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DEFENSES TO PRODUCTS LIABILITY CASES

Dario A. Garibaldi*

INTRODUCTION

THE DOCTRINE of strict liability in tort has arisen to meet the needs of present day economic, social and moral conditions. The doctrine is the natural outgrowth of Justice Cardozo's perceptive and justifiably acclaimed opinion in *MacPherson v. Buick Motor Co.*,[1] in which the privity requirement was abrogated in ordinary tort liability in inherently or imminently dangerous situations. Among the first appearances of strict liability in tort in more recent times are the cases of *Henningsen v. Bloomfield Motors, Inc.*[2] and *Greenman v. Yuba Power Products, Inc.*[3]

Society's need for the theory of strict liability is evidenced by the extremely rapid rate of growth it has experienced in the relatively short period of time it has been applied. The number of pertinent cases prevents any comprehensive discussion in this article. My purpose herein is the very practical one of outlining what I believe to be the most important and most frequently employed defenses to this type of action. This is not a theoretical or philosophical dissertation. It is written in the hope that it may be of some value to both plantiff's and defendant's bar in the trial of strict liability in tort causes.

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

2 32 N.J. 358, 161 A.2d 69 (1960).

3 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

1. *In General*

Generally, in a case involving strict liability in tort, the principle elements which the plaintiff must prove are: (1) the defective and unreasonably dangerous condition of the defendant's product, (2) that the product was unreasonably dangerous through its defect when it left the defendant's control, (3) that the defendant is engaged in a regular business or field of enterprise as the result of which the product has gone into the stream of commerce, (4) some authorities indicate that a showing must be made that the product is expected to and does reach the user or consumer without substantial change in the condition and that it would be used without inspection for defects.[4]

Although strict tort liability and warranty liability have been somewhat confused by the opinions and are somewhat interrelated, nevertheless, there are some defenses applicable to warranty liability which are not defenses in strict tort liability.[5] These distinctions will be discussed more fully later in this article. The application of traditional negligence, contract and warranty defenses such as lack of privity, lack of reliance on a warranty, lack of notice to the defendant of breach of warranty, disclaimer of implied warranties, etc., are not applicable.

2. *Some States Have Not Adopted the Theory*

Probably the best defense to strict liability in tort cases is the most obvious one, where applicable, and that is that the particular jurisdiction whose law is applicable may not have adopted the doctrine. Inasmuch as the law is constantly changing, it will be necessary for each defendant to examine the law of his state to determine whether or not it has adopted the theory. To date, the following states are applying the theory: Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Washington and Wisconsin. The federal courts in Vermont, Indiana and Colorado, guessing at state law, have concluded that the rule would be accepted. All states, with the possible exceptions of Idaho and Louisiana, have adopted

[4] *Id.*; *see* R. Hursh, American Law of Products Liability 226, 227 (Supp. 1970); L. Frumer and M. Friedman, Products Liability (1960).

[5] Hursh, *supra* n.4 at 227–28.

various statutes including the Uniform Commercial Code, which partially abrogate the privity requirement. There appear to be ten states which have rendered decisions rejecting strict liability without privity. These states are: Delaware, Idaho, Maine, Maryland, Massachusetts, New Hampshire, North Carolina, Rhode Island, South Dakota and West Virginia. However, with the exception of Idaho, these decisions have been partially overcome by statutes.[6]

3. *Privity of Contract*

Contract and sales considerations are not controlling under the rule of strict liability in tort. Privity of contract is not a defense. On occasion, similar rulings have been achieved in warranty cases by abrogation of the requirement of privity of contract. This appears to be considered in the Uniform Commercial Code as well.[7] Also Restatement of Torts 2d, Section 402A provides that the doctrine is applicable even though there is no contractual relationship with the defendant.

4. *Necessity for Sale*

Although in warranty cases there is usually a necessity for a sale, there have been cases imposing liability in warranty without a sale, for instance in bailment cases.[8]

However, in strict liability cases a sale is not necessary to impose liability. In *Delaney v. Towmotor Corp.*,[9] a manufacturer had allowed a stevedoring company to use a forklift truck merely to become acquainted with it. The employee was injured and liability was imposed. In *Cintrone v. Hertz Truck Leasing*,[10] the defendant was a bailor and was not a manufacturer. This case appears to be based upon an extension of implied warranty. Liability has also been held in favor of the user of a laundromat.[11] A beauty parlor operator has been held liable for injuries from a cold wave permanent and the lessor has been held liable for a defective ladder.[12]

Section 402A of the Restatement of Torts 2d describes actions against a seller who is engaged in the business of selling products and

[6] *See* W. Schwartz, *A Products Liability Primer*, 33 A.T.L.J. 64, 69 (1970).
[7] *See* U.C.C. § 2-318; 2 L. Frumer and M. Friedman, *supra* n.4 at § 16A [5] [d].
[8] 2 L. Frumer and M. Friedman, *supra* n.4 at § 16A [5] [c].
[9] 339 F.2d 4 (2d Cir. 1964).
[10] 45 N.J. 434, 212 A.2d 769 (1965).
[11] Thompson v. Reily, 211 So.2d 537 (Miss. 1968).
[12] *Supra* n.6 at 85.

further specifies that the doctrine applies to manufacturers, wholesale or retail dealers or distributors and operators of restaurants. The comment goes on to state that the doctrine does not apply to the occasional seller who is not engaged in selling as a part of his business nor to the sales of the stock of merchandise out of the usual course of business such as execution sales, bankruptcy sales, bulk sales, etc. There are other situations in which the doctrine has been applied. For instance, a savings and loan association which financed a housing tract was held subject to liability to purchasers of houses in the tract for loss from gross structural hazards, where the existence of such hazards indicate the financing agency's failure to ascertain soil conditions and to take other precautions.[13] A tract home developer was held liable on this theory for defective hot water system installed in a home.[14] Lessor of a chattel was held liable in *McClaflin v. Bayshore Equipment Rental Co.*[15]

5. *Notice and Reliance*

There are warranty cases holding that the notice requirement is not applicable where the plaintiff sustains personal injuries and where the action is not between a buyer and seller, although notice of breach of warranty is generally required under both the Uniform Commercial Code and Uniform Sales Act. Because notice is a contractual consideration in warranty cases, it is not required under theories of strict liability in tort. Also, reliance is not required under the strict liability theory. Again, in distinguishing warranty cases from strict liability cases, it should be remembered that reliance is required under both the Uniform Sales Act and the Uniform Commercial Code, although neither statute requires reliance when the warranty action is based on warranty of merchantability.[16]

6. *Disclaimers*

Disclaimers, being matters of contract, are not controlling under the rule of strict liability in tort.[17] *Henningsen v. Bloomfield Motors, Inc.*,[18] invalidating the then standard disclaimer of the automobile in-

[13] Connor v. Coneho Valley Development Co., 61 Cal. Rptr. 333 (1967); *see* Hursh, *supra* n.4 at 270.

[14] Shipper v. Levitt and Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).

[15] 274 Cal. App. 2d 446, 79 Cal. Rptr. 337 (1969).

[16] 2 L. Frumer and M. Friedman, *supra* n.4 at § 16A [5] [d].

[17] *See* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 19 (1964) and Haley v. Merit Chevrolet, Inc.. 67 Ill. App. 2d 19, 214 N.E.2d 347 (1966).

[18] 32 N.J. 358, 161 A.2d 69 (1960).

dustry, seems to have left open the contention as to "surprise results" as a basis to invalidate disclaimers. In *Ford Motor Co. v. Tritt,*[19] express waivers of implied warranties were deemed "unconscionable" under the Uniform Commercial Code.

7. *Defective and Unreasonably Dangerous Condition of the Product*

This subject encompasses a great deal of material. Obviously, in order to recover, the plaintiff must plead and prove that the product was defective and unreasonably dangerous when it left the hands or control of the defendant. Generally, defendants urge that the product was not defective and was not unreasonably dangerous, if it was indeed defective.

a. *In General*

Greenman v. Yuba Power Products, Inc.[20] held that defendant was strictly liable in tort where the product which it had placed on the market, knowing it was to be used without inspection for defects, proved to have a defect that caused injury to the plaintiff, who had used the product "in a way it was intended to be used" and that the product was "unsafe for its intended use."

b. *What Constitutes Defective Condition*

The term "defect" has been defined only on a case to case basis and so far has not been susceptible to any general definition.[21] Chief Justice Traynor has stated that "no single definition of defect has proved adequate to define the scope of the manufacturer's strict liability in tort for physical injuries."[22] Where the material used in manufacture is such that the material may not be safely used for the purpose intended, a defect exists.[23] In *Santor v. A. & M. Karagheusian Inc.*,[24] it was suggested that a product is defective if it is not reasonably fit for the ordinary purposes for which such products are sold and used. When it is shown that a product failed to meet reasonable expectations of the user, the inference is that there was some sort of a defect, a precise

[19] 230 S.W.2d 778 (Ark. 1968).
[20] 59 Cal. 2d 57, 377 P.2d 897 (1963).
[21] Hursh, *supra* n.4 at 235.
[22] R. Traynor, *The Ways and Means of Defective Products and Strict Liability,* 32 Tenn. L. Rev. 363, 373 (1965).
[23] *See, e.g.,* Fanning v. LeMay, 78 Ill. App. 2d 166, 222 N.E.2d 815 (1966) and Dunham v. Vaughan and Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967).
[24] 44 N.J. 52, 207 A.2d 305 (1965).

definition of which is unnecessary. If the product failed under conditions concerning which an average consumer of that product could have fairly definite expectations, then the jury would have a basis for making an informed judgment upon the existence of a defect. *Heaton v. Ford Motor Co.*[25] held that a jury can find a product defective when there is evidence of one or more of the following: a dangerous defect in manufacturing; and unreasonably dangerous design; circumstances in which, from common knowledge, the average user reasonably could have expected the product to perform safely. In *Greenco v. Clark Equipment Co.*[26] the court held that liability is conditioned upon the existence of a defective condition at the time the product leaves the seller's control, which condition is not contemplated by the consumer or user and is unreasonably dangerous in the sense that it is more dangerous than would be contemplated by the ordinary consumer or user with the ordinary knowledge of the community as to the product's characteristics and uses. *Heaton v. Ford Motor Co.*[27] has held that the plaintiff must show that the product was dangerously defective, but not that it was ultra hazardous or that it was placed on the market negligently.

c. *Defects in Design*

Manufacturers' strict liability in tort may be based upon a defect in design as well as a defect in manufacture.[28] The lack of proper safety devices can constitute a defective design.[29] However, shoes that became slippery when wet were not, for that reason, defective so as to make the manufacturer liable.[30] The lack of a remote control starting switch, the lack of a protective housing covering starter knob, the lack of a protective covering over the moving blade and the location of the blade close to the metal housing were held design defects in regard to a power mower in *Ilnicki v. Montgomery Ward Co.*[31]

d. *Failure to Warn as a Defective Condition*

Pursuant to comment H of § 402A of the Restatement of Torts 2d, where defendant has reason to anticipate that a danger may result from

25 248 Or. 467, 435 P.2d 806 (1967).
26 237 F. Supp. 427 (N.D. Ind. 1965).
27 248 Or. 467, 435 P.2d 806 (1967).
28 Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966).
29 Barkewich v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968).
30 Fanning v. LeMay, 38 Ill. 2d 209, 230 N.E.2d 182 (1966).
31 371 F.2d 195 (7th Cir. 1967).

a particular use of his product and he fails to give adequate warning, the product sold without such warning is in a defective condition. However, where a state statute required that dynamite be tested by the ultimate user before using it and the product was sold with the expectation that it would be tested for defects or limitations before using, the court held that the existence of a state safety order that the product be tested might be evidence that it was reasonable for suppliers of dynamite fuse in some instances not to warn regarding fuse timing, but that this was not conclusive.[32] In *Crane v. Sears Roebuck and Co.*,[33] plaintiff's action was based upon the theory of breach of warranty; however, it was held that defendant was required to warn against latent dangerous characteristics and that the law of strict liability would be applied. In the case of *Love v. Wolf*,[34] even though one of the defendants failed to give adequate warning that the continued use of one of his drugs could result in disease; and even though it was advisable to have a patient's blood tested to determine the extent of such a danger; and that it was desirable to prevent a patient from using the drug for a prolonged period; the court still refused to apply strict liability. Also, where the person claiming the right to the warning has knowledge of the general danger involved in the use of the product, although not the specific danger that caused the injury, it has been held the failure to warn did *not* impose liability.[35]

e. *Failure to Inspect*

It is generally considered that an injured plaintiff has no duty to inspect or ferret out defects in the product.[36] The questions of contributory negligence and assumption of risk are discussed below.

f. *Condition as Unreasonably Dangerous*

Again, defendants tend to defend the cases wherein they cannot deny a defect by alleging that the defect was not unreasonably dangerous. As stated above, cases have held that the product must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the

[32] Cinifax v. Hercules Powder Co., 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).
[33] 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963).
[34] 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964).
[35] Speyer, Inc. v. Humble Oil and Refining Co., 275 F. Supp. 861 (W.D. Pa. 1967).
[36] *See* notes to Restatement (Second) of Torts § 402A (1965) and Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

community. In resolving this problem the courts must balance the utility of the risk against the magnitude of the risk and should consider the following factors: (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of a serious injury, (4) the obviousness of the danger, (5) the status of the public's customary expectation of the danger, (6) the practical possibility of avoiding injury by care in manufacture as well as by giving instructions as to the use of the product.[37]

Where a child's jacket caught fire, evidence supporting the finding that the behavior and characteristics of the jacket were unusual supported liability.[38] Determination of "unreasonably dangerous" involves a balancing of the likelihood and gravity of harm against the burden of precautions which would be effective to avoid the harm.[39] Failure to place a guard on a power takeoff "brush cutter" was held to constitute an unreasonably dangerous condition.[40] Also the danger may be simply to the plaintiff's property and not to his person.[41]

8. *Alteration of the Product After It Has Left Defendant's Hands*

Section 402A of the Restatement of Torts 2d states that the doctrine applies when the product is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. Justice Traynor in one case held that strict liability in tort should not extend to injuries which cannot be traced to the product as it reached the market.[42]

Comment G of 402A requires the plaintiff to prove that the defective condition existed at the time it left the defendant's hands. A manufacturer of motor boat equipment was held not liable for injuries to a passenger who fell from a boat and was struck by a propeller, although the probable cause of injury was deficiency in the tiller kit. The kit had been modified, after sale, to accommodate a motor of greater horsepower.[43]

37 *See* Wade, *Strict Tort Liability of Manufacturers*, 19 S.W.L.J. 5, 15, 17 (1965).
38 LaGorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967).
39 Dunham v. Vaughan and Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967).
40 Richey v. Sumage, 273 F. Supp. 904 (D. Or. 1967).
41 *See* Santor v. A. and M. Karagheusian Inc., 44 N.J. 32, 207 A.2d 305 (1964).
42 Escola v. Coca-Cola Bottling Co. 24 Cal. 2d 453, 150 P.2d 436 (1944).
43 O. S. Stapley Co. v. Miller, 6 Ariz. App. 122, 430 P.2d 701 (1967); vacated on other grounds, 103 Ariz. 556, 447 P.2d 248 (1968).

Recovery, on the theory of strict tort liability, against an x-ray manufacturer was barred when it was shown that parts of the machine were improperly installed after leaving control of defendant.[44]

In *Dunham v. Vaughan*,[45] a chip from a claw hammer injured the plaintiff while the plaintiff was pounding in a clevis pin. The hammer had a greater tendency to chip as time passed. The court held it was a jury question as to whether or not the hammer was defective when it left the defendant's control. And in an action against the bottler and retailer of Coca-Cola, for injury to the plaintiff when a bottle broke as she tried to open it, evidence was held sufficient to establish the bottle was defective when it left the hands of the retailer but not when it left the hands of the bottler.[46]

Comment P of § 402A of the Restatement of the Law of Torts 2d indicates that there may be circumstances under which a manufacturer will be held liable although the product is further processed or changed after leaving the defendant's hands. The comment states in part: "The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes," and goes on to state, "No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not." Comment Q, indicates that, particularly where the product itself is merely incorporated into something larger, strict liability will be found to carry through to the ultimate user or consumer.

In *Vandermark v. Ford Motor Co.*,[47] the court emphasized that the manufacturer could not delegate its duty to have its automobiles delivered to the ultimate purchaser free from dangerous defects and could not escape liability on the ground that the defect may have been caused by one of the authorized dealers.

In *Alvarez v. Felker Mfg. Co.*,[48] a manufacturer was held strictly liable even though the defect might have been caused by the dealer or retailer who was not an agent or employee of the manufacturer and even though no instruction on the law of agency was required or neces-

[44] Tucson General Hospital v. Russell, 7 Ariz. App. 193, 437 P.2d 677 (1968).
[45] 42 Ill. 2d 339, 247 N.E.2d 401 (1969).
[46] Coca-Cola Bottling Co. v. Hobart, 423 S.W.2d 118 (Tex. Civ. App. 1967).
[47] 61 Cal. 2d 256, 391 P.2d 168 (1964).
[48] 230 Cal. App. 2d 987, 41 Cal. Rptr. 514 (1964).

sary insofar as the rule of strict liability in tort was concerned. The court further held that an instruction which told the jury that the manufacturer would not be liable for what the distributor did, or failed to do, would do violence to the rule of strict liability and was prejudically erroneous because it enabled the jurors to exonerate the manufacturer for an injury caused by a defect in the blade, when the manufacturer left the completion of its product to its authorized dealer.

In *Sharp v. Chrysler Corp.*,[49] the court held that if the manufacturer or assembler surrenders possession and control of a product in which change will occur, or in which change can be anticipated to occur so as to cause a product failure, the existence of a defect at the vital time is established. An assembler or manufacturer who places into the channels of trade a product so fragile that anticipated use is likely to create a dangerous condition has distributed a defective product.

9. *Causation—Res Ipsa Loquitur*

Of course, plaintiff has the burden to prove that his injuries resulted directly and proximately from the defective condition of the product. Accordingly, a proper defense would be that the injuries were not caused by the defective condition of the product, if the product was defective. Frequently the proof of the defective and unreasonably dangerous condition is inseparable from proof of causation. The same circumstantial or expert evidence may be required to establish both.

If the product has been totally destroyed or if it cannot be produced for expert analysis, the question arises—can res ipsa loquitur be used to prove a defective condition? The cases appear to go both ways. In *Buttrick v. Arthur Lessard & Sons, Inc.*,[50] plaintiff purchased and took delivery of an automobile on October 19, 1962, and had trouble with the headlights constantly from that time on, during which period defendant undertook to remedy the situation. In December of 1963, the lights failed to function and plaintiff was injured. The court, in effect, adopted the theory of res ipsa loquitur to prove the defect:

> To require plaintiff to prove negligence would impose in cases like the instant one an impossible burden since here neither plaintiff nor defendant was able to locate even the cause of the malfunction.

[49] 432 S.W.2d 131 (Tex. Civ. App. 1968).
[50] 260 A.2d 111 (N.H. 1969).

The plaintiff is entitled to proceed upon strict liability in tort in this case if there is evidence from which a jury could find that the malfunction of the lights caused the accident and arose from a defect present at the time of purchase.[51]

On the other hand, some people believe that res ipsa loquitur is not applicable on the basis of such cases as *Shramek v. General Motors Corporation.*[52] In this case an automobile had been purchased in February of 1961 and an accident happened on October 20, 1961, approximately nine months after the purchase. An automobile tire had blown out. The tire was not available for examination. Defendants moved for summary judgment, which the court granted. However, it is doubtful whether this case stands for the proposition that res ipsa loquitur may not be employed, inasmuch as one of the reasons for the decision was that the plaintiff appeared unable to prove that the accident was the result of the tire. The court stated:

We hold that the entry of a summary judgment was both proper and required in this case because the record conclusively demonstrates that plaintiff will not be able to prove, directly or inferentially essential elements of his case; i.e., (1) that the accident which resulted in his injuries was caused by a tire. . . .

Moreover, aside from a superficial inspection of the damaged car and tire after the accident by plaintiff and his cousin, the tire in question was never subjected to an examination which could reveal that the blowout was due to a pre-existing defect. Thus, without any examination of the tire designed to elicit the cause of the blowout and without the tire itself or any hope or expectation of its recovery, plaintiff could never prove, directly or inferentially, a case of negligence, breach of warranty or strict liability . . . . The mere fact of a tire blowout does not demonstrate the manufacturer's negligence, nor tend to establish that the tire was defective. Blowouts can be attributed to myriad causes, including not only the care with which the tires are maintained, but the conditions of the roads over which they are driven and the happenstance striking of damaging objects.[53]

In other words in the *Shramek* case, the accident could just as easily have been caused by running over a piece of glass, a nail, a jagged piece of iron or a hole in the street.[54]

In an action for injury to the plaintiff when fingers of a steel sheet piler, manufactured by one defendant and sold to plaintiff's employer by another, opened when they should have remained closed, allowing

[51] *Id.* at 113.
[52] 69 Ill. App. 2d 72, 216 N.E.2d 244 (1966).
[53] *Id.* at 78; 216 N.E.2d at 246-47.
[54] *Supra* n.6 at 84 (further citations regarding causation).

a steel sheet to fall, plaintiff sufficiently established the defective condition of the piler, for purposes of strict liability, by evidence of the malfunction. Changes in the piler made by plaintiff's employer but not affecting the nature of the machine did not affect defendant's liability. The evidence sufficiently showed that the defect existed at the time of delivery of the machine and did not show assumption of risk by the plaintiff or intervening causative negligence by plaintiff's employer.[55]

Defendant seller of Kraft Red Label type shortening was held liable to purchaser for injury from an explosion where, on the evidence presented, the only explanation for the explosion was a defect in the product.[56]

On the other hand, it was held that the requirement of showing a defect cannot be satisfied by reliance on the doctrine of res ipsa loquitur.[57]

10. *Proper and Abnormal Use of a Product*

While many of the cases state that the seller is not to be held liable when the consumer makes abnormal use of the product, the recent case law trend is to permit the jury to determine whether certain unintended or abnormal uses should be anticipated as within the scope of foreseeable risk.[58]

It has been held that manufacturers have a duty to provide adequate warning extending beyond the scope of the intended use of the product in reaching into the zone of foreseeable use.[59]

On occasion, defendants may disprove causation and/or any defect existed by showing that misuse or any improper use rather than the condition of the product itself was responsible for the plaintiff's injuries. However, if the plaintiff has used the product in a manner reasonably foreseeable, defendant will still be liable.[60]

In determining whether a product has been normally or abnormally

[55] Greco v. Bucciconi Engineering Co., 283 F. Supp. 978 (W.D. Penn. 1967).

[56] Franks v. National Dairy Products Corp., 282 F. Supp. 528 (W.D. Tex. 1968).

[57] McCurter v. Norton Co., 263 Cal. App. 2d 402, 69 Cal. Rptr. 492 (1968).

[58] *See e.g.,* Dunham v. Vaughan and Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969). *Supra* n.6 at 91.

[59] Post v. American Cleaning Equipment Corp., 437 S.W.2d 516 (Ky. Ct. App. 1968).

[60] *See* Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968).

handled it is pertinent whether or not it was reasonably foreseeable that the products would be handled or used in the manner described.[61]

It has been held that the second accident or second impact rule, wherein the plaintiff has been injured by coming in contact with the interior of his vehicle, falls within the concept of normal use.[62]

Where plaintiff used a grinding wheel at speeds in excess of the rated capacity, there was no liability.[63] Where a plaintiff knew a particular jack should not be used on a particular make of car, there was no liability.[64]

Where the plaintiff had attempted to stabilize a ladder while using it on an unstable surface, although the ladder was accompanied by directions not to use it on such surface and where the plaintiff had made changes in the ladder, no liability was established.[65]

11. *Normal Wear and Tear*

Generally manufacturers are not liable for injuries resulting from the ordinary wear or deterioration of the product.[66] A number of cases hold the manufacturer or supplier liable many years after the fabrication of the product. In *Thomas v. Ford Motor Co.*,[67] Ford Motor Company contended that the cause of the accident was wear and tear to a wheel. Plaintiff had a retail tire man, of 21 years experience, place an old lock ring from an old exploded wheel on a new wheel of the exact same type and then place a new lock ring on an old wheel demonstrating to the jury that the age of the wheel had nothing to do with the safety of the lock ring in question.

12. *Contributory Negligence—Assumption of Risk*

This is the most strenuously litigated area of defense in strict tort liability cases. Although there is a considerable amount of confusion in the opinions, it is becoming increasingly clear that contributory negligence as it is understood in negligence law, is not applicable to

[61] *See* Estabrook v. J. C. Penney Co., 10 Ariz. App. 114, 456 P.2d 960 (1969).
[62] Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969).
[63] McCurter v. Norton Co., 263 Cal. App. 2d 402, 69 Cal. Rptr. 493 (1968).
[64] Brandenburg v. Weaver Mfg. Co., 27 Ill. App. 2d 374, 222 N.E.2d 348 (1966).
[65] Erickson v. Sears Roebuck and Co., 240 Cal. App. 2d 793, 50 Cal. Rptr. 143 (1966).
[66] *See* 1 L. Frumer and M. Friedman, *supra* n.4 at § 11.03 and Hursh, *supra* n.4 at § 2:4. *See also* Dunham v. Vaughan and Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967).
[67] Birmingham, Ala., Cir. Ct. (1968). *See*, 11 A.T.L.N. 455 (1968).

strict tort liability cases. Since negligence is not the basis of the strict tort liability case, contributory negligence should not be a defense.[68]

Probably the better reasoned formulation of this defense appears in the recent Illinois Supreme Court decision of *Williams v. Brown Manufacturing Company*,[69] in which it was held in addition to the fact that a plaintiff who uses a product for a purpose neither intended nor objectively reasonably foreseeable may be barred from recovery, that the concept of contributory negligence is not applicable in strict product liability in tort cases. The court held that "assumption of risk" is an affirmative defense which does bar recovery. The test to be applied in determining whether a user has assumed the risk of using a product known to be dangerously defective is fundamentally a subjective test, in the sense that it is the user's knowledge, understanding, and appreciation of the danger which must be assessed, rather than that of the reasonably prudent man. In other words, a person who is aware of an unreasonably dangerous defect in a product and who proceeds to use the product in spite of that knowledge, will be barred from recovery.

As a side light, it should be noted that the common law and the Uniform Sales Act cases hold that implied warranties are excluded where inspection or examination would have revealed the defect and the buyer failed to inspect or adequately inspect. The Uniform Commercial Code similarly excludes the implication of a warranty as to defects which an examination ought to have revealed, but recognizes that the standard of inspection is less stringent for non-commercial individual buyers than for commercial buyers. However, this is contrary to strict tort liability wherein it is the subjective knowledge of the plaintiff which controls and not what reasonable men might have done under similar circumstances.

Also, under 402A of the Restatement, contributory negligence in the sense of a failure to discover a defect in a product or to guard against the possibility of its existence is not a defense. In comment n to section 402A it is stated:

> On the other hand the form of contributory negligence which consists in a voluntary and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this section as in other cases of strict liability. If the

68 *See* Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
69 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

The foregoing seems to be consistent with *Greenman, Vandermark* and *Cintrone.*[70]

Numerous cases hold that the failure of the user of a product to search for or guard against the possibility of a product defect is not a defense.[71]

It has also been held that even though the plaintiff was present on prior occasions when a machine malfunctioned, such can be no defense unless it is shown that the plaintiff observed and understood the malfunction and that the malfunction was the same as that which injured the plaintiff.[72]

13. *Statutes of Limitation*

It seems axiomatic that in strict tort liability cases the personal injury statutes of limitations apply. The question then arises as to when does the statute begin to run. Again in the recent Illinois Supreme Court case of *Williams v. Brown Manufacturing Co.*,[73] the court held that the statute of limitations does not begin to run until the plaintiff has been injured.

In the case of *Gardiner v. Philadelphia Gas Works*,[74] it was held that the four year limitation period of the Uniform Commercial Code controls a breach of warranty action in which damages for personal injuries are claimed. Apparently this is an area of possible conflict, not only between strict liability in tort and the Uniform Commercial Code, but between the Code and the pre-code warranty law.[75]

As to the time of accrual, the pre-code warranty cases are in conflict. Some hold the action accrues at the time of sale even though the injury or damage occurs later, while others hold that the action accrues at the time the defect is or should have been discovered.

[70] Greenman v. Yuba Power Products, Inc., 59 Cal. 2d. 57, 377 P.2d 897 (1963); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 198 (1964); Cintrone v. Hertz Truck Leasing, 45 N.J. 434, 212 A.2d 769 (1965).

[71] *See, e.g.*, O. S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968).

[72] Greco v. Bucciconi Engineering Co., 407 F.2d 87 (3d Cir. 1969) noted at 12 A.T.L.N. 110 (1969).

[73] 45 Ill. 2d 418, 261 N.E.2d 305 (1970).

[74] 413 Pa. 415, 197 A.2d 612 (1965).

[75] 2 L. Frumer and M. Friedman, *supra* n.4 at § 16A [5] [g].

In strict liability in tort, as stated above, the better reasoned rule appears to be that the cause of action accrues at the time of accident or injury.

Strict tort liability also applies to wrongful death cases.[76]

In death actions the warranty cases are in conflict as to whether a death action predicated upon a breach of warranty is maintainable. If manufacturing or supplying a defective product is considered a tort, then the death action would be maintainable under the language of most death statutes.

It has been held that warranty liability is a tort liability and that the action was governed by a three year (tort) and not four year (UCC warranty) statute of limitations.[77] And in *Wilsey v. Sam Mulkey Co.*,[78] the court held that a personal injury complaint alleging strict tort liability is a tort action governed by the three year statute and the action accrues at the time of the accident. The court dismissed the count predicated on breach of warranty under New York rule that the warranty action is governed by six year statute of limitations for contracts and accrues at the time of sale—in this case in 1956—whereas the accident occurred in 1963.[79]

14. *Types of Injuries to Which Applicable*

Although it may seem axiomatic, it is possible defendants may attempt to raise defenses on the basis that the doctrine does not apply to particular types of injuries. Obviously the theory is applicable to personal injuries. Courts have held the doctrine applicable in wrongful death actions.[80] The cause of action applies to property damage.[81] There is some authority for the position that the theory may serve as a basis for recovery of damages, reducing the value of the very product itself.[82]

76 Canifax v. Hercules Powder Co., 237 Cal. App. 2d 44 (1965); Swain v. Boeing Airplane Co., 337 F.2d 940 (2d Cir. 1964). *See* Hursh, *supra* n.4 at § 5A:14.

77 Abate v. Barkers Inc., 27 Conn. Sup. 46, 229 A.2d 266 (1967).

78 56 Misc. 2d 480, 289 N.Y.S.2d 307 (1968).

79 *Contra* Mendellve Pittsburgh Plate Glass Co., 57 Misc. 2d 45, 291 N.Y.S.2d 94 (1967).

80 Hursh, *supra* n.4 at 256.

81 *See* Hursh, *supra* n.4 at § 5A:15; Restatement (Second) of Torts § 402A (1965); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 198 (1964); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

82 *See* Santor v. A. and M. Karagheusian Inc., 44 N.J. 52, 207 A.2d 305 (1964), and Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966).

Although it has been recognized that a plaintiff may recover on this theory for monetary losses, such as medical payments or loss of earnings, and that he may likewise recover for the cost of repairing damaged property or a reduction in value of the product directly attributable to its defective condition, the courts apparently have refused to extend strict liability doctrine to cases involving consequential commercial losses in the absence of personal injuries. For example, in *Sweely v. White Motor Co.*,[83] the trial court awarded plaintiff damages for the amount of payments on the purchase price of a truck for lost profits. It was held that although such an award could properly be sustained on the basis of breach of warranty, it could not be sustained on the theory of strict liability in tort. The truck had overturned and was damaged, without the plaintiff himself having been personally injured. The court held defendant could not be liable on the basis of strict liability in tort for plaintiff's commercial losses in connection with the payments on the purchase price and his lost profits.

It has been held that the doctrine is not applicable in an action by a cosmetic manufacturer against the manufacturer of aerosol cans in which the plaintiff claimed that, as a result of leakage of the cosmetic from the can, customers stopped purchasing plaintiff's product. Plaintiff was forced to refund substantial sums to customers, and plaintiff's name and good will were damaged.[84]

15. *Persons Entitled to Benefit from the Strict Liability Doctrine*

The doctrine applies to the purchaser.
The doctrine applies to the user or consumer.[85]
The doctrine applies to a bystander.[86]

16. *Unavoidably Unsafe Products*

Comment k following section 402A of the Restatement of Torts 2d suggests that there may be certain unavoidably unsafe products for which strict liability in tort should not be imposed. Quoting an example from the field of drugs, the section suggests that Pasteur treatment of rabies, which not uncommonly leads to various serious and damaging

[83] 63 Cal. 2d 9, 403 P.2d 145 (1965).
[84] Rhodes Pharmacal Co. v. Continental Can Co., 72 Ill. App. 2d 362, 219 N.E.2d 726 (1966).
[85] *See* Hursh, *supra* n.4 at § 5A:19.
[86] *Id.* at § 5A: 20; Elore v. American Motors Corp., 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969).

consequences, should be considered unavoidably unsafe. Since the disease itself invariably leads to a dreadful death, both the marketing and use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. However, it should be made clear that the danger is the result of allergies peculiar in the individual himself and not from an adulteration of the drug. In other words, the drug is absolutely pure and the side effects result from allergic reactions within the individual himself. This is to be distinguished from such items as contaminated blood, in which the blood itself is contaminated and diseased and ill effects result from such contamination and disease which is improperly within the blood.[87]

The Restatement mentions that, because of lack of time and opportunity for sufficient medical experience, many new or experimental drugs have no assurance of safety or of purity of ingredients. Nonetheless, the marketing and use of the drug notwithstanding a medically recognizable risk may be justified. The seller of such products, again *with the qualification that they are properly prepared and marketed,* and *proper warning is given,* where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use.

In spite of the Restatement, a California court has held that a manufacturer of a drug sold pursuant to a physician's prescription may be held strictly liable in tort.[88]

In *Yarrow v. Sterling Drug Co.,*[89] aralen was given to the plaintiff as a treatment for an arthritic condition. The drug was known by the manufacturer to have certain complications and plaintiff's doctor received a letter to that effect. As the result of daily administration of the drug, plaintiff became 80% blind. Although the court found that the product was not defective, liability was imposed for the defendant's failure to adequately warn plaintiff's doctor of the damage through its salesman. The court further held that the intervening conduct of the doctor did not insulate the manufacturer. In *Davis v. Wyeth Laboratories, Inc.,*[90] there was a failure to warn of risk from Sabin Oral Polio Vaccine, even though the risk was to only one person per million.[91]

87 *See* Cunningham v. MacNeal Memorial Hospital, 47 Ill. 2d 443, 266 N.E.2d 897 (1970).
88 Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).
89 263 F. Supp. 159 (D.S.D. 1967), aff'd 408 F.2d 978 (8th Cir. 1969).
90 399 F.2d 121 (9th Cir. 1968).
91 *Supra,* n.6 at 86.

Conclusion

Because decisions are constantly being rendered, any discussion of strict liability in tort is destined to be outdated even as it goes to press. Also, as previously mentioned, no law review article on this topic can be exhaustive. Our purpose herein has been the practical one—to alert you to possible defenses and the manner in which they have been dealt with in the case law.