August 2015

Strict Liability Comes of Age in Ohio: Almost

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STRICT LIABILITY COMES OF AGE IN OHIO: ALMOST

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IN JUNE 1977 the Ohio Supreme Court decided *Temple v. Wean United, Inc.*,[1] and adopted the doctrine of strict liability for product liability litigation, thereby following a national trend. Earlier decisions had discussed a theory similar to strict liability and had engendered considerable confusion as to the substantive theory supporting possible recovery.[2] *Temple* apparently ended the confusion.

The case arose out of an industrial accident in which a power press was accidentally activated, causing the severing of plaintiff's arms. Suit was filed against the manufacturer of the press, with the primary issue being whether the machine was defective at the time of manufacture. The court seized this opportunity to elucidate its theory of law and clarify the intent of its prior rulings by announcing a clear standard. However, a portion of the syllabus and opinion[3] limited the definition of "defect" so as to potentially place an unnecessary restraint on the application of the strict liability doctrine. This restraint is inconsistent with the historical roots of the doctrine.

By the early 1960's courts in the United States had become aware that traditional theories of negligence and warranty did not adequately protect the user of various products other than drugs and cosmetics. Thus, the California Supreme Court in the landmark decision of *Greenman v. Yuba Power Products, Inc.*[4] applied the doctrine of strict liability to permit recovery in an action for injuries caused by an allegedly defective power tool. The plaintiff was injured when a piece of wood flew out of a "Shopsmith" (a combination power tool incorporating elements of saw, drill and

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[1] 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

[2] *E.g.*, McDonald v. Ford Motor Co., 42 Ohio St. 2d 8, 326 N.E.2d 252 (1975); Gast v. Sears Roebuck and Co., 39 Ohio St. 2d 29, 313 N.E.2d 831 (1974); State Auto Mutual Ins. Co. v. Chrysler Corp., 36 Ohio St. 2d 151, 304 N.E.2d 891 (1973); United States Fidelity & Guaranty Co. v. Truck & Concrete Equip. Co., 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970); Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

[3] 50 Ohio St. 2d at 318, 364 N.E.2d at 267 (syllabus paragraph 5); 50 Ohio St. 2d at 326-27, 364 N.E.2d at 273.

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

wood lathe) and struck him in the head. The trial court ruled that there was no evidence that the retailer was negligent or had breached an express warranty. It further ruled that the manufacturer was not liable for any implied warranty. Only a limited number of issues were presented to the jury: implied warranty as to the retailer, negligence, and express warranty as to the manufacturer. On appeal the court reversed and its opinion extended the manufacturer's liability by applying the doctrine of strict liability. The policy reasons expressed for this decision focused largely on the concept of risk allocation, and the court determined that the risk could be better borne by manufacturers.[5]

The impact of *Greenman* gave added impetus to the already well received decision of the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors, Inc.*,[6] so that in a relatively short time the doctrine of strict liability became the majority view in American jurisdictions.[7] The single most comprehensive statement of the doctrine is set forth in section 402A of the *Restatement (Second) of Torts*.[8]

Despite these precedents and the fact that a lucid definition of the

[5] The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best . . . it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do.

Id. at 61, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[6] 32 N.J. 358, 161 A.2d 69 (1960). Claus Henningsen signed a purchase order for a new automobile on May 7, 1955 and took delivery on May 9. The various documents which accompanied the sale included a disclaimer of liability. On May 19, the co-plaintiff (Claus' wife) was operating the vehicle when something allegedly snapped causing her to lose control of the vehicle and crash. The trial court determined that there was no evidence to support a prima facie case of negligence, partly due to the fact that there was no expert testimony, and permitted the jury to consider only the warranty cause of action. Defendants appealed from the resulting plaintiff's verdict. The main issues on appeal focused on a lack of privity and the disclaimer clause. The affirming decision became a foundation for the subsequent development of strict liability in tort, not because it adopted the doctrine, but because it abolished the need for privity in contract, demolished the disclaimer clause, and helped establish the policy reasons which justify strict liability. Since this decision, courts facing similar issues have almost consistently abolished the privity requirement or adopted strict liability in tort. In a sense this decision is the watershed from which *Greenman* flowed. The privity requirement was further eroded with the acceptance of Uniform Commercial Code, section 2-318. Among the large number of casenotes analyzing this decision, the following are illustrative: Note, 48 CALIF. L. REV. 873 (1960); Note, 29 FORDHAM L. REV. 183 (1960); Note, 74 HARV. L. REV. 630 (1961); Note, 59 MICH. L. REV. 467 (1961); Note, 109 U. PA. L. REV. 453 (1961).

[7] *See* Chart of Strict Liability, [1977] PROD. LIAB. REP. (CCH) ¶ 4060.

[8] RESTATEMENT (SECOND) OF TORTS § 402A (1965) reads:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

doctrine was available to it, the Ohio Supreme Court did not adopt a doctrine analogous to strict liability until 1966.[9] The year before, in *Ingliss v. American Motors Corp.*,[10] the court set the stage by allowing recovery in a tort action premised upon express warranty, despite the absence of privity. However, when the time came, the court did not define its doctrine in terms of existing precedents but rather established in *Lonzrick v. Republic Steel Corp.*[11] the somewhat unique standard of:

> [a]n action in tort which is based upon the breach of a duty assumed by the manufacturer-seller of a product. This duty is assumed by the manufacturer by reason of his implicit representation of good and merchantable quality and fitness for intended use when he sells the product. This duty is breached when a defect in the product causes the collapse of the product and is the direct and proximate cause of injury to a person whose presence the defendant could reasonably anticipate.[12]

The plaintiff in *Lonzrick* had made no allegations of negligence and the court ruled that an action in contract was not proper since there was no contractual relationship between the parties. Although the court did not so state, it is evident that despite its decision in *Ingliss,* the court was still concerned with the privity question. The court was thus faced with a need to permit recovery on some theory other than negligence or contract and did so in a fashion which, in actuality, combined a "tort" element, despite the failure to allege negligence, and a "contract-warranty" element, despite the absence of a contractual relationship. The court termed this standard "an action in tort for breach of an implied warranty."[13]

As to defenses, the parallel to traditional strict liability is highly visible as the court ruled that assumption of the risk was a valid defense to this new concept, but no mention of contributory negligence was made.[14] This makes eminent good sense as the doctrine approved did not require a showing of negligence. It would have been illogical to permit a contributory

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(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[9] *See* Lonzrick v. Republic Steel Corp., 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

[10] 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965). *See also* Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[11] 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

[12] *Id.* at 230, 218 N.E.2d at 188.

[13] *Id.* at 235, 218 N.E.2d at 191.

[14] *Id.* at 237, 218 N.E.2d at 193.

negligence defense. But since assumption of the risk is available in any tort claim, it can properly be considered in relation to the Ohio version of strict liability.

For most purposes it was clear that the decision contained a convoluted definition and application of the doctrine of strict liability in tort which the dissenting opinion recognized.[15] However, the court continued to adhere to its strained definition, thus inviting problems in terms of the application of the statute of limitations as well as the possibility of exemplary damages.[16] In 1970 the court reiterated its position in *United States Fidelity and Guaranty Co. v. Truck and Concrete Equipment Co.*, declaring:

> [T]he plaintiff in a products liability case is not restricted to prosecuting his action on the basis of negligence alone but *may proceed in an action in tort based upon the theory of implied warranty, notwithstanding that there is no contractual relationship between the plaintiff and the defendant.*[17]

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[15] Chief Justice Taft stated in his dissenting opinion:

> The Court of Appeals recognized that "use of the word 'warranty' is probably improper" in explaining what this court is doing in the instant case, and that what it is really doing is recognizing a cause of action for "strict tort liability."
> Quite obviously, as is apparent from the authorities cited, the legal conclusion set forth in paragraph two of the syllabus represents a somewhat disguised statement of what is usually referred to as the doctrine of "strict liability."

6 Ohio St. 2d at 245, 218 N.E.2d at 197 (citations omitted).

[16] The potential conflict as to the statute of limitations is between OHIO REV. CODE ANN. § 2305.10 (Page 1976) (two years from date of injury in personal injury cases) and OHIO REV. CODE ANN. § 1302.98 (Page 1976) (UCC breach of contract actions' four year provision running from date of accrual, which is defined as delivery or tender date except as modified in connection with specific future warranties). Thus, if strict liability is analogized to the contract action, it is possible to bar the action before the injury occurs. On the other hand, if the analogy is negligence, no such bar is possible. Either analogy is proper under Ohio decisions prior to 1977. The federal courts, when interpreting Ohio law, have utilized the personal injury limitation period. Mahalsky v. Salem Tool Co., 461 F.2d 581 (6th Cir. 1972). *Accord,* Lee v. Wright Tool & Forge Co., 48 Ohio App. 2d 148, 356 N.E.2d 303 (1975). Such an interpretation appears to be consistent with United States Fidelity & Guaranty Co. v. Truck & Concrete Equip. Co., 21 Ohio St. 2d 244, 257 N.E.2d 380 (1970). *Cf.* Val Decker Packing Co. v. Corn Products Sales Co., 411 F.2d 850 (6th Cir. 1969), which applied the contract statute.

The potential conflict as to exemplary damages arises from the fact that such damages are normally awarded only in instances of outrageous or malicious conduct, but the conduct of the manufacturer (in this sense) is largely irrelevant to a claim premised upon strict liability. Again, the result will depend upon whether the strict liability case is more closely analogous to negligence or warranty. Those few cases relying on Ohio law which have reviewed the issue have failed to make the analysis necessary for a clear understanding and instead assume that the question is to be decided on the tort analogy. Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1975), *cert. denied,* 424 U.S. 913 (1976); Drayton v. Jiffee Chemical Corp., 395 F. Supp. 1081 (N.D. Ohio 1975). A more detailed analysis is seen in G. D. Searle & Co. v. Superior Court, Sacramento County, 49 Cal. App. 3d 22, 122 Cal. Rptr. 218 (1975).

[17] 21 Ohio St. 2d 244, 251, 257 N.E. 2d 380, 384 (1970).

Although some members of the court, as evidenced by the dissent in *Lonzrick* and at least one appellate court opinion,[18] recognized the obvious, the majority of the court retained its obscure position in *State Auto Mutual Insurance Co. v. Chrysler Corp.*[19] Here it became almost painfully clear to virtually everyone except the writers of the opinion that Ohio had adopted strict liability. The opinion delineated the elements necessary to establish a cause of action for strict liability in warranty as follows:

> In cases involving strict liability, the theory of plaintiff's case, proof of negligence is not required, and the doctrine of *res ipsa loquitur* is applicable only insofar as it allows a jury to infer negligence once a plaintiff has met his burden of proof. That burden of proof, as stated by this court . . . consists of plaintiff alleging and proving, by a preponderance of the evidence, that: (1) there was, in fact, a defect in the product manufactured and sold by the defendant; (2) such defect existed at the time the product left the hands of the defendant; and (3) the defect was the direct and proximate cause of the plaintiff's injuries or loss.[20]

The concept of strict liability in tort, though clarified in terms of acceptance by use of these three elements, was obfuscated by the court's reference to the doctrine of res ipsa loquitur. Under the facts of the case it is apparent that the court was attempting to indicate that a negligence action premised on res ipsa would not be accepted.[21]

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[18] Groves v. Phillips Petroleum Co., 22 Ohio App. 2d 25, 257 N.E.2d 759 (1969). *But see* Mielke v. Singara Grotto, Inc., [1975] PROD. LIAB. REP. (CCH) ¶ 7663 (Ohio App. 1975) (implied warranty in tort).

[19] 36 Ohio St. 2d 151, 304 N.E.2d 891 (1973).

[20] *Id.* at 156, 304 N.E.2d at 894 (citations omitted). A comparison of the elements set forth in the *Restatement* definition of strict liability in tort with those established in *State Auto* underscores the correlation:

State Auto Mutual Ins.	RESTATEMENT (SECOND) § 402A
A defect in the product manufactured and sold . . .	sells a product in a defective condition unreasonably dangerous . . .
such defect existed at the time the product left the hands of the defendant . . .	it . . . does reach the user or consumer without substantial change. . .
the defect was the direct and proximate cause of the plaintiff's injuries or loss . . .	is subject to liability for physical harm thereby caused . . .

See 36 Ohio St. 2d 151, 304 N.E.2d 891 (1973); RESTATEMENT (SECOND) OF TORTS, § 402A, Comment n (1965).

[21] Negligence may be proven by direct or circumstantial evidence. The usual product liability case is premised upon direct evidence coupled with circumstantial evidence in the field of expert testimony, especially as it relates to accident reconstruction including proof that an alleged defect was the cause of the injury preceding event. Res ipsa is a form of circumstantial evidence which, when available, is of considerable assistance to the plaintiff. The essential elements necessary to bring the concept into play are generally viewed as: (1) the event is of a kind which would not occur in the absence of negligence, (2) the event was caused by an instrumentality in the exclusive control of the defendant and (3) the plaintiff in no way contributed to the occurrence of the event or harm. These elements can rarely be met in a product case. Where the elements are present it is possible for a jury to infer negligence and thus to find for the plaintiff even in the absence of additional direct evidence or expert testimony.

The court's absolute confusion is perhaps best illustrated in *Gast v. Sears Roebuck and Co.*[22] The catalyst for this decision was a fire allegedly caused by a defective television set. The court intelligently specified the factors which necessitated imposition of liability on grounds other than negligence and warranty, but stubbornly insisted that the doctrine to be utilized was something other than strict liability in tort, even though that phrase was specifically mentioned:

> In the usual products liability case users of products need not show that the manufacturer was negligent. Courts recognized the difficulty in proving that the specific defect which caused the injury could have been eliminated had the manufacturer exercised ordinary care. Based upon that recognition, courts developed a new remedy - *strict liability in tort for breach of implied warranty of fitness for ordinary use. Ohio adopted that remedy in Lonzrick* . . . . The obvious advantage is that plaintiff need only show that the defect existed at the time the product left the manufacturer and that the defect was the proximate cause of the injury.[23]

The Ohio Supreme Court again addressed the relationship of res ipsa to strict liability since the trial court had given a res ipsa charge to the jury even though plaintiff had failed to establish any negligence and despite the fact that the claim was founded on negligence rather than implied warranty. The court ruled that a res ipsa charge under the circumstances was improper since, if it were permitted, the distinction between strict liability and negligence would disappear in a product liability case.[24] It was made clear that regardless of how the strict liability doctrine was to be enunciated, the courts would maintain a distinction between this theory and negligence theory and would not tolerate the use of res ipsa concepts in a strict liability situation.

From its beginning, dating perhaps back to 1958, and with an early childhood period ending in 1965, the doctrine of strict liability reached adolescence in 1966 and remained there for over a decade before reaching the age of majority in 1977. With some sadness we must recognize that the court which nurtured the doctrine uprooted its effectiveness in the very opinion in which the age of majority was reached. This uprooting, coupled with the effects of legislation now pending in the Ohio General

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[22] 39 Ohio St. 2d 29, 313 N.E.2d 831 (1974).

[23] *Id.* at 31, 313 N.E.2d at 833 (citations omitted) (emphasis added). A similarly convoluted definition is found in McDonald v. Ford Motor Co., 42 Ohio St. 2d 8, 10, 326 N.E.2d 252, 253 (1975), "implied warranty, which is a form of strict liability in tort".

[24] 39 Ohio St. 2d at 32, 313 N.E.2d at 834.

Assembly,[25] may well sound the practical, if not theoretical, death knell of strict liability in Ohio.

Temple v. Wean United, Inc.[26] posed a virtually perfect fact pattern for clarification of the court's theory for recovery in a products liability suit, since the court was reviewing a motion for summary judgment granted to defendant and under the facts recovery had not been possible under any theory.[27] Plaintiff was operating a power punch press during the course of her employment. As plaintiff was placing aluminum extrusions into the back die of the press, an unknown number of extrusions fell from the bolster plate in front of her onto the dual operating buttons. The result was the activation of the press and consequent amputation of plaintiff's arms.

The machine was manufactured and sold in 1954 by Federal Machine and Welder Company, now Wean United, Inc., to a division of General Motors. General Motors sold the machine to Turner Industries, which company immediately sold it to plaintiff's employer, Superior Metal Products, Inc. Upon receipt of the press, Superior immediately made several modifications in the machine, the most significant of which was to lower the location of the dual operating buttons from a position approximately shoulder high to a position approximately waist high. It was established that the machine could not have been activated by the falling extrusions had the dual operating buttons been positioned as they were prior to this modification.[28]

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[25] Am. Sub. H.B. No. 319, 112th G.A. (1977-78). *See also* text accompanying notes 50-54 *infra.*

[26] 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

[27] Plaintiff's suit was premised on the traditional triumvirate of negligence, implied warranty and strict liability in tort (in many cases the warranty assertions are express and implied). The opinion attempts to maintain a clear demarcation between negligence and strict liability. There is no need for it to maintain such a position as to implied warranty because the court's position is that implied warranty and strict liability are virtually indistinguishable legal theories. The court is apparently unaware of the impact of its decision on the design defect area. In this case, a key assertion of the plaintiff was design defect as distinct from malfunction. The court makes no mention of the design defect in its analysis of strict liability although it is aware that malfunction is not involved. This omission may constitute a sub silentio disapproval of the strict liability theory in design cases, but this reading is hard to reconcile with the apparent intent of the court. Such a reading is consistent with the position advanced by some writers and possibly by prior decisions. A fuller discussion of the design defect aspect is set forth in text accompanying notes 38-41 *infra.*

[28] The court noted that:

> The evidence of record reveals that prior to the date of the accident Superior had a company policy which specified that all power press activating buttons be located facing upward, waist high, 24 inches apart. Pursuant to this policy, upon receipt of the press, Superior altered the existing method of guarding by lowering the buttons, which were at that time shoulder high. Clearly, in relation to the danger of unintentional activation, this alteration was a "substantial change" within the meaning of Section 402A (1) (b). Indeed, it is our conclusion that there was no original defect of any sort in the punch press, and that, as a matter of law, Superior's alteration of the safety device,

It was evident that there was no "defect" at the time of manufacture and sale, and recovery was not possible. The court however, aware of the confusion engendered in its prior descriptions of the applicable legal theories, firmly and concisely adopted the definition of strict liability in tort and approved the text as set forth in the *Restatement* as well as indicating that the comments would assist analysis in the area of product liability:

> Since *Greenman* was decided, the rule of the Restatement had been adopted or approved by the vast majority of courts which have considered it. Because there are virtually no distinctions between Ohio's "implied warranty in tort" theory and the Restatement version of strict liability in tort, and because the Restatement formulation, together with its numerous illustrative comments, greatly facilitates analysis in this area, we hereby approve Section 402A of the Restatement of Torts 2d.[29]

Syllabus paragraph (1) consists of a verbatim statement of strict liability as set forth in 402A, and is thus clearly made a part of the law of the State of Ohio. Applying the facts of the case to the doctrine of strict liability as now approved, the court found that there had been a substantial change in the product's condition from the time of its initial sale and that therefore the plaintiff could not recover. Furthermore, there was no duty to warn. This was extended to speculative anticipation of how manufactured components, not in and of themselves dangerous or defective, can become potentially dangerous dependent upon the manner in which they are integrated into the original unit. Had the opinion ended here, it would have been a most satisfactory decision in which several goals were reached: first, a clear definition and acceptance of the doctrine of strict liability in tort; second, a clear analysis of the type of modification which would relieve a manufacturer of liability; third, a clear analysis of the proper parameters of the duty to warn as it relates to component parts.

However the opinion did not end on such a note. Instead, syllabus paragraph (5) sets forth a principle of law virtually unique to the State of Ohio: "Where an order of the Industrial Commission specifies that either a fixed barrier guard or a two-hand tripping device is an acceptable method of guarding a power press, a manufacturer is not negligent in designing a press which utilizes a two-hand tripping device."[30] The body of the

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coupled with the utilization of the press for the stamping of stock long enough to bridge the 24 inch gap between the buttons, was the sole responsible cause of the maiming of Mrs. Temple.

50 Ohio St. 2d at 323, 364 N.E.2d at 271 (1977).

[29] *Id.*

[30] *Id.* at 318, 264 N.E.2d at 269.

opinion makes clear that this portion of the syllabus raises the existence of an Industrial Commission standard to a level of complete defense. To reach this aberrant conclusion the court first points out that as indicated in *Gosset v. Chrysler Corp.*,[31] the manufacturer is under a duty to use such reasonable care under the circumstances as to make his product safe for the use for which it is intended. Such care does not mandate that the product be made accident-proof or foolproof. A similar standard was enunciated in connection with the doctrine of liability for second collision injuries, *i.e.*, crashworthiness, in a line of cases commencing with *Larsen v. General Motors Corp.*[32] In *Larsen* the court declared that an automobile manufacturer has no duty to make his product accident-proof or foolproof, but was under a duty to use such care in design as to avoid subjecting the user to an unreasonable risk of injury in the event of a collision.

Perhaps recognizing that the general rule of *Gosset* and similar cases could impose the equivalent of absolute liability or force the role of insurer upon manufacturers, the court placed a limit on such potential by establishing a new and complete defense as a matter of law. Premised specifically upon the "difficulty and open endedness inherent in passing judgment upon the reasonableness of a manufacturer's conscious design choices,"[33] the court determined it appropriate to look to statutory regulations. The Industrial Commission Safety Code specifically approved the use of either a fixed barrier guard or a two hand tripping device as proper in the construction of a power press so as to prevent the hands or fingers from entering the danger zone. The court states: "In view of this regulation . . . this court holds that the question of whether or not the manufacturer was negligent in not providing fixed barrier guards should be answered, as a matter of law, in the negative."[34]

Although this ruling was directed to the claim premised upon negligence, and the court has consistently ruled that negligence is an action distinct from strict liability, it is hard to fathom the court's use of the industrial regulation as being limited to negligence. Since such a ruling would make clear that the design of the product was not defective in a negligence sense, it would be difficult to then rule that despite the validity of the design it somehow was sold "in a defective condition unreasonably dangerous

[31] 359 F.2d 84 (6th Cir. 1966).

[32] 391 F.2d 495 (8th Cir. 1968). The use of this standard has led to considerable difficulty and may be inappropriate despite its current acceptance. *See* Hoenig, *Understanding 'Second Collision' Cases in New York: A Suggested Guide to Application of Bolm*, 20 N.Y.L.F. 29 (1974); Hoenig & Goetz, *Rational Approach to Crashworthy Automobiles: The Need for Judicial Responsibility*, 6 SW. U. L. REV. 1 (1974); Hoenig & Werber, *Automobile 'Crashworthiness' An Untenable Doctrine*, 20 CLEV. ST. L. REV. 578 (1971).

[33] 50 Ohio St. 2d 317, 326, 364 N.E.2d 267, 273.

[34] *Id.*

to the user or consumer." In essence, the court has raised the use of the state of the art defense to a new level. In the past, compliance with the industrial state of the art was viewed as evidence of due care and the absence of negligence, but it was not viewed as conclusive on the issue.[35] The industrial safety standards, such as those established by the Ohio Industrial Commission, are essentially codifications of existing industry practice and are invariably written only after extensive industrial input. If the industry claims it cannot meet a specified standard, that standard often is not imposed. Anyone who has followed the debates of Congress and the Department of Transportation's efforts to impose safety standards for vehicles can recall ample illustrations of this problem.

If the premise is correct, that use of the industrial standard to negate negligence as a matter of law will carry over to the determination of the existence of a defect in a product for strict liability standards, it is hard to see the doctrine enunciated in *Temple* as anything but a retreat from necessary consumer protection.[36] To make matters worse, nothing in the established Safety Code or the enabling legislation indicates a desire that the standards set should be used as a complete defense to a product claim.[37]

The court does not mention the possibility of federal standards meeting the same goals and thus also becoming available as a defense. Since the court left this open and permitted the use of the government standard to limit its powers to develop common law doctrine for the imposition of liability, it is at least possible that a similar result could occur even in the face of legislation which clearly states that it is not intended to be in derogation of the common law, as is the case with the National Traffic and Motor Vehicle Safety Act of 1966.[38] Should the court take this position,

[35] *See* Witherspoon v. Haft, 157 Ohio St. 474, 106 N.E.2d 296 (1952); Morris v. Cleveland Hockey Club, Inc., 157 Ohio St. 225, 105 N.E.2d 419 (1952); Mills v. City of Springfield, 75 Ohio L. Abs. 150, 142 N.E.2d 859 (Ohio App. 1956); Spitler v. Montgomery Ward & Co., 70 Ohio L. Abs., 321, 128 N.E.2d 445 (Ohio App. 1954). *See generally* FRUMER & FRIEDMAN, PRODUCTS LIABILITY, § 6 (1976); Note, *The State of the Art Defense in Strict Products Liability,* 57 MARQ. L. REV. 651 (1974).

[36] A plaintiff's attorney might well consider filing a complaint without an allegation of negligence or dismissing such count prior to trial whenever a relevant statute would decide the issue adversely to his client's interest. The effect of a directed verdict or jury charge along the lines of *Temple* could devastate the remainder of plaintiff's case. Plaintiff might also gain a tactical advantage since the defendant's use of the standard will not be as effective.

[37] Although a significant number of cases fall within the parameters of the Safety Code's enabling legislation, OHIO REV. CODE ANN. §§ 4101.11, 4107.23 (Page 1976), none deal with the manufacturer's adherence to code standards as conclusive evidence of non-negligence. Conversely, several indicated that a failure to meet code standards raised a jury question as to negligence. *See, e.g.,* Kuhn v. Cincinnati Traction Co., 109 Ohio St. 263, 142 N.E. 370 (1924); Variety Iron and Steel Works Co. v. Poak, 89 Ohio St. 297, 106 N.E. 24 (1914) (possibly negligence per se).

[38] 15 U.S.C. §§ 1381-1410 (1970). Section 108 (c) of the Act, 15 U.S.C. § 1397 (c), expressly negatives any intention of Congress to preempt this field and leaves common law development intact.

it is possible to predict that auto safety will become a non-issue in Ohio courts and we will subjugate our beliefs as to the need for safety standards to those standards established by the federal government. Such a possibility is awesome and the court should address itself to the question so as to negate the premise propounded herein.[39]

It is possible to view the court's action as both intelligent and consistent with prior decisions if the distinction between malfunction and design defect is valid and if this was actually the basis of decision. If the court is applying the government standard to establish non-negligence in design, the *Temple* decision merely requires clarification. A product malfunction occurs when the product fails to function as it was designed to do and this failure is the proximate cause of injury. Often this occurs simply because a component part fails, *i.e.*, the machine breaks. A conscious design choice results in an alleged defect when the product is manufactured in a specific way so as to perform a specific function, but something in that design raises a risk of harm which could have been avoided had some other design been chosen.

Typical cases of design defect involve a failure to incorporate into the product an additional or different safety device or the use of unnecessarily dangerous chemicals in household products. In such cases, product function is not impaired and the product does precisely what it was designed to do. This is not to say that the product was designed to injure, although some persons seem to think this is the case. Thus "crashworthiness" often includes an issue of design choice, not product malfunction.[40]

In cases of malfunction the issue is generally simple in terms of technology, evidence and jury understanding. A finding of liability in such a case may have only minimal impact on continued manufacture and use of the product. A finding of liability premised on design defect can have an exceedingly detrimental effect on the continued manufacture or use of the product. The demands of a competitive system often require that a manufacturer base design decisions on a composite of marketing, cost and safety factors. It is improper to raise the safety factor to a level which im-

[39] Although awesome, the concept of federal preemption is not unprecedented and could be beneficial in the product safety field. If there is effective and comprehensive legislation, the resulting national uniformity would benefit both industry and consumer. Similarly, effective state regulation, where the concerned administrative agency intended its actions to have such sweeping effect, would be beneficial to all parties. The use of legislation to resolve the problems of product safety may ultimately be the most significant method available. Provided that the concerned agencies retain their independence and demand that industry do that which it is capable of doing, there would be no need for ad hoc judicial determinations of what was or was not proper at a given point in time. Since the courts do this with benefit of hindsight, there is an inherent unfairness to industry which would be obviated were a systematic legislative program established.

[40] *See* text accompanying notes 31, 32 *supra.*

poses liability when an objectively supportable design nevertheless results in a possibly foreseeable, though not truly anticipated, injury. In light of increased liberality as to the admissibility of evidence, liability in such cases will almost invariably be rested on benefit of hindsight.[41]

It has been suggested, quite correctly, that in design defect cases the doctrine of strict liability should not be applied since traditional negligence concepts will suffice. Such a limitation would lead to a more appropriate division of responsibility in connection with proofs at trial and would help to eliminate spurious claims. Similarly, such a limitation will make the burden imposed upon defendants tolerable, without impeding imposition of liability where there *is* fault. Such a position is consistent with the historical development of the strict liability doctrine.[42]

Although cases decided under Ohio law do not specifically make this type of distinction, an analysis discloses that the failure to establish negligence in design choice was conclusive of the issues. The applicable standard is apparently one of negligence, despite the court's assertion that there need be no negligence in a strict liability case. In four recent cases a judgment or jury verdict in favor of the defendant was upheld.[43] In each of these cases the plaintiff was proceeding on theories of negligence and strict liability or analogous implied warranty concepts. As previously indicated, the *Temple* decision permitted no finding of strict liability premised on an intervening modification and no negligence in design premised on compliance with an applicable government standard. The theories of negligence, warranty and strict liability are supposedly independent, but in *Temple* we find that there is a correlation: no negligence, no strict liability. Admittedly the reasons for the two findings differ. If the simple equation, "no negligence = no strict liability," is truly founded on lack of negligence in design choice, the remaining recent cases must support the equation.

In *Ball v. E. I. DuPont De Nemours & Co.*,[44] the plaintiff was injured by the detonation of a blasting cap. The court of appeals affirmed the granting of a directed verdict on the issue of strict liability and a defendant's verdict

[41] *See, e.g.,* Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974); Barry v. Manglass, 55 App. Div. 2d 1, 389 N.Y.S.2d 870 (1976); LaMonica v. Outboard Marine Corp., 48 Ohio App. 2d 43, 355 N.E.2d 533 (1976); FED. R. EVID. 407.

[42] *See generally* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication,* 73 COLUM. L. REV. 1531 (1973); Hoenig, *Product Design and Strict Tort Liability: Is There a Better Approach?,* 8 SW. U. L. REV. 109 (1976).

[43] Ball v. E. I. DuPont DeNemours & Co., 519 F.2d 715 (6th Cir. 1975); Strimbu v. American Chain & Cable Co., 516 F.2d 781 (6th Cir. 1975); Temple v. Wean United, Inc., 50 Ohio St. 2d 8, 326 N.E.2d 252 (1977); Gast v. Sears Roebuck and Co., 39 Ohio St. 2d 29, 313 N.E.2d 831 (1974).

[44] 519 F.2d 715 (6th Cir. 1975). *See also* cases cited note 43 *supra.*

by the jury on the negligence issue. Although this case is distinguishable, since the negligence went to failure to warn instead of the design defect, there is some support to the premise suggested. Further support is seen in *Strimbu v. American Chain & Cable Co.*,[45] where the plaintiff was injured when a hoist manufactured by defendant was attached to a dumbwaiter in plaintiff's home. It was alleged that the defective design of the hoist permitted it to fall and injure plaintiff. The district court entered a directed verdict against plaintiff on the counts of negligence and strict liability. The court of appeals affirmed. Finally, the decision in *Gast v. Sears Roebuck and Co.*[46] also centered upon asserted negligence and strict liability, though here plaintiff framed the issue as one of implied warranty. The trial court dismissed the implied warranty claim and no appeal was based on that issue. However, an appeal was taken from the jury verdict based on the issue of non-negligence. The Supreme Court of Ohio affirmed. The pattern is quite clear: unless negligence is established, there is little likelihood of recovery on strict liability grounds under Ohio decisions.

Three recent cases in which liability was imposed also support the premise suggested. *State Auto Mutual Insurance Co. v. Chrysler Co.*[47] involved claims premised on strict liability arising from an accident caused by an allegedly defective brake hose. Here the defect was directly concerned with malfunction, but due to the newness of the product, a malfunction can properly be viewed as a function of design choice. The plaintiff sought to infer the existence of a defect through the equivalent of res ipsa loquitur, supported by rather tenuous expert testimony. Plaintiff was able to convince the court that a directed verdict was not appropriate and that a proper issue as to strict liability was raised. Although the court reiterated that no negligence need be shown, it is quite clear that the res ipsa doctrine was one basis for finding the existence of a defect, even though this alone was inadequate under the circumstances.[48] Res ipsa provides an inference of negligence, not an inference of defect. In this case, the actual proof supports the theory that negligence as to defect is an essential element for strict liability recovery in Ohio regardless of the court's assertions to the contrary.

Anton v. Ford Motor Co.[49] similarly involved a case of defect, this time in the design of a motor vehicle gasoline tank system in the context of a product suit. The theories of the parties were not made quite clear, but the court, in discussing the burden upon the plaintiff, relied on *Lonzrick*

[45] 516 F.2d 781 (6th Cir. 1975). *See also* cases cited note 43 *supra*.
[46] 39 Ohio St. 2d 29, 313 N.E.2d 831 (1974).
[47] 36 Ohio St. 2d 151, 304 N.E.2d 891 (1973).
[48] *Id.* at 155, 304 N.E.2d at 895 (1973).
[49] 400 F. Supp. 1270 (S.D. Ohio 1975).

to assert that plaintiff would have to establish that there was a defect.[50] The opinion did not state that to do so would necessitate a showing of negligence, but on the facts presented, it appears that in the absence of negligence it would have been impossible for plaintiff to sustain his burden of proof.

Finally, in *Drayton v. Jiffee Chemical Corp.*,[51] a judgment in favor of plaintiff was upheld on theories of negligence, warranty and strict liability. The plaintiff proved negligence, and in holding that recovery was permissible under strict liability, the court specifically referred to the fact that it had already been determined that the product caused injury due to a negligent design defect, *viz,* the chemical content of the "Liquid-plumr" was improper.[52]

Recent Ohio cases thus make it clear that to establish the existence of a defect it is essential to establish some degree of negligence on the part of the manufacturer. Unless this can be shown, the action for strict liability will fail. Clearly such a broad limitation is not consistent with the theory of strict liability. Moreover, if state safety standards can be used to establish an absence of negligence as a matter of law, there will be no benefits accruing to plaintiffs in a great number of cases where such benefits would normally flow from the establishment of strict liability theory. On the other hand, if these decisions can be read to establish the position that strict liability in tort will not be imposed for design defect and that negligence must be established in such cases, they are consistent with the doctrine of strict liability. Such a reading justifies the decisions without emasculating the doctrine and will permit recovery in all cases of actual fault or failure to prevent malfunction.

The need for the court to reconsider the ramifications of *Temple* is even more pressing in light of pending legislation.[53] Proposed Ohio Revised Code sections 2305.33 (A) and (B) would establish rebuttable presumptions that a product was or was not defective dependent upon its compliance with federal or state statutes, standards or rules.[54] This provision has little

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[50] *Id.* at 1281.

[51] 395 F. Supp. 1081 (N.D. Ohio 1975).

[52] *Id.* at 1088.

[53] *See* Am. Sub. H.B. No. 319, § 1, 112th G.A. (1977-78).

[54] The proposed legislation, *id.*, contains the following language:

> § 2305.33 (A) In any action for bodily injury, death, or injuring real or personal property caused by a product, evidence that such product, at the time of its manufacture, complied with federal or state statutes, standards, or rules regarding product design, manufacture, or testing, creates a rebuttable presumption that the product, in any respect that is relevant to the action and as to which there was compliance with such statutes, standards, or rules, was not defective.
>
> (B) In any action for bodily injury, death, or injuring real or personal property

practical effect in the determination of liability in product suits. At the present time, compliance or non-compliance with such standards is evidence of negligence or non-negligence and essentially is a basis for an inference of liability, just as compliance or non-compliance with industrial state of the art gives rise to legitimate inferences. By raising such inferences to the status of rebuttable presumptions, the legislation will perhaps have a minimal impact on the parties' burden of proof, but no significant change in the imposition or non-imposition of liability.

The decision in *Temple* far exceeds the rebuttable presumption standard proposed in the legislation and establishes the equivalent of a conclusive presumption. The term conclusive presumption is actually a misnomer, meaning in such cases, the creation of an absolute defense. Framed a little differently, a manufacturer who must meet federal or state standards to produce his product will be absolutely insulated from liability in any case in which a relevant standard can be shown to the court, regardless of changes in the state of the art or how outmoded the standard. Such a position is untenable. The court should reconsider this aspect of the *Temple* decision and make clear that it seeks to establish only a rebuttable presumption. The rebuttable presumption standard is practical and can readily be applied during judicial proceedings. Such a standard will assist manufacturers by providing a reasonable method to defend strict liability cases as well as permitting a shift in the burden of proof to the plaintiff, and the plaintiff will be subject to a directed verdict if he cannot sustain the burden. The standard proposed in the legislation will adequately prevent the subversion of strict liability into absolute liability, and there is no need for the judicial overkill evident in *Temple*.

It is also important to note that compliance with government standards as set forth in the legislation will effect proof of the existence of defect, and thus will effectively negate or support claims in negligence, warranty and strict liability. As indicated above, it is the writer's belief that the *Temple* case will have a similar, even more drastic effect upon all theories of liability despite the fact that the court did not necessarily desire this result.

At least one other element of the proposed legislation will have an important effect upon utilization of the doctrine of strict liability in tort or any other theory presented to impose liability in a product suit. The legislation proposes amendments to Ohio Revised Code section 2305.10

caused by a product, evidence that the product, at the time of its manufacture, did not comply with federal or state statutes, standards, or rules regarding product design, manufacture, or testing creates a rebuttable presumption that the product, in any respect that is relevant to the action and as to which there was not compliance with such statutes, standards, or rules, was defective.

which would impose a statute of limitations on all claims for injuries against manufacturers or sellers of products that occur ten years after the product was first sold or otherwise delivered.[55] In conjunction with the court's utilization of state safety standards to limit liability, this provision will effectively defeat imposition of liability in a significant proportion of possible cases. The limitation imposed is premised on a number of factors, including insurance rates, an inference that a product in use for a substantial number of years is safe, difficulties in connection with the liability of successor corporations,[56] and perhaps simply a reaction to the apparently substantial increase in products liability litigation.

The concept of a special statute of limitations in product suits, even one which bars recovery before the injury has arisen, is a significant one which the writer believes to be well founded within appropriate limits. The proposed Ohio statute has no such appropriate limits. If we are to protect adequately the consumers and users of many products, we must focus more directly upon the dangers to be avoided as they relate to both manufacturers and consumers or users. The manufacturer is quite properly afraid that the bringing of claims asserting defects in older products is encouraged under present law. Even defense costs in such cases can bankrupt smaller individual or corporate manufacturers. The *Temple* case is a fine example: the case was appealed to the Ohio Supreme Court at considerable expense, and concerned a product manufactured over twenty years prior to the injury sued upon. The manufacturer was vindicated, but a less wealthy or non-insured defendant might have settled or been forced out of business. A similar situation led to imposition of liability for an alleged defect in the gear shift selector knob of a motor vehicle almost twenty years old.[57]

On the other hand, the user or consumer of a product, especially one for use in industry, has the right to expect that the product is safe for its entire anticipated life. There is no real difficulty in framing a statute premised on the belief that a product, especially a machine, which has func-

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[55] The statute of limitations contained in the bill, *id.*, reads as follows:

> § 2305.10 (B) Expect as provided in division (D) of this section, no action in tort for bodily injury, death, or injuring real or personal property shall be brought against a manufacturer or seller of a defective product for an injury that occurs after the later of the following periods:
>
> (1) Ten years after the product was first sold, or was otherwise first delivered, for use or consumption. . . .

[56] *See, e.g.*, Knapp v. North Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); Cyr v. B. Offen & Co. 501 F.2d 1145 (1st Cir. 1974); Chadwick v. Air Reduction Co., 239 F. Supp. 247 (N.D. Ohio 1965); Note, *Expanding the Products Liability of Successor Corporations*, 27 HASTINGS L. J. 1305 (1975).

[57] *See* Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969).

tioned safely for ten years is safe, but the proposed statute does not incorporate a provision making it applicable only in the event that the machine has a substantially good safety record. Furthermore, even a machine which has such a record may never have been used in a way which necessitated the operation of its fail-safe device or other safety features. The typical homeowner has never checked the automatic cutoff device in his gas furnace and probably has no idea of how to do so. If the cut-off has had no need to work for the ten year period, but is needed thereafter, recovery should not be barred in the event of a failure and consequent harm. The pending legislation would improperly bar recovery in such a case.

To be fair, the statute must take into account whether the injury was caused by malfunction of a part, especially a safety device, which had not previously been called upon to function. Such a standard would preclude imposition of liability in a significant number of cases while providing adequate protection to the user or consumer of the machine. Liability would be imposed where a specific safety device malfunction is involved and that element of the machine's use had not previously come into play.

The judicial adoption of the doctrine of strict liability came of age in Ohio in *Temple v. Wean United.* If the doctrine is to be meaningfully utilized in the future two steps must be taken: first, the court must retreat from the conclusive presumption standard established in *Temple;* and second, the legislature must redefine its proposed statute of limitations to take into account the competing interests which must be served.

If this is not done, particularly if both *Temple* and the proposed legislation stand, the likelihood of recovery for injuries caused by defective and unreasonably dangerous products will be substantially reduced. The legitimate goals of the court and expectations of the public will be defeated for no valid purpose. If the court believes that strict liability is not a proper basis for recovery and there is authority for such a view, then it should overrule its entire line of cases from *Lonzrick* through *Temple.* To permit such an overruling by default or oversight is ludicrous.