to receive the special attention of the courts; namely, the placing of this degree liability on wholesalers and retailers. In tort law strict liability has been traditionally imposed on persons who either created an ultrahazardous condition\textsuperscript{266} or actively engaged in an ultrahazardous activity. An intermediary who serves only as a conduit does not seem to generate the degree of causation usually required to impose liability without fault. The wholesaler, especially, who neither creates the product or deals with the consumer seems to bear a disproportionate degree of liability. Unless an intermediary processes or otherwise affects the condition of the product, strict liability should not be applicable. Recourse to the intermediaries should be based on negligence or more appropriately on the basis of warranty. There is precedent in the law of negligence for making special provisions for intermediaries. These provisions are summarized in sections 401 and 402 of the \textit{Restatement} and generally impose liability on an intermediary where he knows or has reason to know that the product is, or is likely to be dangerous and he fails to inform his buyer of the dangers. The intermediary is not required to inspect in the usual course of his business unless he is aware or should be aware that the product is likely to be dangerous. As previously noted, Ohio and Washington did not extend strict liability to the manufacturer-seller. However, these states represent a minority position.

The contractual warranty theory of liability deserves the attention of the Editorial Review Committee for the Uniform Commercial Code and the state legislatures. In product liability law it would be beneficial to precisely define "warranty" and to clarify the characteristics of such an action. Toward this end, it is suggested that the courts describe the tort liability of a manufacturer as either strict liability or negligence liability and reserve the use of the word "warranty" to describe the liability of the manufacturer or any other seller arising under the Uniform Commercial Code. In those jurisdictions utilizing warranty concepts an analysis of the adoption cases\textsuperscript{267} reveals that section 402A would achieve the same stated objectives. For example, in the Lonzrick decision, the appellate court expressly adopted the section as the basis of liability.\textsuperscript{268} Although the

\textsuperscript{266} Rylands v. Fletcher, 3 H.L. 330 (1868).
\textsuperscript{267} \textit{Supra}, note 98.
\textsuperscript{268} Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E. 2d 92 (1965).
Supreme Court rejected this determination and characterized the liability as based on an implied warranty sounding in tort, the Lonzrick decision represents strict liability as conceived by section 402A. To the extent required, the provisions of the section could have been the basis of the decision. In addition, the majority of jurisdictions accepting the principle of strict liability in tort avoid the use of the term "warranty."

If "warranty" is reserved to describe the liability of a seller arising under the Uniform Commercial Code, some revisions of the Code must be made to align it more closely to the current law of warranty liability and the growing concern for consumer protection.

Before offering recommendations for these revisions it should be observed that some states varied the Code provisions regarding warranties when enacting the Code. California and Utah excluded section 2-318 which designates the beneficiaries of the express or implied warranties. Virginia substituted for this section a provision eliminating the requirement of privity in actions against sellers based on warranty or negligence. Recovery was permitted by those persons who would reasonably be expected to use, consume or be affected by the goods. Maryland reworded section 2-318 to extend the warranties to "any other ultimate consumer or user of the goods or persons affected thereby if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured by breach of warranty." The statute further provides "a seller may not exclude or limit the operation of this section."

Since the promulgation of the Code an enormous amount of case law has evolved indicating that the provisions of the Code relating to the beneficiaries of warranties need modification. In relatively few product liability cases does the plaintiff rely on the Code for his recovery unless the action is between the immediate seller and buyer. The subject of Article 2 of the Code is the sale of tangible personal property and the liabilities that may arise therefrom. It therefore seems proper to suggest revisions to reflect the warranty liability of sellers of goods as evidenced by the common law.

The cases reflect little variance from the Code's methods of creating the warranties. Where an alleged warranty sounding in tort is in issue the courts frequently refer to the Code for a definition of the warranty and how it may arise. The cases do reflect a concern for injuries arising from a use of the product other than its specific intended use. The

269 Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 205 N.E. 2d 92 (1965).
271 Maryland Code Annotated, Article 95B, § 2-318.
272 Uniform Commercial Code, §§ 2-313, express warranties; 2-314, implied warranty of merchantability; 2-315, implied warranty of fitness for a particular purpose.
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manufacturer has been required to foresee reasonable uses other than the ordinary intended use. Therefore, section 2-314(2) covering the implied warranty of merchantability and defining merchantable should be revised and clarified accordingly. Presently, the goods to be merchantable must be fit for the ordinary purposes for which such goods are used. The direction of the law seems to be to require that the goods must be fit for reasonably foreseeable uses, even if unintended. For example, the automobile is intended ordinarily for transportation not for excess speeding and collision. Nevertheless, liability has been imposed in automobile cases on the reasoning that such use was foreseeable. Therefore, it is recommended that merchantable be defined to include the requirement that the product be fit for reasonably foreseeable use or misuse, even if unintended. Consistent with this suggestion, the same section should also be revised to insure that a merchantable product includes adequate instructions for proper usage and warnings against reasonably foreseeable misuses.

Another question that has been resolved by resorting to the tort nature of warranties is the effect of any disclaimers in the contract for sale of the goods. When the seller has carefully drafted a disclaimer provision its purposes have been frustrated by the employment of the doctrine of unconscionability273 or by characterizing the cause of action as one sounding in tort to which the contractual disclaimers have no application. To reflect this judicial position, section 2-316, concerning the exclusion or modification of warranties, should be revised to place the burden of establishing the conscionability of any disclaimer on the manufacturer or seller. However, it is not commercially feasible to hold a manufacturer or seller liable in all events for breach of any implied warranty. In the case of used cars that are known by both the seller and buyer to be unsafe for use, a seller should not be held accountable for breach of an implied warranty of merchantability. Presently, the Code protects the seller in this situation by permitting disclaimers in these circumstances and there is seldom a conscionability problem. However, to achieve the present posture of the common law and retain the warranties under the Code, it is recommended that the section be revised to make any attempt to exclude, disclaim or limit the implied warranties of merchantability or fitness prima facie unconscionable. A further provision must then be promulgated to exonerate a seller from implied warranty liability for injuries caused to a user when the user knows of the product's condition, understands the risks involved and still uses the product. This latter provision reflects the official comments to this section of the Code,274 and would permit the use of an untested product at the assumed risk of the buyer.

274 Uniform Commercial Code, § 2-316, Comment 8.
When a court reaches the position that the warranties involved in a suit are in the nature of a tort not only are the disclaimer provisions of the Code preempted but also the notice provisions of section 2-607 are held irrelevant. Therefore, it is recommended that the notice requirement for breach of warranty be deleted from the Code. The concern reflected by this section for the seller can be preserved by retaining notice for other purposes than breach of warranty and retaining the statute of limitations period at four years measured from the time the injury or damage occurs. Where the injury or damage is not apparent or obvious the statute should begin to run from the date the user or consumer should reasonably have been aware of such injury or damage. Section 2-725 of the Code establishing the statute of limitations period should be revised accordingly.

The significant area for revision in the Code is section 2-318 which specifies the beneficiaries of any warranties. This section confronts the privity issue which few jurisdictions continue to regard as a bar to proceeding against a manufacturer. Sufficient definition has emerged from the common law to crystallize this section.

In this regard, a distinction should be made between the beneficiaries of any express warranty or implied warranty of fitness for a particular purpose and the implied warranty of merchantability. With reference to the former an element of reliance must be present. In contrast, the implied warranty of merchantability is concerned with the reasonable expectations of the user. With this difference in mind, it is suggested that the beneficiaries of these warranties be separately defined as follows:

A merchant's express warranties or implied warranty of fitness extends to any ultimate consumer or user of the goods who relies upon these warranties if it is reasonably foreseeable that such person may use or consume the goods and such person is injured in his property or person by breach of the warranty. A merchant may not exclude or limit the operation of this provision.

A merchant's implied warranty of merchantability extends to any ultimate consumer or user of the goods if it is reasonably foreseeable that such person may use or consume the goods and such person is injured in his property or person by the breach of warranty. A merchant may not exclude or limit the operation of this provision.

The above suggested revision encompasses the beneficiaries presently enumerated in section 2-318 and extends to those persons currently permitted by many courts to bring direct actions against the manufacturers under the warranty theory. It does, however, expressly exclude the bystander. Consistent with tort law principles, the bystander's remedy should be founded on a theory of strict liability involving not merely a defective product but an inherently or imminently dangerous product.

An alignment of the Code with the concept of strict liability in tort and the case law requires resolution of the issue of what kinds of damages may be recovered. There is little authority for awarding purely com-
mmercial losses as an element of damage in an action based on strict liability in tort. There is some authority for allowing differences in value between the product as it exists and as it was warranted to be when an express warranty is the basis of the suit. The Code presently authorizes the limitation of damages and remedies where the standard of conscionability is not offended. It expressly provides that limitations of consequential damages for injuries to the person in the case of consumer goods is prima facie unconscionable. Again, when a product liability suit is pursued against the manufacturer and is characterized as an action in tort, the contractual limitations are not applicable. It is therefore, recommended that the Code reflect this position by providing that any limitation of damages for breach of any implied warranty for physical injury to the person or to his property, including diminution in value, is prima facie unconscionable. In the absence of any strong authority to the contrary, the Code provision that limitation of damages where the loss is commercial is not prima facie unconscionable would be retained.

If the state legislature through the efforts of the American Law Institute and the National Conference of Commissions on Uniform State Laws can be induced to incorporate the above changes for the purpose of bringing the Code up to date with the common law developments and to produce uniformity, a significant step will have been achieved toward clarifying the haziness in this area of the law. In addition, the courts should strive to apply the concept of strict liability uniformly using the same theory of liability with identical elements. The existence of confusing theories and variances among the jurisdictions works an injustice to an injured party and to the manufacturer. If the above direction in the law is pursued, the manufacturer's liability will be founded upon either negligence, a well defined area of legal liability, warranty, as provided in the express provisions of the Uniform Commercial Code, or on strict liability in tort as defined in the Restatement. The manufacturer will be exposed to liability to the classes of persons described for any injuries to their person or to their property including diminution in value, when his product is not as warranted or is in an unreasonably defective condition. The manufacturer will still be able to guard against commercial losses and will be able to insure against more adequately defined liability. These recommendations acknowledge the present concern for the consumer in the legislature, the courts, and the public forum.

On the Horizon

New developments in the law of product liability at the national level can be anticipated. The common law has introduced new principles of
liability and discarded old concepts to distribute the losses arising from products across a broader economic base. Its major contribution has been and continues to be its flexibility and responsiveness to the needs of a particular circumstance of injury. The criticism usually leveled at the common law is that it acts retroactively. Prevention of the injury, it is urged, is a more desirable objective. The automobile industry is presently operating under the provisions of the National Traffic and Motor Vehicle Safety Act. Product standards are being established by the Department of Transportation. Legislative flexibility directed toward preventing the marketing of unsafe products has been recommended. In October, 1969, President Nixon, in a special message to Congress, urged the enactment of a legislative program described as a "Buyer's Bill of Rights." The 91st Congress did not react to the recommendation. A modified proposal was presented by the President to the 92nd Congress in February, 1971. Under this proposal a product safety program would be established within the Department of Health, Safety and Welfare with the Secretary having the authority to fix minimum safety standards for products and ban from the marketplace those products that fail to meet the standards. Consumers, either as individuals or as a class, could bring suits for damages for violation of the act. In addition, the government could proceed against a violator in a civil proceeding which could result in a penalty of $10,000 for each violation.

Coincidentally with the President's recommendations, legislation was introduced in the Senate toward the same objectives. This legislation would create a new administrative agency entitled the Consumer Product Safety Commission with powers to promulgate product safety standards and other pertinent regulations, such as testing methods and requirements, for the purpose of reducing risk of injury or death from the performance, construction, finish or packaging of products. The commission would be empowered to ban ultrahazardous products and to seek injunctive relief when its regulations were not being followed. Civil and criminal penalties not in excess of $500,000 are included. The act specifically reserves to the consumer all of his remedies under the common law of any state statute and provides for a civil suit by any consumer injured by violation of the act in which the remedy is treble damages plus attorney fees. Companion legislation defines the warranty duties of a warrantor of a

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282 Senate Bill S.983, 92nd Congress, 1st Session, To Protect Consumers Against Unreasonable Risk of Injury From Hazardous Products and Other Purposes.
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product and extends these warranties to the purchaser. An express disclaimer of any implied warranties is disallowed if any express warranty of a consumer product against defect or malfunction is made in writing to a purchaser. The conscionability test is otherwise applied to any exclusion of implied warranties. Consumers are given the ability to bring a civil action for violation of the act and seek damages plus attorney fees and expenses. The Federal Trade Commission may also proceed civilly against any violator. It can be anticipated that some of these recommendations will be enacted in the coming years.

Conclusion

The objective of this article has been to impart an understanding of the law of product liability, to explore the direction of the law as evidenced by recent decisions of the courts, and to recommend steps that would considerably clarify and define the elements of liability. With the current emphasis on consumerism, this area of the law will continue to expand and experience significant developments. Manufacturers can anticipate the next major development in the form of federal legislation creating or assigning to an existing administrative agency the power to regulate product design or safety standards and providing civil remedies for consumers injured by any product or misrepresentations associated with any product. The emergence of such an agency will provide an entirely new arena for the development of the law of product liability.

283 Senate Bill S.986, 92nd Congress, 1st Session. To Provide Minimum Disclosure Standards for Written Consumer Product Warranties Against Defect or Malfunction.