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Products Liability Part II

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PRODUCTS LIABILITY*

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PART II: IMPLEMENTATION

In an earlier article, the theories supporting actions for liability for harm caused by defective products were explored with particular emphasis on developments in Missouri. It was concluded that the Supreme Court decision in *Morrow v. Caloric Appliance Corp.*[1] and the St. Louis Court of Appeals decision in *Williams v. Ford Motor Co.*[2] place Missouri among those jurisdictions where strict liability in tort is recognized as an appropriate theory for products liability. This article considers some of the many facets of implementing a cause of action in Missouri on the strict liability theory.

DAMAGES

The items of damage for which a plaintiff may recover should be controlled by the theory upon which he rests his action. Since personal injuries and consequential property damage are within the contemplation of contracting parties when contractual warranties are made, traditional tort damages are recoverable in actions *ex contractu* as well as in actions *ex delicto*. And in actions against the retailer with whom the plaintiff was in privity of contract, the contractual nature of the implied warranty permits plaintiff to recover for loss of bargain.[3] Such an action would clearly be subject to the requirements of the law of sales.[4] But in *Smith v. Ford Motor Co.*[5] the plaintiff could not collect for loss of bargain and cost of repair from the manufacturer. The court held there was no implied warranty from the manufacturer to the remote purchasers, and distinguished

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1. 372 S.W.2d 41 (Mo. 1963).
2. 411 S.W.2d 443 (St. L. Mo. App. 1966).
3. Dubinsky v. Lindburg Cadillac Co., 250 S.W.2d 830 (St. L. Mo. App. 1952); Mullins v. Sam Scism Motors, Inc., 331 S.W.2d 185 (Spr. Mo. App. 1960).
4. DeGrendele Motors, Inc. v. Reeder, 382 S.W.2d 431 (St. L. Mo. App. 1964).
5. 327 S.W.2d 535 (St. L. Mo. App. 1959).

cases in which an element of tort such as actual injury existed. Since the basic policy reasons supporting strict tort liability are concerned with shifting the loss of physical harm, the *Smith* decision should be just as sound after *Morrow* as it was before.[6]

A commercial loss to the plaintiff (apart from or in addition to loss of bargain) as a result of defects in the chattel supplied by the remote defendant might be treated differently. Certainly, where the manufacturer has expressly represented characteristics of his product that lead the plaintiff to buy it, and the absence of those very characteristics cause him loss of profits he has been harmed in a tort sense. In a leading Tennessee case the plaintiff had purchased a tractor on the strength of advertising brochures of the defendant manufacturer. He recovered for the resulting commercial loss when the tractor failed to be as represented.[7] The court founded liability on *Restatement* section 552D which sets out the rule for strict liability for *pecuniary losses* from misrepresentation through advertising to the public. In a similar case the Missouri Supreme Court affirmed a directed verdict for the manufacturer not for failure to state a case of action, but because the evidence failed to establish justifiable reliance upon the representations.[8] The *Restatement* would not impose strict liability for commercial loss in the absence of representations.

Parties Defendant

In *Winkler v. Macon Gas Co.*[9] plaintiffs were allegedly injured by escaping gas. They charged negligence for failure to odorize the gas against the retail dealer and the jobber, Phillips Petroleum Company. The gas had been manufactured by other companies in Texas and had been consigned, under uniform straight bills of lading from Phillips Petroleum Company to the Macon Gas Company. Phillips, which clearly did business in Missouri,

6. Kyker v. General Motors Corp., 214 Tenn. 521, 381 S.W.2d 884 (1964) is in accord with this position. See also, Prosser, *The Fall of the Citadel* (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 822 (1966). The Supreme Court of New Jersey, which seems determined to lead the extension of strict liability into all corners, has allowed recovery, Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

7. Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966). *Accord*: Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (1965). See Comment, 54 Calif. L. Rev. 1681 (1966) for a contrast of the policies behind *Seely and Santor.*

8. Dotson v. International Harvester Co., 365 Mo. 625, 285 S.W.2d 585 (1955). See also for items of damage, Venie v. South Central Enterprises, Inc., 401 S.W.2d 495 (Spr. Mo. App. 1966).

9. 361 Mo. 1017, 238 S.W.2d 386 (1951).

never had possession of the gas. This was probably a situation where plaintiff's attorney could not obtain jurisdiction over the manufacturers in Texas,[10] and doubted his ability to obtain or collect a substantial judgment against the retail dealer. Therefore, he joined Phillips as a defendant. The court held a verdict should have been directed for Phillips because in the absence of physical possession or other evidence that Phillips had reason to know that the gas had not been odorized, there was no duty of due care and no breach on the part of Phillips. This is the fate usually encountered when one tries to establish negligence against a jobber, distributor, or wholesaler.[11] Will strict tort liability be applied to such middlemen? The *Restatement* position as adopted in Missouri, includes every seller of chattels, and explains that public policy demands that the burden of injuries caused by products be borne by those who market them.[12] The policy reasons enunciated by courts as justification for strict liability will determine whether middlemen are subject to it. One of the reasons given in a 1936 Missouri case is that it will encourage the making of safer products. In *De Gouveia v. H. D. Lee Mercantile Co.*,[13] the wholesaler of canned salmon bearing a label with the wholesaler's name was held not to come within the strict liability rule of *Madouros v. Kansas City Coca-Cola Bottling Co.*[14] This was because the salmon was sealed when it came into the possession of the wholesaler so that the wholesaler could not inspect its contents. *Madouros* was distinguished because under its facts only the bottler could control the contents. This is a holding that strict tort liability through the device of implied warranty does not apply to middlemen. The mid-1960's find courts all over the country giving as the primary justification for strict liability the superior ability of the supplier to bear the burden of injuries

10. The new "long arm statutes" should be particularly important in products liability cases. See Levin, *The Long Arm Statute and Products Liability*, 4 Willamette L. J. 331 (1967). However roadblocks to obtaining service over foreign manufacturers are still possible. The Missouri case which held the service provisions of the 1961 amendments unconstitutional was a products liability case. State v. Scott, 387 S.W.2d 539 (Mo. 1965). The 74th General Assembly responded with a more comprehensive statute in Senate Bill #130 passed in 1967, §§ 506.500-.520, RSMo (Supp. 1967).

11. See also, Willey v. Fyrogas Corp., 363 Mo. 406, 251 S.W.2d 635 (1952); De Gouveia v. H. D. Lee Mercantile Co., 231 Mo. App. 447, 100 S.W.2d 336 (K.C. Ct. App. 1936); compare Braun v. Roux Distributing Co., 312 S.W.2d 758 (Mo. 1958) where it was alleged that defendant was wholly owned by the president of the manufacturing company, and where defendant did not challenge its basic duty to use care.

12. RESTATEMENT (SECOND), TORTS § 402A, comment *c* (1965).

13. 231 Mo. App. 447, 100 S.W.2d 336 (St. L. Ct. App. 1937). See cases cited *supra* note 11.

14. 230 Mo. App. 275, 90 S.W.2d 445 (K.C. Ct. App. 1936).

through his ability to spread the cost. Such a policy is more applicable to wholesalers than that of encouraging safer products. Perhaps it was this risk-spreading policy that the Supreme Court of Missouri had in mind in the *Morrow* case when it cited *De Gouveia* saying that certain Missouri courts had denied "warranty" without privity, and adding, "but since that time the courts of appeals have held that the ultimate consumer may recover from the manufacturer or processor. . . ."[15] Acceptance of risk-spreading as the justification for these more recent cases would discredit *De Gouveia* as meaningful precedent.

The same considerations pertain to an action against the retailer since he could not make a sealed can of salmon any safer than a wholesaler could. When plaintiff proceeds against the retailer, can he avoid possible defenses from the law of sales by pleading his case in strict liability terms rather than warranty terms? In *Williams v. Ford Motor Co.*[16] the injured plaintiff purchased her automobile from the dealer, McMahon Ford Company, before the effective date of the *U.C.C.*, and she joined it as defendant with the manufacturer, Ford. The court quoted from an influential California case:[17]

> Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.

In holding that a submissible case was made against McMahon, the court clearly extended strict tort liability to retailers. This is in accord with the majority rule elsewhere. The holding should also control a situation such as that in *Hays v. Western Auto Supply Co.*[18] where the retail chain was sued by a person who had not been in privity of contract with it. The defendant conceded that if the product was defective the doctrine of strict liability applied to him. The holding for the defendant rested on failure to prove a defect.[19]

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15. Morrow v. Caloric Appliance Corp., 372 S.W.2d 41, 52 (Mo. 1963).
16. 411 S.W.2d 443 (St. L. Mo. App. 1966).
17. Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 899, 391 P.2d 168, 171 (1964).
18. 405 S.W.2d 877 (Mo. 1966).
19. The case is an enlightening example of the confusion engendered by pleading a strict liability case in warranty terms. The plaintiff was injured by a riding mower sold by the retail chain. In terms of the RESTATEMENT (SECOND), TORTS § 402A, the defendant was obviously a proper one against whom to assert strict liability. But the plaintiff, a two year old neighbor of the purchasers of the mower, was injured while it was being driven by his own brother and at a time

What extending strict tort liability to retailers will do to the contract action that is theoretically available against them under the *U.C.C.* is questionable. There is very likely no particular advantage in seeking to recover for personal injuries or property damage under the *U.C.C.* It may be that the *Williams* holding has rendered the contract theory for these purposes a thing of the past. But, does any action for breach of implied warranty such as a claim for loss of bargain, remain subject to the limitations of the law of sales? It is regrettable that the otherwise excellent opinion in *Williams* was clouded by the inaccurate use of the "implied warranty" phrase. Both before and after the court set out in full *Restatement* section 402A, it said that Missouri law now applies "strict liability for breach of implied warranty." This is misleading. It is *not* the wording of the *Morrow* opinion which said only that defendant was to be held liable "*as* a warrantor." Such slight inaccuracies lead to more major ones. The *Williams* opinion said that the "defendants' liability for breach of implied warranty can no longer be measured by the law of sales," and later it cited traditional contract, loss of bargain, cases[20] for the existence of the implied warranty. This loose language makes it appear as though the court thought the doctrine of *Morrow* removed *all* warranty problems from the law of sales. That it does not and that the St. Louis Court of Appeals knows that it does not is apparent from a reading of *DeGrendele Motors, Inc. v. Reeder*.[21] In that case the court held that the dealer's implied warranty of fitness was precluded by a disclaimer of warranty which the court recognized as valid because the damages claimed were for loss of bargain, not for personal injuries.

The *Restatement* has limited its statement of the rule to sellers of products who are engaged in the business of selling such products. Comment *f.* states:

> The basis for the rule [here stated] is the ancient one of the special responsibility for the safety of the public undertaken by one who

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when no one knew that the plaintiff was on the premises. If the mower had been defective, and if the U.C.C. had been in effect there probably would not have been an action under the U.C.C., because plaintiff could not meet even the extended privity requirements of the code. But the law of sales would be immaterial to an action pleaded in terms of strict liability. Since the plaintiff did plead in warranty terms this was not clear. The defendant nonsensically conceded a warranty that did not exist running to a person it would not have run to if it did exist. The court turned out an exceedingly poor opinion because it could not resist mentioning requirements of the law of sales, which had nothing to do with the case. How fortunate for Missouri law that the mower was not defective!

20. Dubinsky v. Lindburg Cadillac Co., 250 S.W.2d 830 (St. L. Mo. App. 1952); Mullins v. Sam Scism Motors, Inc., 331 S.W.2d 185 (Spr. Mo. App. 1960).

21. 382 S.W.2d 431 (St. L. Mo. App. 1964).

> enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.

Both this basis and the ability to spread the cost of injury through the price of his product are lacking in the casual sale or loan of a chattel. In *Davis v. Gatewood*[22] a trailer which was owned for use in the defendants' business was loaned without charge for the personal use of the borrower. While being so used it came unhitched and caused the death of plaintiff's husband, but the evidence did not make out a submissible case of negligence. To impose strict liability in this situation is not justifiable. But what if the defendants had been in the business of *renting* trailers? The majority rule is that a lessor is liable only for negligence.[23] The situation would not come within the "seller" limitation of *Restatement* section 402A, but it might be encompassed within the policy as set out in comment *f*. The New Jersey court extended strict liability to Hertz Truck Leasing and Rental Service for injuries to an employee of the lessee of a defective truck.[24] The lease provided for once a year or every 18,000 miles preventive maintenance by Hertz, an inspection every fourteen days by a Hertz mechanic, and a procedure for daily reports by the drivers to Hertz of any troubles with the trucks. This was an arrangement wherein the defendant was providing for safety as part of the business of supplying the chattels. Could such a result be justified where the lessee assumed the risk of harm from the chattel? A number of nationwide organizations lease small trailers which are owned by investors or the leasing company, and are supplied through local outlets such as corner service stations. Here is a marketing structure analogous to that for the sale of automobiles and thousands of other products, the difference being that the chattel is rented. In contrast to the New Jersey case, the lessee usually agrees to maintain the trailer in good condition and to indemnify the lessor for any damage arising out of or resulting from use of the trailer. Many of the policy reasons supporting strict liability do exist here, and if such liability to the lessee or to a third party would be justified, the indemnification agreement would be held void. However, the lessee of a trailer is hardly

22. 299 S.W.2d 504 (Mo. 1957).
23. 8 C.J.S., *Bailments*, § 25 (1949); *cf.* Fletcher v. Kemp, 327 S.W.2d 178 (Mo. 1959). Ikeda v. Okada Trucking Co., 47 Hawaii 588, 393 P.2d 171 (1964).
24. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

forced to rent a trailer in the manner that a consumer of food or even a user of an automobile or a gas stove is forced to utilize those products. The relative freedom of choice to rent or not to rent could be a sufficient basis for refusing to extend strict liability to this situation. There is another reason to doubt the extension of strict liability to rentals. In previous cases dealing with the "warranties" of a bailor to his bailee, the "warranty" has been interpreted as an assurance only that *ordinary care* had been used to determine that no defect existed at the time of the bailment. In other words, even when "warranty" language has been used, only ordinary negligence liability has been imposed.[25] In Missouri this interpretation was given to an alleged express warranty by the lessor of an airplane.[26] For these reasons it is doubtful that strict liability will be extended to lessors of chattels in Missouri.

In Missouri liability for negligence without privity has been extended to the *repairer*[27] of a chattel, but there is no reason to suppose that strict liability will go so far. The repairer does not make the article available for use, *i.e.*, does not put it into the channels of trade, but rather acts in a service capacity. This puts him outside the policy aims of strict products liability. The far-reaching New Jersey court has also applied strict liability in the absence of privity to the *builder* of mass-produced homes for personal injuries to a child caused by a defect in one of the homes. To reach such an extreme result in Missouri would require overruling or distinguishing *Flannery v. St. Louis Architectural Iron Co.*[28] which held that a builder's liability was measured by the principles of ordinary care.

Parties Plaintiff

Occasionally a person who has neither purchased nor used a product is hurt by it. In this class is the neighbor boy injured by a lawn mower while merely watching it or the person in an oncoming car injured when a defect in another car brings about an accident. The manufacturer of the lawn mower or car could be responsible on a negligence theory if the foreseeable risk of harm extended to this type of person.[29] However, *Restatement* section 402A extends strict liability only to consumers or users.

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25. 8 C.J.S., *Bailments*, § 25 (1949).
26. Stone v. Farmington Aviation Corp., 363 Mo. 803, 253 S.W.2d 810 (1953).
27. Central & Southern Truck Lines, Inc. v. Westfall G.M.C. Truck, Inc., 317 S.W.2d 841 (K.C. Mo. App. 1958).
28. 194 Mo. App. 555, 185 S.W. 760 (St. L. Ct. App. 1916).
29. Lawson v. Benjamin Ansehl Co., 180 S.W.2d 751 (Spr. Mo. App. 1944).

Whether this limitation on the extent of strict liability should be imposed depends upon the underlying policy justifying the liability. Prosser describes the situation as follows:

> If the philosophy of the strict liability is that all injured plaintiffs are to be compensated by holding the suppliers of products to strict liability for all the harm they do in the world, and expecting them to insure against the liability and pass the cost on to society by adding it to the price, then there is no reason whatever to distinguish the pedestrian hit by an automobile with bad brakes from the injured driver of the car. If the supplier is to be held liable because of his representation of safety in marketing the goods, then the pedestrian stands on quite a different footing. He is not the man the supplier has sought to reach, and no implied representation has been made to him that the product is safe for use; nor has he relied upon any assurance of safety whatever. He has only been there when the accident happened; and in this he differs from no other plaintiff. Thus far, with the emotional drive and the public concern and demand centering on the consumer, it has been the second theory that has prevailed; and those who have no connection with the product except as victims have been denied the strict liability, and left to negligence. In 1965, however, the Michigan court kicked over the traces in *Piercefield v. Remington Arms Co.* [375 Mich. 85, 133 N.W.2d 129 (1965)], and found strict liability to a bystander injured when a shotgun exploded.[30]

In Missouri the question has not been litigated. Both *Morrow* and *Williams* involved injured users, and the language of the opinions was confined to users. In *Hays v. Western Auto Supply Co.*[31] where the plaintiff was a bystander the court skipped over the question with the following language:

> While pointing out that plaintiff was neither a consumer, purchaser nor a member of the family of a purchaser from Western, defendant concedes that privity of contract is no longer a requirement, so we will not dwell on this question but will take it that the parties agree that for the purposes of this case the implied warranty extends to plaintiff.

This indicates that unless more enterprising counsel in the future point out that eliminating privity does not necessarily extend the strict liability

30. Prosser, *supra* note 6 at 819.
31. 405 S.W.2d 877, 883 (Mo. 1966).

to nonusers, the Missouri Court may make the extension without consideration of the underlying policy reasons.

SUBMISSIBLE CASES: ELEMENTS

What are the elements of a cause of action in strict liability?[32]

Plaintiff must have evidence that a defect in the product, for which the defendant in question was responsible, caused the injury. This is similar to the requirement of a faulty product that has always existed in both warranty and negligence cases.[33] In addition, plaintiff must show that the defect existed at the time the product left the particular defendant's hands and that it reached the plaintiff without substantial change. This is the familiar requirement of showing that this particular defendant is responsible because he, in fact, passed on a defective product.[34] To state a cause of action the Supreme Court of Connecticut has held that an allegation that the product was expected to and did reach the user without substantial change must be pleaded.[35] The Tennessee Supreme Court has held necessary an allegation of defective condition when it left defendant's hands.[36] There are no Missouri decisions on pleading. However, the *Williams* decision

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32. The court in Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963), stated frankly that the question of recovery by an ultimate consumer from the manufacturer on implied warranty was a question of whether the manufacturer of an instrumentality which is imminently dangerous if defectively manufactured is to be held to strict liability. Therefore, the ensuing discussion assumes that in Missouri whether the theory is described as "implied warranty" or as strict liability, the elements of a cause of action are the same. Because of the apparent adoption of RESTATEMENT § 402A in Williams v. Ford Motor Co., 411 S.W.2d 443 (St. L. Mo. App. 1966), it is also assumed that those elements are as required under § 402A.

33. See text discussion, *infra,* at note 41.

34. In Stone v. Farmington Aviation Corp. 363 Mo. 803, 253 S.W.2d 810 (1953), the plaintiff alleged an express warranty that the airplane he was renting was in good condition. He attempted to show its breach by the fact that nearly two hours later oil sprayed on the windshield and caused him to hit power lines. The court said that the warranty was not a warranty that no defect would develop later; thus, plaintiff failed to prove his case by failing to show any defective condition existing at the time of delivery of the plane. Contrast Willey v. Fyrogas Co., 363 Mo. 406, 251 S.W.2d 635 (1952), where inspections of a valve by the assembler and 23 months of use of the heater onto which the valve was installed were not sufficient as a matter of law to relieve the valve manufacturer of responsibility. In negligence cases the necessity to connect the defect with the defendant is often considered along with the application of res ipsa loquitur. See Parlow v. Dan Hamm Drayage Co., 391 S.W.2d 315 (Mo. 1965). *Contrast* Williams v. Coca-Cola Bottling Co., 285 S.W.2d 53 (St. L. Mo. App. 1955) *with* Leathers v. Sikeston Coca-Cola Bottling Co., 286 S.W.2d 393 (Spr. Mo. App. 1956).

35. Rossignol v. Danbury School of Aeronautics, 154 Conn. 549, 227 A.2d 418 (1967).

36. Olney v. Beaman Bottling Co., —— Tenn. ——, 418 S.W.2d 530 (1967).

reversed a judgment for plaintiff solely because the verdict directing instruction failed to require a finding that the defect in the steering mechanism existed when it left Ford's control.[37]

Also to place responsibility upon this defendant, it is necessary for the evidence to show that the product was being used in a normal or ordinary fashion when it caused the injury. The theoretical basis for this requirement is that the primary responsibility of the defendant is to provide a product safe only for normal use. In *Hays v. Western Auto Supply Co.* the court said that the implied warranty theory required defendant to supply a lawnmower that would "protect life and limb in normal, ordinary reasonably-to-be-expected operation; to protect against harm in reasonably foreseeable situations," not one "which could be driven safely and with impunity over the bodies of infants."[38] Defendant's foreseeability of the use of his product is involved here. His strict liability runs to normal uses which the court in *Hays* defines as uses reasonably to be expected by the supplier of the product. Plaintiff must also show that the defect was the cause of the injury, and he will have to guard against assertions that abnormal use of the product was the cause. In the *Hays* case the court moved smoothly from foreseeability of use to causation with these words: "This leads to the question of causation. The cause of the injury was not the lack of a guard, but rather the misuse of the machine."[39] This element of normal use of the product is the same element long required for either warranty or negligence liability. It has often been described as "intended use,"[40] but the Missouri courts have used normally expected or foreseeable uses as synonymous with intended use. The elasticity of this element is such that it serves to contract or expand the outer limits of the defendant's liability in the same fashion that foreseeability of harm and proximate cause do in negligence actions.

What constitutes a defective product? The *Restatement* position would impose liability only for harm from an unreasonably dangerous defective condition.[41] Defective condition is described as not safe for normal

37. 411 S.W.2d 443, 450 (St. L. Mo. App. 1966). In *Morrow,* the verdict directing instruction was apparently proper in that it required a finding that the stove when sold to the plaintiff was in the same condition as when manufactured.
38. 405 S.W.2d 877, 884 (Mo. 1966).
39. *Ibid.*
40. Cohagan v. Laclede Steel Co., 317 S.W.2d 452 (Mo. 1958); Zesch v. Abrasive Co., 193 S.W.2d 581 (Mo. 1946); Lawson v. Benjamin Ansehl Co., 180 S.W.2d 751 (Spr. Mo. App. 1944); 1 HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 3:10 (1961); PROSSER, TORTS 667-68 (3d ed. 1964).
41. RESTATEMENT (SECOND), TORTS § 402A, comments *h* and *i* (1965).

handling and consumption. When the Missouri Supreme Court recognized strict liability for defective products it described it as liability for harm caused by a product "imminently dangerous" if manufactured defectively.[42] The Missouri courts had defined an "imminently dangerous" product as one which is safe for use when properly constructed, but which contains a defect which makes it dangerous when used in the customary manner.[43] It is submitted that the meaning of the phrase "imminently dangerous" is wholly encompassed within the *Restatement*'s definition of dangerous condition; therefore, its use by the Missouri court neither adds to nor subtracts from the elements of a strict liability case as envisioned by the *Restatement* drafters.[44] The use of the phrase "unreasonably dangerous" does add two other considerations to the type of defect for which there would be strict liability. First, it recognizes that nearly any product has some danger connected to it. The liability would be for harm only from an unreasonably dangerous article. This is defined as dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. This consideration relates directly to the underlying justification for imposing strict liability: under mass marketing conditions the consumer is led to rely upon the suitability of products for normal use. To the extent that the consumer expects the danger, the product is safe for normal use (not unreasonably dangerous). Secondly, the word "unreasonable" retains the familiar balancing of the utility of the defendant's action (marketing the defective product) against the gravity of the risk thereby created. When the defect is made known to or is expected by the user,

42. Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (1963).

43. La Plant v. E. I. Dupont De Nemours and Co., 346 S.W.2d 231 (Spr. Mo. App. 1961).

44. Failure to accept this analysis of the meanings of defective condition and "imminently dangerous" could lead to confusion in at least two respects. The "imminently dangerous" phrase harks back to the language of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), and is sometimes considered to be merely another exception to the requirement of privity for recovery on a negligence theory. Since the phrase is also considered by many to be meaningless it has led to a great deal of litigation in negligence actions. See Annot. 74 A.L.R.2d 1157, 1164. It would be unfortunate if this unnecessary technicality were to slip into Missouri strict liability actions. Secondly, there have been some indications that the strict tort liability theory would not encompass as many situations as a strict liability theory worded in terms of implied warranty. CCH PRODUCTS LIABILITY REPORTER, ¶ 4250. This speculation is due to an incorrect interpretation of the meaning of unreasonably dangerous. The RESTATEMENT's own definition is in terms of consumers' expectations of danger or suitableness for ordinary use. This conforms exactly to the terms of an implied warranty. Hays v. Western Auto Supply Co., 405 S.W.2d 877 (Mo. 1966), Paton v. Buick Motor Division, General Motors Corp., 401 S.W.2d 446 (Mo. 1966).

the gravity of the risk of harm is sharply reduced, thus allowing the utility of supplying the product to outweigh the risk. In sum, the danger is not then unreasonable. It must be noted that these considerations in no way pertain to the foreseeability of harm by the defendant that makes his conduct unreasonable, and thus, negligent. In contrast, they focus upon only the foreseeability or expectations of ordinary consumers.

There are two categories of defective products. The first category includes products that reach the consumer in a physical condition different from that which was intended by the manufacturer, *i.e.*, products that were incorrectly or mistakenly produced at the manufacturing level. Although expert evidence might be the best way to prove such a defect, other evidence may be sufficient. In *Morrow*[45] there was evidence as to the reasons for malfunctioning of one of the gas stove's burners prior to the time that the other burner flared up and caused the fire damage sued for. This was sufficient from which to infer a similar malfunctioning of the other burner. In the *Williams*[46] case the evidence consisted of testimony from an expert as to probable causes and testimony of the purchaser concerning incidents in which the steering had not responded normally. The court held that opinion evidence is not the only way of showing a defect, and that the existence of a defect could have been inferred from the circumstantial evidence supplied by the purchaser. Since a dangerous defect caused by a mistake in manufacturing is seldom expected by the ordinary consumer, if it exists, it is almost certain to meet the test of "unreasonably dangerous."

The importance of the consumers' expectations is much more evident in the second category of defects. In this category are those products which are made and marketed exactly as they were designed to be, and yet they are dangerous, *i.e.*, the danger is designed or built into the product. In Missouri such a product has been described as inherently dangerous.[47] Under either the *Restatement* language or warranty language, such a product is defective only when it is more dangerous than expected by the ordinary consumer.[48] This concept is rather elementary when one considers items such as properly constructed guns, automobiles, knives, gas stoves,

45. 372 S.W.2d 41 (Mo. 1963).
46. 411 S.W.2d 443 (St. L. Mo. App. 1966).
47. La Plant v. E. I. Dupont De Nemours & Co., 346 S.W.2d 231 (Spr. Mo. App. 1961).
48. RESTATEMENT (SECOND), TORTS, *op. cit. supra* note 45; Hays v. Western Auto Supply Co., 405 S.W.2d 877 (Mo. 1966); *cf.* Baker v. Stewart Sand & Material Co., 353 S.W.2d 108 (K.C. Mo. App. 1961); Paton v. Buick Motor Division, General Motors Corp., 401 S.W.2d 446 (Mo. 1966).

or lawn mowers. These products are dangerous. But, since their dangers are generally known by purchasers and users, there is no defect. Among Missouri negligence decisions in which no liability existed for this reason are cases involving inflammability of nail polish,[49] inflammability of a fuzzy lounging robe,[50] and the caustic nature of cement.[51] It is this familiar concept of unexpected danger constituting the defect that is also applied in strict liability actions. Plaintiff has the burden of proving that the inherent danger would not have been expected by the ordinary consumer of that product. For this reason it is expected that there could be no strict liability for harm caused by smoking cigarettes since the year 1964 or thereabouts. Even without the warning on cigarette packages, by that time it was common knowledge that smoking could be harmful.[52]

DEFENSES

When one considers all the lines of defense available in a strict liability action, one wonders why there has been such an extreme pro-plaintiff psychology built up around it. Remote parties such as manufacturers can be liable without negligent conduct. But they are not made insurers. A quick listing of all the issues upon which the plaintiff has the burden of proof should encourage defense counsel: a defective product; defective when it left this defendant's hand; defective in the same manner when it affected this plaintiff; personal or property injury; injury caused by this defect; product in normal use. Defense counsel may wish to use contributory negligence or assumption of risk for its psychological effect upon the jury. But contributory negligence should not be a defense to strict liability unless it involves full awareness of the risk. Many activities that could be contributory negligence will be better used to negate either normal use of the product or causation of the injury by a defect. Assumption of risk can be a good defense to strict liability. However, evidence which will establish the plaintiff's awareness of the risk of harm might also negate the existence of a defect (unexpected danger). Therefore, defendant can

49. Lawson v. Benjamin Ansehl Co., 180 S.W.2d 751 (Spr. Mo. App. 1944).
50. Dempsey v. Virginia Dare Stores, 239 Mo. App. 355, 186 S.W.2d 217 (K.C. Ct. App. 1945).
51. Baker v. Stewart Sand & Material Co., 353 S.W.2d 108 (K.C. Mo. App. 1961).
52. See discussions: RESTATEMENT (SECOND), TORTS § 402A, comment *i* (1965). Prosser, *The Fall of the Citadel* (Strict Liability to the Consumer), 50 MINN. L. REV. 791, 810 (1966); Kessler, *Products Liability*, 76 YALE L. J. 887, 929 (1967).

use the evidence profitably without taking on the burden of proving assumption of risk.

There are at least three issues customarily part of a plaintiff's negligence case that under strict liability are more easily understood as matters of defense. The first is "duty to warn." In negligence actions, liability for harm from a product that is inherently dangerous to most users in a way that the ordinary consumer is not aware of, but which is nevertheless reasonable to market, rests upon failure to warn of the danger. This category of products includes items such as chemicals, drugs, dyes, insecticides, caustic agents, and almost any newly developed product which would be inherently dangerous to normal persons. In terms of defect, the unexpected danger renders the product defective. This was well illustrated in *Baker v. Stewart Sand & Material Company*[53] where the court held there was no need to warn of the caustic dangers of cement. It distinguished two prior cases in which a warning was required on the ground that the amount of danger in the paint[54] and the highly caustic drain solvent[55] involved in those cases were not commonly known. In a sense, giving warning of the danger of the product renders it nondefective, for then the danger can be commonly known by users. Since *Restatement* section 402A requires an unreasonably dangerous defect, the same reasoning applies in strict liability cases. So long as the danger cannot by any means be removed from the product, and so long as it remains reasonable to market it, the product will not be defective or unreasonably dangerous if a proper warning accompanies it. Blood plasma from which it is currently impossible to remove serum hepatitis virus and rabies vaccine which may cause a severe adverse reaction are examples.[56] *Assuming defendant knew of the danger* in the product, his defense will be that it could not be removed and that he gave warning of the danger. This turns the tables on the duty to warn issue, and makes it a matter of defense for the defendant to assert.[57] If he cannot show either that the product was unavoidably unsafe or that he gave proper warning, he will be strictly liable.[58]

The second issue arises when ordinary consumers know nothing of any inherent danger, but danger to a limited number of persons does

53. 353 S.W.2d 108 (K.C. Mo. App. 1961).
54. Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958).
55. Bean v. Ross Mfg. Co., 344 S.W.2d 18 (Mo. 1961).
56. Russell v. Community Blood Bank, Inc., —— Fla. ——, 185 So.2d. 749 (1966); RESTATEMENT (SECOND), TORTS § 402A, comment *k* (1965).
57. Russell v. Community Blood Bank, Inc., *supra* note 56.
58. Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159 (S.D. S. D. 1967).

exist. The troublesome cases involving hypersensitive or allergic reactions to products are in this group. In negligence cases the majority rule is that defendant has no duty to warn of danger to abnormally susceptible users. It is only when the product is shown to be dangerous to a substantial, significant, or considerable number of persons that the duty arises.[59] Since warranties only guarantee a product safe for normal or ordinary use, the majority of courts in the warranty cases also emphasize the number of persons who might be harmed. When a substantial number would be harmed, the product is not safe for normal use.[60] In sum, the majority position has been that there is no responsibility for harm from products which carry inherent dangers for the unusual or abnormal user. In Missouri whether this approach is likely to be followed in strict liability cases is an intriguing question.

Worley v. Procter & Gamble Mfg. Co.[61] is a case well known for its recognition of "warranty" liability without privity of contract; but it actually held, in line with the majority view, that a judgment for the plaintiff must be reversed because she failed in her burden of showing that her use of the product was a normal or ordinary use. The court said that the warranty was limited to an absence of ingredients noxious to normal persons using the product in a normal fashion, and that on the evidence the rash could have been caused by an allergy rather than a poison in the detergent.[62] In contrast, three Missouri negligence decisions are not in line with the majority rule. In *Arnold v. May Department Stores Co.*[63] and *Braun v. Roux Distributing Co.*[64] each plaintiff claimed that she was sensitized to an ingredient in hair dye and that the defendant had a duty of due care to warn of the dangers of sensitivity. In the

59. PROSSER, TORTS 668 (3d ed. 1964); Traynor, *The Ways and Meaning of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 369 (1965); Note, 22 Mo. L. REV. 223 (1957); Evinger v. Thompson, 364 Mo. 658, 265 S.W.2d 726 (1954).

60. Casagrande v. F. W. Woolworth Co., 340 Mass. 552, 165 N.E.2d 109 (1960); Merrill v. Beaute Vues Corp., 235 F.2d 893 (10th Cir. 1956).

61. 253 S.W.2d 532 (St. L. Mo. App. 1952).

62. Allergy is ordinarily defined as a reaction of a certain person to materials which the ordinary person does not react to. A reaction to a primary irritant is one which normal persons would also experience under similar circumstances. See the testimony quoted in Evinger v. Thompson, 364 Mo. 658, 265 S.W.2d 726 (1954); Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability*, 18 RUTGERS L. REV. 947, 950 (1964); Keeton, *Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 863 (1963).

63. 337 Mo. 727, 85 S.W.2d 748 (1935).

64. 312 S.W.2d 758 (Mo. 1958). The third decision holding in accord was reported just as this article went to press. Bine v. Sterling Drug Co., 422 S.W.2d 626 (Mo. 1968).

Arnold case defendant operated a beauty parlor, and plaintiff informed defendant's employee of her previous sensitivity to some hair dyes. The employee then applied hair dye even though the instructions said not to use it on persons known to have an idiosyncrasy to skin or scalp diseases. In affirming a judgment for plaintiff, the court quoted extensively from a leading case[65] espousing the minority view that when there is *certain knowledge* that some persons, even a small percentage, are certain to be harmed there is a duty to warn of the hidden danger. In the *Braun* case a judgment for plaintiff was affirmed on an appeal which attacked only the probative force of the evidence,[66] and did not question the basic duty to warn of the danger of acquired sensitivity to the ingredient, paraphenylenediamine. Plaintiff's theory was apparent in her verdict directing instruction. It required findings that the product was dangerous in that it was certain to cause injury to some of the persons who used it, even though the great majority of persons who used it would be safe, and that the defendant with reasonable care could have known of this certain injury to some users. Defendant did not question this as a basis for its duty to warn. Plaintiff's evidence showed that 3 to 4% of the users of hair dye containing paraphenylenediamine were allergic, or became sensitized to it so that continued exposure would lead to a reaction. The appellate court indicated that if the danger of allergy to even a small percentage of users is known and if the consequences are serious enough, reasonable care may require giving a warning. This result in regard to responsibility for allergic reactions is contra to that of *Worley v. Procter & Gamble Mfg. Co.*[67] The Missouri courts seem to be in the anomolous position of having reached different results in warranty and negligence cases even though the underlying issue, responsibility to an abnormal plaintiff, is the same. The risk spreading theory behind modern strict liability calls for responsibility to relatively few persons, at least when the defendant was aware of some danger inherent in his product. Therefore, one would expect the Missouri courts to follow the approach of the Missouri negligence cases rather than of *Worley*.

The preceding discussion was based on the assumption that the defendant was aware of a danger inherent in the product he marketed. Across the country today, the hottest issue concerning strict liability is: to what extent should foreseeability of harm affect liability of the unaware defendant?

65. Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48 (1913).
66. See further discussion of this controversial case, *infra* at note 70.
67. 253 S.W.2d 532 (St. L. Mo. App. 1952).

In order to put the problem of foreseeability of harm in clear perspective it is best to review the part it plays in a negligence action for harm caused by an inherent danger in a product. There are two well known Missouri products cases dealing with foreseeability of harm, which is also properly described as knowledge of the danger. In *Braun v. Roux Distributing Co.*[68] the court held that a manufacturer of a product is held to the skill of an expert in that particular business; he is held to have an expert's knowledge, and is bound to keep reasonably abreast of scientific knowledge and discoveries concerning his field. The court approved instructions that the defendant was held to the skill of an expert and that it could be liable if it knew "or by the exercise of ordinary care should have known," of the danger.[69] The key fact of negligence is included in the words "reasonably" and "ordinary care." Even though the court applied the standard of an expert, this only required the defendant to know what an expert would *reasonably* know, *i.e.*, what an expert in the exercise of the *ordinary care* of an expert in that field would know.[70] The decision affirming a judgment for plaintiff has been heavily criticized on the ground that there was insufficient evidence to support the verdict.[71] On the instructions given, the knowledge issue would have been: Should the defendant as an expert in the field of manufacturing hair dye in the exercise of ordinary care have known that users of the dye could acquire a sensitivity to the ingredient, paraphenylenediamine, in the dye? The favorable evidence on the issue was: testimony that 3 to 4% of users of hair dyes become sensitized; testimony that medical information as to the dangers of paraphenylenediamine had been available for thirty years; testimony by both plaintiff's

68. 312 S.W.2d 758 (Mo. 1958).

69. *Id.* at 763.

70. As this article went to press an excellently written opinion was reported which approved instructions giving this precise test for knowledge. Bine v. Sterling Drug Co., 422 S.W.2d 626 (Mo. 1968).

71. Freedman, *Allergy and Products Liability Today*, 24 O.S.L.J. 479, 502 (1963); Noel, *The Duty to Warn Allergic Users of Products*, 12 VAND. L. REV. 331 (1959). These critics failed to analyze the case carefully. On the question of causation, the court acknowledged that this was the first instance in the history of law or medicine of periarteritis nodosa (a usually fatal systemic malady) caused by allergic reaction to paraphenylenediamine. The court accepted as fact that in 50 to 75 million applications of this hair dye no systemic injury to anyone had been reported. However, defendant did not contest the diagnosis of the disease; and, in addition to the circumstantial evidence concerning onset of the alleged reaction, two doctors testified that its cause was a sensitivity or reaction to paraphenylenediamine. On the duty issue, that the particular disease could not have been foreseen was rendered moot by the plaintiff's clever statement of defendant's alleged duty as a duty to warn of the possibilities of acquired sensitivity to paraphenylenediamine. Foreseeability of generally dangerous sensitivity would give rise to a duty to warn.

and defendant's witnesses that paraphenylenediamine was a known potent sensitizer, and introduction of a list of twenty-three articles in medical journals concerning paraphenylenediamine; statements of one of defendant's witnesses made before a congressional committee to the effect that paraphenylenediamine was one of the most dangerous of all cosmetics.[72] Certainly this was sufficient evidence upon which to submit the question of reasonable foreseeability to the jury. In *La Plant v. E. I. Du Pont De Nemours & Co.*[73] the same test of expert's knowledge in the exercise of ordinary care was applied in upholding a verdict for plaintiff when the evidence consisted of testimony that the fact of this danger was included in an identified college textbook and in a practice manual.

The primary contrast between a negligence action and one based on strict liability, is that this issue of reasonably foreseeable harm or reasonable knowledge of the danger is no part of a plaintiff's strict liability case.[74] Furthermore, strict liability means more than shifting the burden to the defendant. He cannot successfully defend a strict liability suit by showing that he did use the ordinary care of an expert, and still was ignorant of the danger.[75]

But what of the defendant who can show that no amount of human skill would have made him aware of the danger? Is he to be held liable even though, at the stage of scientific advancement at the time he acted, it was wholly impossible to know of or detect the inherent danger? This was the problem raised in *Ross v. Philip Morris & Co.*[76] when the plaintiff sought to recover damages for cancer caused by smoking defendant's cigarettes since 1934. The U. S. Circuit Court of Appeals for the Eighth Circuit, applying what it considered to be Missouri law, affirmed a judgment

72. 312 S.W.2d 758, 767 (Mo. 1958).
73. 346 S.W.2d 321 (Spr. Mo. App. 1961).
74. Numerous Missouri negligence cases have been appealed on questions involving the reasonableness of inspections and lack of knowledge of the risk of harm. Those issues would not exist if the theory were strict liability. See McLeod v. Linde Air Products Co., 318 Mo. 397, 1 S.W.2d 122 (1927); Schroder v. Barron-Dady Motor Co., 111 S.W.2d 66 (Mo. 1937); Tayer v. York Ice Mach. Corp., 342 Mo. 912, 119 S.W.2d 240 (1937); Gibbs v. General Motors Corp., 350 Mo. 431, 166 S.W.2d 575 (1942); Zesch v. Abrasive Co., 353 Mo. 558, 183 S.W.2d 194 (1944), and appeal from second trial, *supra* note 40; Dempsey v. Virginia Dare Stores, 239 Mo. App. 355, 186 S.W.2d 217 (K.C. Ct. App. 1945); Parker v. Ford Motor Co., 296 S.W.2d 35 (Mo. 1956); Willey v. Fyrogas Corp., 363 Mo. 406, 251 S.W.2d 635 (1952).
75. Russell v. Community Blood Bank, Inc., —— Fla. ——, 185 So.2d 749, 755 (1966). However, if he was aware of the danger and can show that he acted reasonably in giving a warning of the danger, he would not be liable. See text at note 58, *supra* and RESTATEMENT (SECOND), TORTS § 402A, comment *j* (1965).
76. 328 F.2d 3 (8th Cir. 1964).

for the defendant. It approved instructions which required a verdict for the defendant if the jury found that the harmful effects of substances in the cigarettes "could not have been anticipated by the use of any developed human skill or foresight before the commencement of plaintiff's cancer." The court said, "And the burden that the foreseeability instruction placed upon defendant was not a light one. For defendant was required to offer evidence affording proof that no one, not even the most renowned authority in the world, could have foreseen the cancer-producing danger that smoking cigarettes can—under certain circumstances—apparently create."[77] Under this rule, evidence like that in the *Braun* and *La Plant* negligence cases would be used in rebuttal of defendant's testimony that no knowledge could have been gained. The defendant would be charged with any knowledge that, in fact, existed concerning the inherent danger in his product. But, if as is true of many newly developed products, there are dangers that were not and could not be known at the time the defendant supplied the product, he would not be strictly liable. This seems to be quite a heavy burden, but it is far better for the defendant than liability wholly at one's peril if for no other reason than that it presents the question to the jury. It is likely to be the solution most widely accepted in the country.[78] Missouri's strict liability cases give no reason to suppose that this position will not be followed here.

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77. *Id.* at 12.

78. This solution is supportable because strict liability is justified as a means of spreading the burden of injuries caused by products by treating them as a cost of production against which liability insurance can be obtained. It is argued that when the specific danger is unknowable the risk is not calculable and, thus, the seller is not in a position to spread the risk by insurance or otherwise. Connolly, *The Liability of a Manufacturer for Unknowable Hazards Inherent in His Product,* 32 INS. COUNSEL J. 303 (1965). For this reason the utility of marketing a product with an unknowable danger outweighs the risk involved, and the product is not "unreasonably dangerous." This also explains why the fact of foreseeability goes to the issue of "unreasonably dangerous" product rather than raising an independent issue. Only when the danger is knowable is the product without a warning of the danger, unreasonably dangerous.

Contrary to this analysis is that of "enterprise liability." The argument is that, not foreseeability of the specific danger at the time of producing or marketing the particular product, but rather, foreseeability of the general type of risk which the defendant's enterprise is likely to create is a sufficient basis for risk calculation and loss spreading. Therefore, strict liability should apply for any harm within the general kind of risk the enterprise was likely to create. James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability,* 54 CALIF. L. REV. 1550 (1966); Ehrenzweig, *Negligence Without Fault* (1951), reprinted in 54 CALIF. L. REV. 1422 (1966); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight,* 70 YALE L. J. 554 (1961). A recent decision discussing this theory is Helene Curtis Industries, Inc. v. Pruitt, 385 F.2d 841, 862 (5th Cir. 1967).

CONCLUSION

A recent decision of the Missouri Supreme Court illustrates the hazards involved in obscuring and confusing the differences between a strict liability theory and a negligence theory. In *Krug v. Sterling Drug, Inc.*[79] the court affirmed a judgment for $125,000 for blindness. The theory of the case was negligent failure to warn of the possibilities of serious eye damage from taking drugs manufactured by the defendant. Apparently the case was tried, argued on appeal, and decided with a minimum of legal acumen.[80] According to the reported opinion, the evidence at trial was that the plaintiff took defendant's drugs from 1953 until 1961. She was losing her eyesight by 1956. At that time defendant informed her doctor that so far as it was aware reactions were reversible upon reduction in dosage. The first report anywhere in the world of possible serious eye injury was an English medical report in 1959 of which the defendant was unaware. Plaintiff's own eye specialist testified that he did not recognize her reaction until 1961 because it was not known to anyone in the profession until 1959, and he did not read of it in the American literature until 1961.[81]

Also according to the opinion, the instructions to the jury on the issues of defendant's knowledge did not include the word "reasonable" or the phrase "by using ordinary care."[82] The argument on appeal as to sufficiency of the evidence on the issue of reasonable knowledge was ineptly stated,[83] and there was no objection at all made to the omission in the instructions.[84] The result was a most deplorable decision. The opinion affirmed a negligence liability in a case in which neither the evidence nor the instructions could possibly have led to a jury finding of negligence

79. 416 S.W.2d 143 (Mo. 1967).

80. The criticism made here of the court's decision should be tempered somewhat with the knowledge that the court was faced with an unduly burdensome task. At the beginning of the opinion (p. 145) written by Commissioner Barrett is the following statement:

> Unfortunately the parties, Sterling and Krug, in failing to precisely delineate and articulate respective basic theories, in briefing and arguing numerous irrelevancies and factitious technicalities, have so thoroughly obfuscated essential and meritorious issues that the appellate function has been made unnecessarily difficult.

There is a remarkable contrast between this ineptness and the astuteness of counsel and court in the just reported decision in Bine v. Sterling Drug, Inc., 422 S.W.2d 623 (Mo. 1968).

81. The court's opinion at no point indicates that there was anything *in the record* suggesting available information prior to 1959.

82. 416 S.W.2d 143, 153 (Mo. 1967).

83. *Id.* at 147.

84. *Id.* at 153.

in failing to be aware of the danger involved. The court rationalized its affirmance by citing an opinion in a completely different case against this same defendant for the proposition that defendant could have been aware of the danger before 1959,[85] and by equating the skill of an expert with knowledge of any information that exists in the world regardless of the amount of care used.[86] Neither rationalization is appropriate.[87]

The practical result of the *Krug* decision was that absolute liability was imposed without an opportunity to consider the social wisdom of doing so.[88] Even though the line between liability for negligence and strict liability is fine, it represents the division between two widely divergent bases for legal liability. The former delimits the extent of liability by the traditional fault concept embodied in the requirement of reasonable foreseeability of harm. The latter, without this limiting factor, is the basis that should be used for the extension of the modern risk spreading theory to those areas where it is thought socially justifiable to extend it.

In Missouri the decisions contain all the elements needed for applying strict liability. However, a controlled and rational development of this theory will occur only if counsel and courts carefully scrutinize whether it is this theory that they are applying to the facts before them. Doing so should be an exciting and challenging task.

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85. Yarrow v. Sterling Drug, Inc., 263 F. Supp. 162 (S.D. S.D. 1967).
86. 416 S.W.2d 143, 152 (Mo. 1967).
87. In Bine v. Sterling Drug, Inc., 422 S.W.2d 623, 630 (Mo. 1968) the court held that an instruction was correctly submitted which defined the defendant's negligence as the failure to use that degree of care "that an ordinarily careful and prudent expert engaged in the same business would exercise under the same or similar circumstances." This explicitly confirms the requirement of ordinary care in obtaining knowledge previously suggested in the *Braun* and *La Plant* opinions. Courts may not supply facts necessary to sustain a verdict unless they are of the type of which judicial notice may be taken. Judicial notice includes matters of common knowledge, not specific matters proved in a different case. The evidence did show that Sterling acted irresponsibly after 1961, but this had no causal connection with plaintiff who had ceased taking the drugs by then.
88. It is quite possible that under instructions such as those approved in Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964) discussed *supra,* a defense of no foreseeability of danger by the use of any developed human skill prior to the time plaintiff's condition became irreversible could have been sustained. Liability under those circumstances would be liability wholly at defendant's peril, or, at least, enterprise liability as described in note 78. Strict liability of any type should not be imposed without a consideration of the policy ramificatons. Whether drug manufacturers can continue to carry on developmental research and to furnish new drugs for the market may depend upon the extent to which they will be subjected to civil liability and the extent to which they can spread that cost either through insurance or through the cost of the drugs.