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PRODUCTS LIABILITY*

JOAN M. KRAUSKOPF**

The area of law denominated "products liability" includes at least three distinctly different theoretical bases for possible liability for personal injuries or property damage: negligence; breach of warranty under the *Uniform Commercial Code*; and strict tort liability. Damages collectible could be the same under any of the theories, and in certain circumstances all three theories could be pleaded in the alternative. However, developments in the courts during the past seven years indicate that the trend in Missouri, as elsewhere, is toward an overshadowing of the first two theories by the broad strict liability sounding in tort. At some time in the rather near future the phrase "products liability" might connote strict tort liability shaped by many of the concepts previously developed in both negligence cases and contractual warranty cases. This article seeks to differentiate the theories and to explore the requirements and defenses in a cause of action based on the strict liability theory in Missouri.

PART I: THEORIES

Since *MacPherson v. Buick Motor Co.*¹ and its acceptance in Missouri, negligence is an available theory for an injured plaintiff against either the immediate supplier of the product which injured him or anyone in the distribution chain back to and including the manufacturer of the entire product or any of its components. The limitation that a duty of due care existed in the absence of privity of contract only when the product was *inherently* dangerous began its demise with *MacPherson*, and over the years has been eliminated in Missouri also.² The obvious shortcoming of the

*This is Part I of a two part article. The second part will appear in a later issue.

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1. 217 N.Y. 382, 111 N.E. 1050 (1916).

2. *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343 (Mo. 1964); *LaPlant v. E. I. DuPont de Nemours & Co.*, 346 S.W.2d 231 (Spr. Mo. App. 1961); *McCormick v. Lowe & Campbell Athletic Goods Co.*, 235 Mo. App. 612, 144 S.W.2d 866 (K.C. Ct. App. 1940). Although the court in the first case says it would come within the exception, it does not indicate that this is a requirement for liability as the Defense Research Institute would have one believe. Monograph, *Brief Opposing Strict Liability in Tort*, p. 9.

negligence theory is the difficulty of proving lack of ordinary care. Negligence existing at the manufacturing level may be impossible to establish even with the aid of *res ipsa loquitur*. Intermediate suppliers such as wholesalers and retailers certainly are not expected to tear apart each product they sell and subject it to rigid inspections, so a supplier could use due care and yet pass on a dangerous product.³ The heart of negligence is *reasonable* care on the part of the defendant, not absolute or extreme care. Furthermore, if the danger of the product was discoverable by the use of due care, plaintiff faces the affirmative defense of contributory negligence. It would be a complete defense even if plaintiff was merely negligently unaware or inadvertent to the risk of harm.

Pleading an action sounding in contract obviates the necessity of proving a "fault" element in the sense of lack of care in a negligence action. Since the adoption of the U.C.C. in Missouri, there is no doubt as to the applicability of implied or express warranty theories.⁴ Section 400.2-314 describes the implied warranty of merchantability which includes that the goods "are fit for the ordinary purposes for which such goods are used," and section 400.2-315 describes the implied warranty of fitness for a particular purpose where the buyer relies upon the skill and judgment of the seller who has reason to know the particular purpose for which the goods are required. Section 400.2-313 describes express warranty as being created upon any affirmation of fact made by the seller to the buyer. It is section 400.2-314 that overrules *State ex rel. Jones Store Co. v. Shain*⁵ in which the Supreme Court held there was no implied warranty by a retailer that a blouse was fit for the ordinary purpose of wearing it. The code supercedes *Jones* at least as far as an action predicated upon the law of sales, and therefore contractual in nature, is concerned. A pleading sounding in contract and setting out implied warranties can support a claim for the consequential damages of personal injury or property damages since section 400.2-715 specifically provides for it.⁶ However, such an action would be subject to all the requirements and limitations of the law of sales as embodied in the U.C.C. Most important may be section 400.2-318 which describes the persons who may claim the benefit of such implied warranties.

3. *Wiley v. Fyrogas Corp.*, 363 Mo. 406, 251 S.W.2d 635 (1952); *Winkler v. Macon Gas Co.*, 361 Mo. 1017, 238 S.W.2d 386 (1951); *Zesch v. Abrasive Co. of Philadelphia*, 353 Mo. 558, 183 S.W.2d 140 (1944); *Schroder v. Barron Dady Motor Co.*, 111 S.W.2d 66 (Mo. 1937).

4. Sections 400.2-313 through 400.2-318, RSMo 1963 Supp.

5. 352 Mo. 630, 179 S.W.2d 19 (1944).

6. Section 400.2-715, RSMo 1963 Supp.; *Jones, Remedies under Article 2*, 30 Mo.L.Rev. 212, 216 (1965).

One must remember that the law of sales deals primarily with transactions between persons who are in privity of contract, *i.e.*, who dealt with one another in a bargaining situation. Section 400.2-318 goes quite far in extending the benefits of a seller's implied warranty not only to his immediate buyer but also to members of the buyer's family and to guests in his home. It does nothing to extend the warranties of a manufacturer to purchasers from a wholesaler or to purchasers from a retailer. The party most often injured by a product is the purchaser from a retailer or a subsequent user, and to these people the manufacturer's warranty is not extended. Even the retailer's implied warranty would not extend to an employee of his buyer or to a neighbor of his buyer or to a bystander on the street injured while the buyer uses the product. In short, the crucial limitation to an action based upon the implied warranties of the law of sales under the U.C.C. is that a form of privity of contract is required between the injured party and the defendant.

Other limitations of an action sounding in contract that could be important are the requirement for giving notice of breach within a reasonable time⁷ and the provisions for disclaimer of warranty.⁸

In Missouri an unusual situation exists in regard to the statute of limitations. The U.C.C. provides its own period of limitations for warranty actions; it is only four years from the time of breach.⁹ The ordinary tort statute of limitations is five years.¹⁰ If the limitations or requirements of the law of sales create no doubts as to the ability to sustain a cause of action sounding in contract, plaintiff's attorney need not trouble his head as to whether he pleads a contract or tort theory to recover for consequential damages. When there are doubts he should attempt to draft, as his sole theory or in the alternative, a pleading which states the elements for strict tort liability without using traditional contract language.¹¹

The recent nationwide products liability explosion has centered around the imposition of strict tort liability for personal injuries and property damage. Quite often the courts imposing this liability utilized the device

7. Section 400.2-607(3), RSMo 1963 Supp.

8. Section 400.2-316, RSMo 1963 Supp.

9. Section 400.2-725, RSMo 1963 Supp.

10. Section 516.120, RSMo 1959.

11. All three authors of articles on products liability cases in the April 1967 MISSOURI BAR JOURNAL were bothered by the possible application of U.C.C. requirements to an action for personal injuries. Godfrey, *A Glimpse at Products Liability*, 156; Kodas, *Products Liability, Plaintiff's Approach to Proof*, 159; Lowther, *Defense of Products Liability Case*, 166. Hopefully, the instant article will make clear that the U.C.C. is inappropriate so long as the action can be characterized as a tort action.

of "implied warranty without privity." An understanding of why this was done and what it means clears the way for understanding the present and future of products liability law both in Missouri and elsewhere. By the twentieth century the theory now embodied in the U.C.C. that permitted recovery for physical harm in a contract action against one with whom the plaintiff had been in privity was well accepted. Therefore, questions of tort liability were raised only when the parties had not been in privity.

The ultimate manufacturer was ordinarily the one best able to satisfy a judgment, but without privity between the injured party and the manufacturer supporting an action sounding in contract was impossible. Plaintiff's attorneys sought to convince courts that a strict liability as imposed in the contractual actions could be justified against the remote manufacturers. This would relieve them of proving lack of care; but in the absence of privity, it had to be a liability in the nature of tort, not contract. This was accomplished with relative ease during the 1920's and 1930's in cases involving food products prepared and packaged by the processor with the expectation that they not be opened or inspected until they were ultimately consumed. A combination of factors justified strict liability: the extreme danger from consumption of unwholesome food, the ultimate consumer's inability to safeguard himself from the dangers of contaminated food, and the extreme difficulty of proving negligence against remote processors of food products. Courts also articulated as a policy reason for strict liability that holding the manufacturer at his peril would force him to do all possible to safeguard the products he supplied. To sum it up, "social justice" demanded strict liability.¹²

But these were basic policy reasons supporting what might appear to be a wholly new judge-made principle of law. The certainty and continuity of our remarkable common law system is assured by courts' resistance to "making new law." A connecting link between pre-existing legal principles and an otherwise new legal concept cuts under the resistance and assures continuity. Plaintiffs' attorneys supplied the link with "implied warranty"¹³ and forged it with modern marketing practices. Historically, implied warranties had sounded in tort and may have originated in the law's effort to force strict liability for harm from unwholesome food. The legal concept of

12. *Madouras v. Kansas City Coca-Cola Bottling Co.*, 90 S.W.2d 445 (K.C. Mo. App. 1936); *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913).

13. Prosser says that warranty was first used in 1927 and that subsequent cases until 1962 all adopted some theory of warranty. Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1106 (1960); PROSSER AND SMITH, *TORTS CASES AND MATERIALS*, p. 818, 4th ed., Foundation Press (1967).

warranty of fitness for consumption had been recognized before the action of *assumpsit* developed. In fact, implied warranty had not been included in an action sounding in contract until 1778. In other words, warranty was a tort concept. It was an obligation recognized by law for the redress of harm without regard to actual or implied in fact intention or consent of any persons. Warranty apparently first became connected with contract principles for convenience in pleading. Its application was later limited to contract situations in order to protect growing industry and commerce from heavy liabilities.¹⁴ Thus, requiring privity for warranty liability achieved the same underlying purpose that the privity requirements for negligence liability of *Winterbottom v. Wright*¹⁵ had served. When twentieth century "social justice" demanded strict liability in the food cases, plaintiffs' attorneys argued that the artificial contract limitations could be swept away and the original tort sense of "implied warranty" could be reinstated. The result would be strict tort liability *described* as liability in the absence of privity for breach of an implied warranty. With social policy and historical legal principles supporting them, plaintiff's attorneys buttressed their arguments with shrewd analyses of modern marketing practices indicating that the remote manufacturer should be held liable *as a warrantor* because he, *in fact*, guaranteed the good quality of his food to the ultimate consumer. The courts were convinced that this was done not only through mass advertising designed to reach the ultimate consumer but also through the very act of placing the goods on the market with the intent that they be consumed without further significant inspection. This act of putting the food into the channels of trade constituted a representation that the food was fit for consumption, and the consumer's act of using the food constituted his reliance upon the representation. Social policy, historical principle, and actual fact marshalled together were invincible. Thus was kindled the products liability revolution that exploded in the 1960's. It was not until 1962 that a court imposed strict liability without using the device of "implied warranty." Since that time parallel lines of decision have developed in the various states: some courts still utilize the implied warranty theory as a tool or means for applying strict liability while others impose strict liability without the use of this artificial device.¹⁶

14. In *Worley v. Proctor & Gamble Mfg. Co.*, 253 S.W.2d 532, 536 (St. L. Mo. App. 1952) the history of warranty is given. See also, Roberts, *Implied Warranties—The Privity Rule and Strict Liability—The Non-Food Cases*, 27 Mo. L. REV. 194 (1962).

15. 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

16. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

It is to the credit of Missouri attorneys and courts that from the first food cases Missouri opinions articulated in some fashion a recognition that a tort liability was being imposed in spite of the use of "warranty" terminology. Missouri courts have helped to shape and foster the nationwide revolution by handing down some of the nation's leading cases in products liability development. An often cited case is *Madouras v. Kansas City Coca-Cola Bottling Co.*¹⁷ in which the Kansas City Court of Appeals affirmed a judgment against the bottler and in favor of the plaintiff who had purchased a bottle of contaminated Coke from a retailer. As a make-weight argument the court suggested that if privity was required right thinking persons would find it here, but the decision's significance is that it upholds a tort liability, not a contract liability. The petition alleged the facts of drinking the Coke and the resulting illness in great detail. Near the conclusion of the petition it alleged that the defendant by selling the beverage knowing that it would be consumed by the public "thereby warranted and represented said beverage as being a pure, harmless, wholesome, safe drink for all persons who might purchase the same." No allegations sought to establish a contract between defendant and plaintiff. Even the one use of the word "warranted" did not suggest a warranty to this plaintiff individually. The court quoted from a Tennessee case as follows: "There are many authorities holding an implied warranty to exist, as between seller and buyer But we see no reason or principle upon which a warranty might run with an article for consumption like a warranty of title running with land. We think the real ground of liability of the seller to an ultimate consumer is, more properly speaking, a duty one owes to the public not to put out articles to be sold upon the market for use injurious in their nature, of which the general public have not the means of inspection to protect themselves."¹⁸ In regard to what theory this plaintiff proceeded on the court had this to say: "But, since all the facts involved in the entire transaction were set forth in both pleading and instruction, the sole theory of plaintiff's right to recover is not to be limited to the technical requirements of the one word "warranty" and that there must be an expressed actual contract between the stricken customer and the blameworthy manufacturer before the former can recover anything against the latter, does not necessarily follow. Here is a case where, if any one should be held liable, it is clearly the manufacturer."¹⁹ This

17. *Madouras v. Kansas City Coca-Cola Bottling Co.*, *supra* note 12.

18. *Id.* at 448.

19. *Id.* at 449.

constitutes one of the earliest reported indications that the implied warranty technique was not even needed, but rather that it was tort strict liability being applied. It is fascinating to read the dissenting opinion of Judge Bland and to appreciate the accuracy of his analyses: “. . . [These cases] have brushed aside the whole logic of a warranty which can only be based upon contract . . . because they have been swayed by the dreadfulness and shock of the thought of one taking into his system poisoned or deleterious food or drink and have grasped at some means to hold the manufacturer, as an insurer [A machine] would be as dangerous to human-kind as deleterious drugs or foods. Similarly, the doctrine might be extended to almost any article manufactured and sold, if the theory of the majority opinion herein is the correct one.”²⁰ The St. Louis Court of Appeals was soon citing *Madouras*, but relying upon use of “implied warranty” in cases of foreign ingredients in milk and in wrapped and sealed packages of bread.²¹

In 1952 the St. Louis Court of Appeals decided the leading case of *Worley v. Proctor & Gamble Mfg. Co.*²² The product was a washing powder placed on the market for use in washing dishes where it was expected to come into contact with human hands. The court stated that there would be strict liability if the product contained ingredients making it unsafe for normal persons using it in a normal manner. Although the plaintiff lost for failure of proof the opinion is significant for two reasons: it recognized a strict liability for a product other than food, and it thoroughly analyzed the bases for this liability. The court traced the warranty concept from its tort origins through its contract connections and stated,

There is no good reason why the courts cannot re-examine the nature of a warranty and determine whether in all cases a relationship of sale or contract is a prerequisite to its existence and, in the interest of social justice, reshape the law to conform to the requirements of modern economic life.

The necessities of logic do not require that we disregard legal history, which refutes the oft repeated statement that a warranty is necessarily a contractual obligation, and follow decisions which have imposed arbitrary limitations resting upon convenience, or considerations of policy not applicable at the present time.

20. *Id.* at 450.

21. *Helms v. General Baking Co.*, 164 S.W.2d 150 (St. L. Mo. App. 1942); *Carter v. St. Louis Dairy Co.*, 139 S.W.2d 1025 (St. L. Mo. App. 1940); *McNicholas v. Continental Baking Co.*, 112 S.W.2d 849 (St. L. Mo. App. 1938).

22. *Worley v. Proctor & Gamble Mfg. Co.*, *supra* note 14.

Under modern conditions of retail merchandising, and the employment of widespread advertising, representations are, in fact, made to the consuming public.²³

After a lengthy quotation from *Williston Sales* to the effect that warranties were originally enforced in an action sounding in tort, the court said that it should look beyond procedural forms to see the "real nature of the wrong" and stated:

In the case of food products sold in original packages, and other articles dangerous to life, if defective, the manufacturer, who alone is in a position to inspect and control their preparation, should be held *as a warrantor*, whether he purveys his product by his own hand, or through a network of independent distributing agencies. In either case, the essence of the situation is the same—the placing of goods in the channels of trade, representations directed to the ultimate consumer, and damaging reliance by the latter on those representations. Such representations, being inducements to the buyers making the purchase, should be regarded as warranties, imposed by law, independent of the vendor's contractual intentions. The liability thus imposed springs from representations directed to the ultimate consumer, and not from the breach of any contractual undertaking on the part of the vendor. This is in accord with the original theory of the action.²⁴

The box of washing powder contained the legend "Tide is kind to your hands." Therefore, the case technically involves an express representation. This may account for the heavy emphasis on warranty theory. However, the authorities relied upon and the language of the opinion easily encompass the notion that strict liability is justified because placing the product on the market constituted a representation that it was fit for use.²⁵

23. *Id.* at 536.

24. *Id.* at 537. (Emphasis added)

25. It should be mentioned here that it has long been recognized that a tort action may be maintained for physical harm as a result of reliance upon an express representation of fact made through advertising even though there was no privity of contract between the plaintiff and defendant. *Baxter v. The Ford Motor Company*, 168 Wash. 456, 12 P.2d 409 (1932). The rule is restated in RESTATEMENT, TORTS § 402B (1965). Since this is strict liability, unlike deceit there would be no necessity to prove intent or scienter. *Cf. Turner v. Central Hardware Co.*, 353 Mo. 1182, 186 S.W.2d 603 (1945), *Venie v. South Central Enterprises, Inc.*, 401 S.W.2d 495 (Spr. Mo. App. 1966). Most of the underlying theories and the practical problems of strict liability for injuries caused by products are about the same whether the defendant has expressly or impliedly guaranteed his product. Therefore, in this article discussions of express warranty are woven into the text wherever pertinent to the problem under consideration.

In *Midwest Game Company v. M.F.A. Milling Co.*²⁶ the Missouri Supreme Court, without discussion, not only approved as an established rule the strict liability for packaged food for human consumption without privity, but also extended the "implied warranty" to processed and packaged animal foods. The case is interesting because it was necessary to use evidence of trade usage to establish that the food was marketed as a "complete" fish food. Once that fact was established, the "implied warranty" in the absence of privity resulted in strict tort liability for failure to be a complete food for fish. Although the holding is limited to packaged food, the primary significance of the decision is that it imposes strict liability for damage to property (plaintiff's fish) as distinguished from personal injuries. Only one short step was needed to plunge Missouri into the forefront of modern products liability law.

In *Morrow v. Caloric Appliance Corp.*,²⁷ where a defective valve in a gas cooking stove had caused a fire which destroyed the plaintiff's household furnishings, the step was taken. The supreme court held the manufacturer of the stove strictly liable for the damage. The court, paraphrasing the leading *Henningsen*²⁸ decision, said, ". . . there can be no rational doctrinal basis for differentiating between the fly in the beverage bottle, the defective automobile, the defectively processed food for animals, and an imminently dangerous defective gas cooking range . . ." ²⁹ The decision is historic because the court extended strict liability to harm from manufactured articles and facilities. Thus was fulfilled Judge Bland's dire prophecy: the doctrine of strict liability without privity was extended to harm from any defective manufactured article.

It is of primary importance that the court traced the tort background of warranty and twice acknowledged the exact type of liability being imposed: "The precise question now presented to this court . . . is whether privity of contract is necessary in order for an ultimate consumer to recover from a manufacturer on an implied warranty or, perhaps stated more frankly, whether a manufacturer . . . is to be held to strict liability upon proof of the defect and of causation,"³⁰ and ". . . courts of many of the states have considered and, with varying degrees of forthrightness, applied the rule of implied warranty without privity of contract

26. 320 S.W.2d 547 (Mo. 1959).

27. 372 S.W.2d 41 (Mo. 1963); McCleary, *Torts in Missouri*, 30 Mo. L. REV. 71 (1965).

28. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

29. *Morrow v. Caloric Appliance Corp.*, *supra* note 27, at 54.

30. *Id.* at 51 (emphasis added).

(*in effect, strict liability*) to the manufacturers . . .”³¹ Further, in stating its holding the court did not say the defendant was to be held liable for breach of warranty, but was “to be held liable *as* an implied warrantor of the fitness and reasonable safety of the gas cooking range . . .”³² These are the statements that classify *Morrow* as among the more radical and far-reaching of the country’s decisions. *The court was revealing that the implied warranty technique which it used was not necessary to its holding.*

The court that first held a manufacturer strictly liable in tort without resort to the warranty theory was the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*,³³ which was prominently quoted in the *Morrow* opinion. *Greenman* is, “. . . a landmark decision which is certainly the most important decision since *Henningsen* and perhaps the most important since *MacPherson v. Buick*.”³⁴ This decision and the *Vandermark*³⁵ decision, which followed soon after, formed the basis for the new *Restatement of Torts* section, 402 A, that sets out strict liability in tort without the use of any warranty terminology.³⁶ With good reason, in 1966 the United States District Court for the Western District of Missouri held that the *Morrow* case obviously adopted the rationale of the rule restated in section 402 A and predicted that that section would be expressly adopted as the law of Missouri.³⁷ In January, 1967 a motion to transfer to the Supreme Court was denied in *Williams v. Ford Motor Company*,³⁸ the Missouri decision that can be fairly interpreted as an express adoption of *Restatement* section 402 A. The opinion sets out the section in full after saying, “The defendant’s liability for a defective prod-

31. *Id.* at 53 (emphasis added).

32. *Id.* at 55.

33. 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

34. 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, 173 (1966).

35. *Vandermark v. Ford Motor Co.*, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

36. RESTATEMENT (SECOND), TORTS § 402A (1965):

(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 reach the user or consumer 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.

37. *Hacker v. Rector*, 250 F. Supp. 300 (W.D. Mo. 1966).

38. 411 S.W.2d 443 (St. L. Mo. App. 1966).

uct can no longer be measured by the principles of negligence and privity, nor by the intricate law of sales."³⁹

To adopt the *Restatement* position is to be in the forefront of surging legal change.⁴⁰ The main advantage to Missouri courts in fully adopting the *Restatement* theory could be release from the shackles of warranty language. Whether the words "strict liability" or "implied warranty" or both combined are used, the difference in Missouri would not be one of substance since our courts are clearly recognizing the tort nature of the liability imposed. However, using the language of the *Restatement* would avoid innumerable vexing problems that have arisen in other jurisdictions where the device of warranty is used to impose strict liability. It is unfortunate that the *Williams* opinion unnecessarily and inaccurately uses the phrase "implied warranty" in addition to the expression "strict liability." The use of that phrase is in no way essential to its holding. So long as we use the superfluous implied warranty words we must continually remind ourselves, as Dean McCleary indicated, that it is different from the warranty usually found in the sales of goods cases.⁴¹ Better yet, since section 402 A is our position then let us use that language. Let us develop tort liability and defenses as much as possible without the use of the warranty concept which is so tainted with contractual overtones.

Clear analysis and careful selection of terminology by attorneys could avoid confusion at the trial level which leads to needless errors and appeals. Very little law has developed on what should be pleaded. Alternative methods of pleading a tort action have been suggested as follows:⁴²

Strict Liability in Tort

1. Defendant placed upon the market a product in a defective condition which was unsafe for its intended use.

Strict Liability in Warranty

1. Facts upon which warranty is based; manufacture, distribution, sale, bailment, or other transactions which give rise to the warranty.

39. *Id.* at 448.

40. See bitter opposition from the Defense Research Institute in Monograph, *supra* note 2. The Brief in turn received its licks. Langermann, *Defense Institute's "Brief" Assailed For Intellectual Dishonesty*, *Trial* p. 43, Dec.-Jan. 1966-1967.

41. McCleary, *Torts in Missouri*, 30 Mo. L. REV. 71, 73 (1965).

42. Emroch, *Testimony and Proof in a Products Liability Case*, PROCEEDINGS, SECTION OF INSURANCE, NEGLIGENCE AND COMPENSATION LAW, A.B.A. 1966; See also, 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, ¶ 46.02 (3).

2. Defendant placed the product upon the market knowing that it would be used without inspection for defects.⁴³
3. Plaintiff was using the product in a manner which was reasonably foreseeable.⁴⁴
4. The defect in the product was a proximate cause of the plaintiff's injuries.
5. Medical causation, injuries, and damage.
2. Identifying type of warranty as express or implied.
3. Reliance where action is brought upon an express warranty for particular purpose.
4. Facts and circumstances surrounding the breach of the warranties, such as defect in product, or, not fit for the ordinary purposes for which such product was used.
5. Plaintiff's injury proximately caused by defendant's breach of the warranty.
6. Notice to defendant of the breach of warranty (where required).
7. Injuries and damages.

The Strict Liability in Tort column could be the model for pleading any action in Missouri that falls within section 402 A of the *Restatement*. Hopefully, we will soon have an approved instruction along the lines of that submitted in *Williams v. Ford Motor Company*. A new trial was ordered for failure to include a requirement that the defect existed at the time it left the defendant's control; however, the instructions form a basic pattern, which could be used for stating strict tort liability without reference to warranty. In the opinion of this author it is neither necessary nor wise to couch Missouri pleadings or instructions in the old-fashioned warranty form illustrated in the second column.

In working out the practical problems of pleading and proving a strict liability case it may help to review the policy considerations behind the theory. The *Morrow* opinion does not specify in particular what policy reasons impelled the decision. It relies upon an excellent law review

43. The wording would be more accurate if it alleged that the product was to be used "without further processing or substantial change." Decisions have not yet begun to clarify the extent to which the manufacturer's responsibility will be shifted by further processing, but mere inspection by a subsequent person such as a retail car dealer will not relieve the manufacturer.

44. In Missouri it may be more accurate to allege that the plaintiff was using the product "in the manner and for the purpose for which it was manufactured" or "in an ordinary and normal manner."

comment,⁴⁵ the *Worley*⁴⁶ decision, and the well known *Henningsen*⁴⁷ and *Greenman*⁴⁸ decisions among others and in so doing refers to all the policy reasons that have been stated at various times as vindication for strict liability. There is a major policy justification included in some of the more recent cases to which the court referred that had not been previously articulated in the Missouri cases and which could be influential in the development of future products liability law. The court in *Morrow* sets out the following statement from *Henningsen*: "In that way the burden of losses consequent upon use of defective articles is borne by those who are in a position to *either control the danger or make an equitable distribution of the losses when they do occur.*"⁴⁹ This is the risk-spreading theory first expressed by Justice Traynor in 1944 when he stated in a concurring opinion, "the risk of injury can be insured against by the manufacturer and distributed among the public as a cost of doing business."⁵⁰ In the *Greenman* case, which the *Morrow* court cites, Traynor said, "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."⁵¹ Rather than a somewhat narrow justification based on chances of increasing safety or based upon "fault" for having made a representation, this is the essence of traditional tort strict liability theory as enunciated in cases dealing with dangerous animals or abnormally dangerous activities. It is the fundamental notion that as between two innocent persons the one whose activities caused an injury is the one who ought to bear the cost of it. "Fault" lies in causation of an unusual risk. In these days of The Great Society it is the courts' conviction that the cost of individual injuries can be spread without apparent detriment to the economy or to society which permits them to implement this theory in such a vast area as products liability.

45. Roberts, *supra* note 14.

46. *Worley v. Proctor & Gamble Mfg. Co.*, *supra* note 14.

47. *Henningsen v. Bloomfield Motors, Inc.*, *supra* note 28.

48. *Greenman v. Yuba Power Products, Inc.*, *supra* note 33.

49. *Morrow v. Caloric Appliance Corp.*, *supra* note 27 at 54 (emphasis added).

50. *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 461, 150 P.2d 436, 441 (1944).

51. *Greenman v. Yuba Power Products, Inc.*, *supra* note 33, at 901.