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Recent Decisions: Torts — Products Liability — Theory of Strict Tort Liability under Restatement (Second) of Torts § 402a Held Applicable in Maryland When Complaint Alleged That Defendant Manufactured and Placed on the Market an Automobile in a Defective Condition Not Reasonably Safe for Its Intended Use. Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976)

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RECENT DECISIONS

TORTS — PRODUCTS LIABILITY — THEORY OF STRICT TORT LIABILITY UNDER RESTATEMENT (SECOND) OF TORTS § 402A HELD APPLICABLE IN MARYLAND WHEN COMPLAINT ALLEGED THAT DEFENDANT MANUFACTURED AND PLACED ON THE MARKET AN AUTOMOBILE IN A DEFECTIVE CONDITION NOT REASONABLY SAFE FOR ITS INTENDED USE. *PHIPPS V. GENERAL MOTORS CORP.*, 278 Md. 337, 363 A.2d 955 (1976).

On September 29, 1976, the Court of Appeals of Maryland continued the assault on the "citadel"[1] that stood in opposition to the theory of strict products liability. On that date, the court filed its opinion in *Phipps v. General Motors Corp.*,[2] joining Maryland with the vast majority of jurisdictions that have adopted some form of strict products liability in tort.[3] The standard adopted in *Phipps* is that stated in Section 402A of the Restatement (Second) of Torts.[4] Neither the Restatement nor *Phipps*, however, answers the multitude of questions that may arise in a case in which strict liability is alleged, and pending further court decisions, the scope of the doctrine remains unclear in Maryland.

This note discusses the *Phipps* decision, and presents an overview of a cause of action under a strict liability theory, emphasizing *Phipps* and other Maryland cases.

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1. The term "citadel" relates to what was once a fortress in opposition to applying strict liability to a seller of an allegedly defective product. The term was first employed by Professor Prosser in a 1960 law review article, Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099 (1960), and reiterated in Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). When read together, these two articles provide an in-depth historical analysis of the doctrine of strict products liability. For further background material, *see* the Products Liability Symposium in the 1975 University of Baltimore Law Review. 5 U. BALT. L. REV. 1-151 (1975). *See also* the brief history of strict liability in Phipps v. General Motors Corp., 278 Md. 337, 341-43, 363 A.2d 955, 957-58 (1976).
2. 278 Md. 337, 363 A.2d 955 (1976).
3. With Maryland's adoption of strict liability, only three states continue to resist the deluge. They are Alabama, Delaware and Massachusetts. Puerto Rico has also refused to espouse the doctrine. 1 CCH PROD. LIAB. REP. ¶ 4060 at 4036-37 (1976). Despite the fact that the CCH REPORTER includes Georgia in its chart of states that have not adopted strict liability, the Georgia Supreme Court indicated in Center Chemical Co. v. Parzini, 234 Ga. 868, 218 S.E.2d 580 (1975), that Georgia has accepted strict products liability pursuant to GA. CODE ANN. § 105-106 (1968).
4. RESTATEMENT (SECOND) OF TORTS § 402A (1965), adopted in *Phipps* at 278 Md. at 353, 363 A.2d at 963.

I. *PHIPPS V. GENERAL MOTORS CORP.*

In 1972, James Phipps test drove an automobile which had been brought to his employer, an automobile dealership, to undergo servicing. The automobile had been manufactured by General Motors Corporation. During the test drive, the accelerator pedal stuck, resulting in Phipps' loss of control of the automobile. The car consequently left the road and smashed into a tree, injuring Phipps.[5]

Phipps and his wife instituted suit against General Motors in the Federal District Court for Maryland.[6] The plaintiffs alleged that the accelerator became stuck because of latent defects in the automobile's accelerator mechanism, carburetor and/or motor mounts. Two of the counts in the complaint sought to impose strict liability in tort on the defendant for the injuries which allegedly resulted from the latent defects.[7]

The defendant filed a motion to dismiss the strict liability counts, asserting that because strict liability had not been recognized in Maryland, those counts did not state a cause of action under Maryland law.[8] Finding a lack of controlling precedent on the issue, the federal court certified the following question to the Maryland Court of Appeals:[9]

> Do the third and sixth [strict liability] counts of the Complaint (alleging that the defendant manufactured and placed on the market an automobile in a defective condition which condition rendered the automobile not reasonably safe for its intended use) state causes of action under Maryland law by a person who allegedly sustained bodily injuries by reason of the defective condition.[10]

General Motors argued against an affirmative answer and against the adoption of strict liability in Maryland. The defendant contended that the warranty provisions of the Maryland Uniform Commercial Code[11] adequately protected the consumer, thereby obviating the need for strict liability.[12] Further, the defendant

5. 278 Md. at 339, 363 A.2d at 956. One of Phipps' co-workers was also in the car and sustained injuries, but did not join in the suit. *Id.*
6. *Id.* Jurisdiction was based on 28 U.S.C. 1332 (1970). Phipps' wife joined in the suit to recover loss of consortium.
7. 278 Md. at 339, 363 A.2d at 956. The other four counts in the complaint related to the defendant's alleged negligence and breach of express and implied warranties. *Id.*
8. *Id.* at 339–40, 363 A.2d at 956.
9. The court of appeals is empowered to answer questions certified to it by federal courts pursuant to MD. CTS. & JUD. PROC. CODE ANN. § 12–601 (1974).
10. 278 Md. at 340, 363 A.2d at 956–57. The federal court also certified the question of whether a spouse can recover loss of consortium by reason of an injury caused by defendant's breach of warranty. This question was answered in the affirmative. 278 Md. at 353–56, 363 A.2d at 963–65.
11. MD. COM. LAW CODE ANN. §§ 2–313–315 (1975). § 2–313 provides for express warranties; § 2–314 provides for implied warranties of merchantability; and § 2–315 provides for implied warranties that the product is fit for a particular use.
12. 278 Md. at 348, 363 A.2d at 961.

contended that these warranty provisions constituted a legislative preemption in the field of products liability, and thus that strict liability could not properly be recognized judicially.[13] Finally, the defendant asserted that adoption of strict liability in Maryland would "substantially alter the rights of consumers and sellers as presently defined by the law of negligence and contract, and that the policy reasons advanced by the courts for altering those traditional rights are more properly a matter of legislative rather than judicial determination."[14]

The court of appeals disagreed and answered the certified question affirmatively, recognizing strict liability in Maryland.[15] Judge Eldridge, writing for the court, adopted the following theory as expressed in Section 402A:[16]

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[17]

In adopting strict liability, the court reviewed and dismissed each contention of the defendant. The court remarked that there were "significant differences between actions based upon contract [that is, actions for breach of warranty] and strict liability in tort."[18] Although both dispense with the need for privity of contract between the plaintiff and defendant, warranty law imposes various requirements and limitations which do not exist in an action brought under a strict liability theory.[19] The court noted that a

13. *Id.*
14. *Id.* at 349, 363 A.2d at 961.
15. *Id.* at 353, 363 A.2d at 963.
16. *Id.*
17. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (quoted in *Phipps* at 278 Md. at 341, 363 A.2d at 957.)
18. 278 Md. at 350, 363 A.2d at 962.
19. *Id.* at 349, 363 A.2d at 962.

manufacturer could avoid warranty liability for a defective product in certain situations by the use of a disclaimer; such a disclaimer would be ineffective with respect to an action brought under Section 402A.[20] Further, although the notice requirements in an action brought under a breach of warranty theory in Maryland had been modified,[21] the *Phipps* court stated that the failure to give proper notice of a breach of warranty could still preclude an injured plaintiff from recovering from an otherwise liable manufacturer; strict liability in tort would involve no notice requirements.[22] Finally the court noted the different limitations periods applicable to the two actions.[23]

The court then rejected the defendant's preemption theory on the ground that there was no indication that the legislature had "intended to prevent the further development of product liability law by the courts."[24] As stated by the court in *Phipps,* "[i]n the absence of any expression of intent by the Legislature to limit the remedies available to those injured by defective goods exclusively to those provided by the Maryland Uniform Commercial Code, we believe that the General Motors' preemption contention is without merit."[25]

Finally, the court rejected the proposition that the "adoption of strict liability would result in such a radical change of the rights of sellers and consumers that the matter should be left to the Legislature."[26] The court pointed out that strict liability was "really but another form of negligence per se, in that it is a judicial determination that placing a defective product on the market which is unreasonably dangerous to a user or consumer is itself a negligent act sufficient to impose liability on the seller."[27] *Phipps,* then, was but another of the "appropriate occasion[s]" on which the court establishes "specific rules of conduct."[28]

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20. *Id.* at 349, 363 A.2d at 961–62.
21. *See* Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460 (1976). *Frericks* held that a third party warranty beneficiary need not give notice of a breach of warranty to the seller of a defective product.
22. 278 Md. at 350, 363 A.2d at 962.
23. *Id.* In a suit brought under a warranty theory, the governing limitations period is four years from the time when "tender of delivery is made." MD. COM. LAW CODE ANN. § 2–725(1), (2) (1975). In a suit brought under Section 402A, however, the governing limitations period would likely be three years from the time the injury occurred. *See* MD. CTS. & JUD. PROC. CODE ANN. § 5–101 (1974); Burch, *A Practitioner's Guide to the Statutes of Limitations in Product Liability Suits,* 5 U. BALT. L. REV. 23, 33–36 (1975).

    Thus, if a product delivered on January 1, 1977 proved to be defective and caused injury on January 1, 1981, the consumer would be barred from recovery under a warranty theory, but would be able to recover under Section 402A until December 31, 1984.
24. 278 Md. at 350, 363 A.2d at 962.
25. *Id.*
26. *Id.*
27. *Id.* at 351, 363 A.2d at 962 (citing Wade, *Strict Tort Liability of Manufacturers,* 19 SW. L.J. 5, 14 (1965)).
28. *See* Wade, *Strict Tort Liability of Manufacturers,* 19 SW. L.J. 5, 14 (1965).

"Thus," the court noted, "the theory of strict liability is not a radical departure from traditional tort concepts."[29] Section 402A continues to require some fault on the part of the manufacturer. The seller of an allegedly defective product is not strictly liable merely because the product proved defective and caused injury:[30]

> Proof of a defect in the product at the time it leaves the control of the seller implies fault on the part of the seller sufficient to justify imposing liability for injuries caused by the product. Where the seller supplies a defective and unreasonably dangerous product, the seller or someone employed by him has been at fault in designing or constructing the product.[31]

The adoption of Section 402A was predicated upon the court's belief that:

> there is no reason why a party injured by a defective and unreasonably dangerous product, which when placed on the market is impliedly represented as safe, should bear the loss of that injury when the seller of that product is in a better position to take precautions and protect against the defect. Yet this may be the result where injured parties are forced to comply with the proof requirements of negligence actions or are confronted with the procedural requirements and limitations of warranty actions.[32]

II. STRICT LIABILITY

In adopting the doctrine of strict liability in tort, the court pointed out that in the cases before *Phipps* in which adoption of strict liability had been urged, the court had neither accepted nor rejected the theory.[33] The court stated that it would have been "inappropriate" to adopt strict liability in those cases because "Section 402A was not applicable and would have afforded no

29. 278 Md. at 351, 363 A.2d at 963.
30. *Id.* at 352, 363 A.2d at 963.
31. *Id.*
32. 278 Md. at 352–53, 363 A.2d at 963. The court was persuaded by the justifications for strict liability set forth in RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965) which states:
> the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.
33. *Id.* at 346, 363 A.2d at 960.

additional basis of liability."[34] The court then briefly reviewed four previous cases[35] in which it had been urged to accept strict liability, but had refused to do so.[36]

The court's analysis of prior cases to show that the doctrine had not been rejected prior to *Phipps,* and its care in not overruling them, seemingly indicates that if these cases arose subsequent to *Phipps,* Section 402A would still be inappropriate and inapplicable. Since these cases retain their precedential value, in any products liability case subsequent to *Phipps* they should be utilized to determine the scope of Section 402A liability in Maryland.

A. Types of Defects

The cases prior to *Phipps* will play a significant role in determining whether Section 402A applies to various types of defects. In any products liability action, the first step should be to characterize the particular defect which will be alleged to have caused the injury, and determine whether strict liability applies to that particular category of defect.[37] Generally, there are three types of defects — manufacturing or construction defects, design defects and warning defects.[38]

Manufacturing defects result from a mistaken deviation from the manner in which the product was supposed to be manufactured or assembled, and generally cause the product not to function as intended and expected. While such defects are usually confined to a small number of the manufacturer's total output of a particular product, a design defect occurs in every one and involves no deviation from the manner in which the product was supposed to be made. Rather, a defectively designed product is made as intended and may function as intended, and yet create an unreasonable risk of injury,[39] as in the case of a manufacturer's failure to incorporate a safety feature. Warning defects result from the seller's failure to warn or instruct the user with respect to potential danger in the use

34. *Id.*
35. The four cases cited by the court are: Frericks v. General Motors Corp., 274 Md. 288, 336 A.2d 118 (1975); Volkswagen of America v. Young, 272 Md. 201, 321 A.2d 737 (1974); Myers v. Montgomery Ward & Co., 253 Md. 282, 252 A.2d 855 (1969); Telak v. Maszczenski, 248 Md. 476, 237 A.2d 434 (1968).
36. 278 Md. at 346–48, 363 A.2d at 960–61. The *Phipps* court neglected to cite or review Bona v. Graefe, 264 Md. 69, 285 A.2d 607 (1972), in which the issue of strict liability was argued before the court and the court similarly found that Section 402A was not "appropriate" or "applicable" in that case.
37. *See* Vetri, *Products Liability: The Prima Facie Case,* 11 ABA INSURANCE, NEGLIGENCE & COMPENSATION LAW SECTION, THE FORUM 1117 (1976).
38. *Id.* at 1118.
39. *See* Volkswagen of America v. Young, 272 Md. 201, 214–20, 321 A.2d 737, 745–47 (1974); Note, *Automobile Design Liability:* Larsen v. General Motors *and its Aftermath,* 118 U. OF PA. L. REV. 299 (1970).

of a product which may be neither defectively made nor defectively designed.[40]

With respect to manufacturing defects, those jurisdictions which have adopted Section 402A uniformly hold that it applies to any defect caused by faulty manufacturing or assembly or by some foreign ingredient or impurity.[41] As noted by the court in *Phipps*, "where the defect is a result of an error in the manufacturing process, that is where the product is in a condition not intended by the seller, there is less difficulty in applying the defectiveness test of of § 402A."[42] Presumably, the Court of Appeals of Maryland would hold Section 402A similarly applicable in manufacturing defect cases.

There is a split among jurisdictions, however, as to whether Section 402A applies to design defects.[43] Generally, the courts that refuse to impose strict liability for defective design reason that a manufacturer's liability for unsafe design is founded primarily upon a failure to meet proper standards of care in that industry, which properly falls within a negligence analysis.[44] Some courts purport to recognize strict liability for defective design, but require as a prerequisite to recovery under Section 402A proof that the manufacturer failed to adhere to a standard of care exercised by the "reasonable man" in the industry.[45] This is, of course, tantamount to a negligence standard.

The court in *Phipps* recognized that when the product is allegedly defective due to design, Section 402A is not so easily applied.[46] The court found, however, that there are "those kinds of conditions which, whether caused by design or manufacture, can never be said to involve a reasonable risk."[47] The examples given by

40. *See, e.g.*, Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975). *See generally* Annot., 53 A.L.R.3d 239 (1973).
41. *See, e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
42. 278 Md. at 344, 363 A.2d at 959.
43. *Compare* Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) *with* Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). *See generally* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A [4][e] at 3–327 (1976) [hereinafter cited as FRUMER & FRIEDMAN]; 72 C.J.S. SUPP. *Products Liability* § 20 at 30–31 (1975).
44. *See, e.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968) (applying Minnesota law).
45. *See, e.g.*, Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66 (Ky. 1973).
46. 278 Md. at 344–45, 363 A.2d at 959. The court took note of authorities that have refused to apply Section 402A to design defects, and instead applied traditional standards of negligence. The court then gave the reasoning of these authorities for not applying strict liability:

> The reasoning of these authorities is that in a design defect case the standard of defectiveness under § 402A, involving as it does the element of unreasonable danger, still requires a weighing of the utility of risk inherent in the design against the magnitude of the risk.

Id. at 345, 363 A.2d at 959.
47. *Id.* at 345, 363 A.2d at 959.

the court of such conditions to which strict liability should apply, regardless of whether the defect was in manufacturing or design, were a new automobile swerving off the road due to a faulty steering mechanism;[48] separation of a new automobile's drive shaft when the automobile is being driven in a normal manner;[49] brake failure;[50] and the defect in *Phipps,* the sticking of an automobile's accelerator.[51]

Phipps, thus, seemingly stands for the proposition that Section 402A applies in cases in which the product malfunctions, regardless of the nature of the defect. *Phipps* leaves unanswered the question whether Section 402A would apply in a case in which the product functions as intended but nevertheless causes injury.

There is Maryland authority, however, for the proposition that Section 402A does not apply to design defects if the product functions in the manner intended. In *Volkswagen of America v. Young,*[52] one of the questions certified to the Maryland Court of Appeals by the United States District Court for the District of Columbia was whether, under Maryland law, a manufacturer may be strictly liable for failure to design a "crashworthy" vehicle.[53] The plaintiffs had alleged that the driver seat assembly and interior of the decedent's Volkswagon had been so designed as to create an unreasonable risk of injury in the event of a collision.[54] The court of appeals held that Section 402A was inapplicable, but that a manufacturer might be liable in such a case under "traditional principles of negligence"[55] for a departure from proper standards of care which enhance the risk of injury should an accident occur.[56] Although Judge Eldridge, who also wrote the *Phipps* opinion, broadly declared in *Young* that "[Section 402A] has no proper application to liability for *design* defects in motor vehicles,"[57] the combined effect of the two opinions is to limit *Young* to holding Section 402A inapplicable to design defects that do not cause the product to malfunction.

48. *Id.* (citing Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960)).
49. 278 Md. at 345, 363 A.2d at 959 (citing Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969)).
50. 278 Md. at 346, 363 A.2d at 959 (citing Sharp v. Chrysler Corp., 432 S.W.2d 131 (Tex. Civ. App. 1968)).
51. 278 Md. at 346, 363 A.2d at 959.
52. 272 Md. 201, 321 A.2d 737 (1974).
53. *Id.* at 203–04, 321 A.2d at 738. The design defect alleged in a case such as *Young* is that the automobile was designed in such a manner as to increase or enhance the injury resulting from a collision. This type of case is also known as a "second collision" case. *Id.* at 207, 321 A.2d at 740. The primary difference between this type of case and other design defect cases is that in the former, "the defect is not the cause of the initial impact." *Id.*
54. *Id.* at 205, 321 A.2d at 739.
55. *Id.* at 221, 321 A.2d at 747–48.
56. *Id.*
57. *Id.* at 220–21, 321 A.2d at 747.

Further, in *Myers v. Montgomery Ward & Co.*,[58] the court of appeals refused to apply Section 402A when the absence of safety features resulted in injury. The plaintiff fell and was injured when his foot was caught in the whirling blades of a lawn mower sold and manufactured by the defendants. The plaintiff had alleged, *inter alia,* that the defendants were strictly liable for their failure to adequately protect against danger from the mower's blades.[59] In affirming the trial court's sustaining of the defendants' demurrer, the court distinguished a California case[60] which had applied strict liability to defective design, by noting that in the California case, the machinery had malfunctioned.[61]

Thus, in Maryland, Section 402A would seem to apply to manufacturing or construction defects and design defects which cause products to malfunction, but may not apply to other types of design defects.[62]

Phipps did not discuss warning defects. Prior to *Phipps,* however, manufacturers had been subjected to liability in negligence for warning defects.[63] Most jurisdictions that have adopted strict liability have extended its coverage to warning defects.[64] Maryland's position on this matter remains to be determined.

B. Elements of a Section 402A Cause of Action

Once the defect is characterized and it is determined that Section 402A may apply, the facts of the case must then be analyzed to determine whether the elements of a cause of action in strict liability can be proven.

To establish a cause of action under Section 402A, the plaintiff must prove that:

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58. 253 Md. 282, 252 A.2d 855 (1969).
59. *Id.* at 287, 252 A.2d at 858-59.
60. Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
61. 253 Md. at 297, 252 A.2d at 864.
62. *But see* Rindlisbaker v. Wilson, 95 Idaho 752, 519 P.2d 421 (1974), which is representative of those cases that make no distinction between design and manufacturing defects with respect to the applicability of Section 402A. As noted by the Idaho court, "[t]he risk to the user will be just as great with an unreasonably dangerous design defect as with a manufacturing defect." *Id.* at 762, 519 P.2d at 428.

    Whether Section 402A applies to all, some or no design defects may be entirely academic. As noted by one court:

    > '[T]he distinction between the so-called strict liability principle and negligence is of no practical significance so far as the standard of conduct required of the defendant is concerned. In either event, the standard required is reasonable care [in design].'

    Garrison v. Rohm and Haas Co., 492 F.2d 346, 351 (6th Cir. 1974) (quoting Jones v. Hutchinson Mfg., Inc., 502 S.W.2d 66, 69-70 (Ky. 1973)). The Maryland Court of Appeals recognized this principle in *Young,* 272 Md. at 221, 321 A.2d at 747.
63. *E.g.,* Moran v. Faberge, 273 Md. 538, 332 A.2d 11 (1975).
64. Annot., 53 A.L.R.3d 239, 243 (1973).

1. The defendant is the seller of a product
2. in a defective condition
3. unreasonably dangerous to the user or consumer
4. when it leaves the seller's possession or control
5. which causes the plaintiff's injury
6. and has reached the consumer without substantial change in its condition.[65]

1. Seller of a product

One element not discussed in *Phipps* is that the defendant must be a seller of the allegedly defective product.[66] The word "seller" generally encompasses defendants other than retailers who actually put products in the hands of consumers. Wholesalers,[67] manufacturers,[68] makers of component parts[69] and importers[70] have been included within the definition of a seller. Section 402A's requirement of a seller has also been extended to the builder,[71] seller[72] and financer[73] of a new home. It has generally been held, however, that repairers,[74] those providing services with products that prove to be defective,[75] general endorsers who make no representation that they

65. The six elements listed are taken from the Restatement. The *Phipps* court listed four elements:

> For a recovery [under Section 402A], it must be established that (1) the product was in a defective condition at the time that it left the possession or control of the seller, (2) that it was unreasonably dangerous to the user or consumer, (3) that the defect was a cause of the injuries, and (4) that the product was expected to and did reach the consumer without substantial change in its condition.

278 Md. at 344, 363 A.2d at 958.

66. RESTATEMENT (SECOND) OF TORTS § 402A, Comment f (1965). Comment f states, however, that strict liability would not apply to an "occasional seller." One example of an "occasional seller" is an automobile owner who "on one occasion sells it to his neighbor, or even to a dealer in used cars . . . even though [the former owner] is fully aware that the dealer plans to resell it." *Id.* In Balido v. Improved Machine Co., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973), the defendant company sold a plastic press it had been using in its plant. The machine proved to be defective due to a lack of a safety device. The court ruled in the defendant's favor, holding that the defendant was at most an occasional seller and not liable under Section 402A.
67. Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967).
68. Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976).
69. E.I. du Pont de Nemours & Co. v. McCain, 414 F.2d 369 (5th Cir. 1969).
70. Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975).
71. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).
72. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).
73. Connor v. Great Western Savings & Loan Ass'n, 69 Cal. 2d 887, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).
74. Hoffman v. Simplot Aviation, Inc., 97 Idaho 32, 539 P.2d 584 (1975).
75. Magrine v. Krasnica, 94 N.J. Super. 228, 227 A.2d 539 (1967). For a general overview, *see* Annot., 29 A.L.R.3d 1425 (1970).

have tested the product[76] and design engineers[77] are not sellers within the meaning of Section 402A.

There has been some conflict as to whether the lessor of a defective product is a seller within Section 402A's meaning.[78] The majority view is that a lessor may be liable under Section 402A.[79] One of the leading cases in this area is *Cintrone v. Hertz Truck Leasing and Rental Service,*[80] in which the New Jersey Supreme Court reasoned:

> A bailor for hire, such as a person in the U-drive-it business, puts motor vehicles in the stream of commerce in a fashion not unlike a manufacturer or retailer. In fact such a bailor puts the vehicle he buys and then rents to the public to more sustained use on the highways than most ordinary car purchasers. The very nature of the business is such that the bailee, his employees, passengers and the traveling public are exposed to a greater *quantum* of potential danger of harm from defective vehicles than usually arises out of sales by the manufacturer. We [have held that] the liability of the manufacturer might be expressed in terms of strict liability in tort. . . . By analogy the same rule should be made applicable to the U-drive-it bailor-bailee relationship. Such a rental must be regarded as accompanied by a representation that the vehicle is fit for operation on the public highways. . . . Accordingly, we are of the opinion . . . that the nature of the U-drive-it business is such that the responsibility of Hertz may properly be stated in terms of strict liability in tort.[81]

Despite the seemingly sound reasoning exemplified in cases such as *Cintrone,* there is authority in Maryland to the contrary, holding that a defect in a leased product does not give rise to a cause of action under Section 402A because there has been no sale of a product. In *Bona v. Graefe,*[82] the plaintiff was injured due to the brake failure of a leased golf cart. The court refused to adopt Section 402A, ruling that the Section was not intended to cover leased product situations. Instead, the proper cause of action against a lessor would be in negligence.[83] Although this case was not mentioned in *Phipps,* it should still limit the scope of Section 402A in

76. Hanberry v. Hearst Corp., 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1972). For a general overview, *see* Annot., 39 A.L.R.3d 181 (1971).
77. LaRosa v. Scientific Design Co., 402 F.2d 937 (3d Cir. 1968). *See also* Note, *Liability of Design Professionals: The Necessity of Fault,* 58 IOWA L. REV. 1221 (1973).
78. *See* 2 FRUMER & FRIEDMAN, *supra* note 43, § 16A [4] [iii] at 3-277.
79. *Id.*
80. 45 N.J. 434, 212 A.2d 769 (1965).
81. *Id.* at 449, 212 A.2d at 777-79.
82. 264 Md. 69, 285 A.2d 607 (1972).
83. *Id.* at 77-78, 285 A.2d at 611.

Maryland because of the *Phipps* court's care in not overruling previous decisions.[84]

Another point of conflict as to the applicability of Section 402A is whether a "seller" includes the seller of a used product. There is no Maryland authority on this point, and other jurisdictions are split on the issue.[85] In the case of *Peterson v. Lou Bachrodt Chev. Co.*,[86] the Illinois Supreme Court overturned an intermediate appellate court's determination that Section 402A applied to the seller of a used car. The court found that there was no allegation that the defendant used car dealer created the risk of injury,[87] and ruled that there was "no need to place an absolute duty on a used car dealer to find all discoverable defects."[88]

Generally, courts that take a more liberal view hold that one who places an item in the stream of commerce is a seller within the meaning of Section 402A.[89]

2. Defective condition

In defining this element of Section 402A, the *Phipps* court relied on the official comments to the Restatement and stated, "the requirement of a defective condition limits application of § 402A to those situations where 'the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.' "[90]

In determining whether a product is defective,[91] other courts have generally employed one of two objective standards.[92] Under one test, which has its roots in the Uniform Commercial Code, the court views the product to see if it is reasonably fit for its intended use.[93]

84. *See* text accompanying notes 33–36, *supra*.

85. *Compare* Peterson v. Lou Bachrodt Chev. Co., 61 Ill. 2d 17, 329 N.E.2d 785 (1975); Rix v. Reeves, 23 Ariz. App. 243, 532 P.2d 185 (1975) *with* Hovenden v. Tenbush, 529 S.W.2d 302 (Tex. 1975). For a general overview, *see* Annot., 51 A.L.R.3d 8 (1972).

86. 61 Ill. 2d 17, 329 N.E.2d 785 (1975).

87. *Id.* at 21, 329 N.E.2d at 787.

88. *Id. See also* Rix v. Reeves, 23 Ariz. App. 243, 532 P.2d 185 (1975), in which the court recognized that application of Section 402A to the used products industry would deal a severe economic blow to that business. The court noted that a buyer of a used product should recognize that it will not be of the same quality as a new one.

89. In Challoner v. Day & Zimmerman, 512 F.2d 77 (5th Cir.), *vacated on other grounds* 423 U.S. 3 (1975), the defendant contended that there was no sale because it had merely assembled the product according to the specifications supplied by the United States Army. Applying Texas law, the court held, "[t]he [product] in this case came into commerce via a commercial transaction. . . . This is all that is necessary for the attachment of strict liability under Texas law." 512 F.2d at 82.

90. 278 Md. at 344, 363 A.2d at 959 (quoting RESTATEMENT (SECOND) OF TORTS § 402A Comment g (1965)).

In 2 FRUMER & FRIEDMAN, *supra* note 43, at § 16A[4][e] at 3–306, this element is defined as, "that condition which renders the product inadequate, and which in turn leads to liability on the part of its seller or manufacturer."

91. *See, e.g.*, Maas v. Dreher, 10 Ariz. App. 520, 460 P.2d 191 (1969).

92. 2 FRUMER & FRIEDMAN, *supra* note 43, at § 16A[4][e] at 3-320–320.1.

93. *See, e.g.*, Scanlon v. General Motors Corp., 65 N.J. 582, 326 A.2d 673 (1974).

Under the other test, which emerges from the Restatement itself and was apparently adopted in *Phipps*,[94] the court views the product to determine if it is in a condition not contemplated by the ultimate consumer and unreasonably dangerous to him. As noted by one commentator, "[u]sing either phraseology, if a product in an *unintended condition because of a miscarriage in the manufacturing process is involved,* the product would be classified as defective."[95] As further noted by that commentator, "if it is shown that the product was not fit for the ordinary purpose for which it was manufactured, it would also be unreasonably dangerous. . . ."[96]

As discussed above, some courts have held that the defective condition element is not met in the case of an alleged defective design. Apparently this is also the law in Maryland with respect to design defects which do not cause a product to malfunction.[97] A warning defect is proved if the injury is or should have been foreseeable and the product lacks an appropriate warning, even though the product is properly made and designed.[98]

Regardless of which type of defect is involved, the plaintiff in a strict liability action may rely on expert testimony to prove the existence of a defect.[99] Such proof is not mandatory, however, and a defect may be established circumstantially.[100] Practices by others in the industry are generally admissible on the issue of whether a defect exists,[101] as are subsequent changes in design of the product.[102]

3. Unreasonably dangerous to the user or consumer

The Restatement defines unreasonably dangerous as follows: "An unreasonably dangerous product . . . [is] one which is 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics.' "[103]

94. 278 Md. at 344, 363 A.2d at 959.
95. 2 FRUMER & FRIEDMAN, *supra* note 43, at § 16A[4][e] at 3-320-320.1 (emphasis added).
96. *Id.* at 3-321. *See generally* Annot., 51 A.L.R.3d 8 (1973).
97. *See* text accompanying notes 46-62, *supra.*
98. 2 FRUMER & FRIEDMAN, *supra* note 43, at § 16A[4][e] at 3-334.6-3-334.7.
99. *See, e.g.,* Waller v. Fort Dodge Laboratories, 356 F. Supp. 413 (E.D.Mo. 1972).
100. *See, e.g.,* Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (8th Cir. 1972).
101. *E.g.,* Price v. Buckingham Mfg. Co., 110 N.J.Super. 462, 266 A.2d 140 (1970).
102. *E.g.,* Ault v. International Harvester Co., 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974).
103. RESTATEMENT (SECOND) OF TORTS § 402A Comment i (1965) (quoted in *Phipps* at 278 Md. at 344, 363 A.2d at 959).

Phipps clearly establishes that the requirement under Section 402A that a defective product be unreasonably dangerous is an element of a cause of action. A minority of jurisidictions, however, have eliminated the concept of "unreasonable danger" from Section 402A cases. *E.g.,* Glass v. Ford Motor Co., 123 N.J.Super. 599, 304 A.2d 562 (1973). *See* 2 FRUMER & FRIEDMAN, *supra* note 43, at § 16A[4][e] at 3-333—334.6.

Although some courts combine this element with the requirement that there be a defect,[104] *Phipps* lists it as a separate and distinct element.[105]

The determination of whether a product is unreasonably dangerous generally depends on the facts of the particular case.[106] There are, however, general considerations which the courts employ in making this determination and, "in the final analysis, the determination depends upon considerations of public policy, and on balance the utility of the product must be weighed against the magnitude of the danger."[107] More specifically, the courts look to:

> (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 injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.[108]

Prior to *Phipps,* the Maryland courts rigidly adhered to the rule that if the danger is patent[109] or should be known to the user,[110] there can be no liability for resulting injury either under Section 402A[111] or in negligence[112] because the product is not unreasonably dangerous. Thus, in such cases after *Phipps,* Section 402A should not apply.

4. When the product leaves the seller's possession or control

When the plaintiff has shown that the product contains a defect and is unreasonably dangerous to the consumer or user, he has not

104. *E.g.,* Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969).
105. 278 Md. at 344, 363 A.2d at 958.
106. *E.g.,* Turner v. International Harvester Co., 133 N.J.Super. 277, 336 A.2d 62 (1975).
107. 72 C.J.S. SUPP. *Products Liability* § 13 at 21 (1975). *See also* Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973), *cert. denied* 419 U.S. 869 (1974).
108. Wade, *Strict Tort Liability of Manufacturers,* 19 Sw.L.J. 5, 17 (1965) (cited in Phipps at 278 Md. 345 n.4, 363 A.2d at959 n.4). *See generally* Annot., 54 A.L.R.3d 352 (1973).
109. Patten v. Logemann Bros. Co., 263 Md. 364, 368–70, 283 A.2d 567, 569–70 (1971); Blankenship v. Morrison Mach. Co., 255 Md. 241, 245–46, 257 A.2d 430, 432 (1969); Myers v. Montgomery Ward & Co., 253 Md. 282, 292–95, 235 A.2d 855, 861-63 (1969).
110. Telak v. Maszczenski, 248 Md. 476, 237 A.2d 434 (1968); Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1959).
111. Myers v. Montgomery Ward & Co., 253 Md. 282, 252 A.2d 855 (1969); Telak v. Maszczenski, 248 Md. 476, 237 A.2d 434 (1968).
112. Patten v. Logemann Bros. Co., 263 Md. 364, 283 A.2d 567 (1971); Blankenship v. Morrison Mach. Co., 255 Md. 241, 257 A.2d 430 (1969); Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1959).

yet made out a prima facie case. Although the defendant's negligence, or lack thereof, is not relevant in a strict liability action,[113] the defect in the product must still be traced to the defendant.[114] The seller is not the consumer's insurer, and the failure of a product to perform properly does not automatically entitle the plaintiff to recover.[115] Thus, Section 402A does not entirely eliminate the concept of fault. As noted by the court in *Phipps*, "[p]roof of a defect in the product at the time it leaves the control of the seller implies fault on the part of the seller sufficient to justify imposing liability for injuries caused by the product."[116] As a general rule, if the plaintiff fails to prove by a preponderance of the evidence that the defect existed when the product left the seller's control, liability will not attach to that seller.[117] As a corollary to this rule, if the product has been used over a period of time, the plaintiff will have a more difficult time showing that the defect existed when it left the seller's control, rather than being the result of ordinary use or wear.[118]

5. Causation of plaintiff's injury

Once the product is proved defective, the plaintiff must still prove that the defect proximately caused the injuries.[119] It has been held that the defect need not be the only cause and that it is sufficient if it causes injury in combination with other factors.[120] If the other factors predominate, however, the plaintiff cannot recover.[121]

The burden of proving causation may be met by showing sufficient facts to permit the jury to infer that the defect was a

113. Phipps v. General Motors Corp., 278 Md. at 344, 363 A.2d at 958.
114. *E.g.*, Hall v. E. I. du Pont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972). *See also* 2 FRUMER & FRIEDMAN, *supra* note 43, § 16A[4][e] at 3-304—306.
115. Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974). There is authority holding that once the product is shown by the plaintiff to be defective, the burden of proving who caused the defect shifts to the defendant. Curtiss v. Young Men's Christian Ass'n, 7 Wash. App. 451, 99 P.2d 915 (1972), *aff'd* 82 Wash. 2d 455, 511 P.2d 991 (1973).
116. 278 Md. at 352, 363 A.2d at 963.
117. Paoletto v. Beech Aircraft Corp., 464 F.2d 976 (3d Cir. 1972); Bates v. Werner Co., 419 F.2d 1118 (6th Cir. 1970); Southwire Co. v. Beloitt Eastern Corp., 370 F. Supp. 845 (E.D. Pa. 1974); Morrison v. Trailmobile Trailers, Inc., 526 S.W.2d 822 (Ky. App. 1975); Herbstman v. Eastman Kodak Co., 68 N.J. 1, 342 A.2d 181 (1975); General Motors Corp. v. Franks, 509 S.W.2d 945 (Tex. Civ. App. 1974).
118. Rockett v. General Motors Corp., 31 Ill. App. 3d 217, 334 N.E.2d 764 (1975).
119. Phipps v. General Motors Corp., 278 Md. at 344, 363 A.2d at 958. *See also* Farr v. Armstrong Rubber Co., 288 Minn. 83, 179 N.W.2d 64 (1970).
120. Vlahovich v. Betts Machine Co., 101 Ill. App. 2d 123, 242 N.E.2d 17 (1968), *aff'd* 45 Ill. 2d 506, 260 N.E.2d 230 (1970).
121. *See* Myers v. Montgomery Ward & Co., 253 Md. 282, 252 A.2d 855 (1969) (injuries from lawn mower blades caused primarily by plaintiff's fall and not the product).

substantial cause of the injury.[122] Expert evidence may also be used to show causation.[123]

The defendant may be able to prove the lack of causation (or the lack of a defect) by showing that the plaintiff's misuse of the product caused the injury.[124] If the plaintiff's misuse was reasonably foreseeable, however, strict liability may still be imposed upon the seller.[125] Although such misuse smacks of contributory negligence, which Section 402A eliminates as a defense,[126] the case law in this area is firm in denying recovery when a plaintiff has unforeseeably misused the defendant's product.[127]

6. Substantial change in its condition

The sixth element of a Section 402A cause of action is that the product reached the consumer without any substantial change in its condition.[128] As noted by the court in *Phipps,* Section 402A was not applicable in a previous Maryland case[129] when there was a "subsequent mishandling or alteration [which] render[ed] an otherwise safe product unsafe."[130] If the defendant can prove that the product alleged to have caused the injury was modified or changed after it left his control, plaintiff's recovery would be barred under a strict liability theory.[131] The defendant will not escape strict liability, however, if the subsequent alteration or mishandling did not cause the product to become defective.[132]

122. *See, e.g.,* Kline v. Ford Motor Co., Inc., 523 F.2d 1067 (9th Cir. 1975). *See also* 2 FRUMER & FRIEDMAN, *supra* note 43, at § 16A[4][e] at 3-310.

123. It is not unusual to employ the same expert evidence to prove that the product was in a defective condition and that it caused the plaintiff's injury. *See* Annot., 13 A.L.R.3d 1057, 1085 (1967).

124. *See, e.g.,* McGrath v. Wallace Murray Corp., 496 F.2d 299 (10th Cir. 1974). *See also* 2 FRUMER & FRIEDMAN, *supra* note 43, § 16A[4][d] at 3-299.

125. Cronin v. J.B.E.Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

126. RESTATEMENT (SECOND) OF TORTS § 402A Comment n (1965).

127. *See, e.g.,* Swain v. Boeing Airplane Co., 337 F.2d 940 (2d Cir. 1964), *cert. denied* 380 U.S. 951 (1965). *See also* 63 AM. JUR. 2d *Products Liability* § 136 at 143-45 (1972).

128. Phipps v. General Motors Corp., 278 Md. at 344, 363 A.2d at 958. This requirement is closely related to the fourth requirement discussed in text accompanying notes 113-18, *supra.*

129. Telak v. Maszczenski, 248 Md. 476, 237 A.2d 434 (1968). In *Telak,* the plaintiff was injured when he dived off a diving board which had not been sold by the defendant who sold the pool.

130. 278 Md. at 347, 363 A.2d at 960 (citing RESTATEMENT (SECOND) OF TORTS § 402A Comment g (1965)). *See also* Santiago v. Package Machinery Co., 123 Ill. App. 2d 305, 260 N.E.2d 89 (1970) (manufacturer could avoid liability when the defect was caused by another's negligence in making repairs).

131. *See* O.S.Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968). It should be noted, however, that a manufacturer cannot delegate its duty to produce a safe product, and if the source of the defect is the failure of a party further down the distribution chain to perform an act in preparing the product for sale, the manufacturer will still be strictly liable. Alvarez v. Felker Mfg. Co., 230 Cal. App. 2d 987, 41 Cal. Rptr. 514 (1964).

132. *See, e.g.,* Dennis v. Ford Motor Co., 332 F. Supp. 901 (W.D.Pa. 1971), *aff'd* 471 F.2d 733 (3d Cir. 1973).

C. Damages Covered by Section 402A

In *Phipps* the plaintiffs sought and, if successful on the merits, could recover damages for personal injuries and loss of consortium. In addition to recovery for personal injuries,[133] the Restatement also allows for recovery of damages inflicted by injury to or loss of property.[134] This would also include loss or damage to the product itself.[135] As to whether a party can recover for economic or commercial losses, the courts are split, with the majority refusing to extend strict liability to such losses if there are no personal injuries.[136]

D. Defenses to a Strict Liability Action

Affirmative defenses based on the conduct of the plaintiff are briefly reviewed in the comments to Section 402A.[137] As noted by the court in *Phipps:*

> Under § 402A, various defenses are still available to the seller in an action based on strict liability in tort. These defenses are set forth and explained in the official comments following § 402A. For example, the seller is not liable where injury results from abnormal handling or use of the product (Comment h), where mishandling or alteration after delivery of the product renders it unsafe (Comment g), or if warnings or instructions supplied with the product are disregarded by the consumer where, if used in accordance with these warnings, the product would be safe (Comment j). Additionally, where the plaintiff unreasonably proceeds to use a product despite a known risk or danger, the defense of assumption of the risk is still available (Comment n).[138]

Lack of privity of contract,[139] lack of notice of a claim[140] and a manufacturer's disclaimer[141] are not defenses to a Section 402A cause of action. Further, contributory negligence of the plaintiff in failing to discover a defect or to guard against its existence is not a defense to a strict liability action.[142]

133. RESTATEMENT (SECOND) OF TORTS § 402A (1) (1965).
134. *Id.*
135. *See, e.g.,* Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).
136. *Compare* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) *with* Monsanto Co. v. Thrasher, 463 S.W.2d 25 (Tex. Civ. App. 1970). For a general discussion, *see* Note, *Strict Tort Liability of Manufacturer for "Economic Loss,"* 7 BOST. COLLEGE IND. & COMM. L. REV. 767 (1966).
137. RESTATEMENT (SECOND) OF TORTS § 402A Comments g, h, i, j, k and n (1965).
138. 278 Md. at 346, 363 A.2d at 959–60.
139. *See, e.g.,* Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965).
140. *See, e.g.,* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).
141. *Id.*
142. RESTATEMENT (SECOND) OF TORTS § 402A Comment n (1965).

Limitations remains a defense to a strict liability action for a defective product.[143] Although some jurisdictions apply the four-year period provided for in the Uniform Commercial Code,[144] Maryland, following the majority of jurisdictions, applies the three-year period also applicable in negligence actions.[145]

III. CONCLUSION

With the advent of strict liability in Maryland, consumers in this state are further protected against injuries which result from the use of defective products. The difficulty that exists in proving a manufacturer's or seller's negligence, and the difficulties presented in bringing an action for a breach of warranty, can now be avoided, allowing recovery from a party who might otherwise escape liability.

In one sense, strict liability is a misnomer, because Section 402A still requires that there be some fault on a defendant's part. In a negligence action, a plaintiff must prove this fault by showing some act or omission to act on the defendant's part that departs from a recognized standard of care. *Phipps* and Section 402A eliminate proof of the act, and provide instead that a seller is sufficiently at fault if he places a defective product in the stream of commerce. Most cases brought under Section 402A will focus on the product.

Phipps and Section 402A place a greater responsibility on those who supply and sell the goods bought and used by the otherwise innocent public. Hopefully, *Phipps* will cause those involved in each step of the chain of distribution to exercise greater care before releasing goods into the market place.

The scope of strict liability coverage in Maryland remains, as of this date, somewhat unclear. Since 1962, when the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*[146] made that state the first to adopt the theory,[147] the doctrine of strict liability has evolved into a well defined body of law. Each jurisdiction, however, has molded the theory to fit what it believes the law should be. With *Phipps* and the prior Maryland cases in which strict liability was alleged, the Maryland Court of Appeals has outlined the boundaries of a new theory of law by which injured consumers may be protected against defective products. At present, Maryland consumers now possess a theory, the substance of which awaits elucidation by the courts in decisions subsequent to *Phipps v. General Motors Corp.*[148]

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143. 2 FRUMER & FRIEDMAN, *supra* note 43 § 16A[5][g] at 3-366, 4-70.
144. *Id.*
145. Phipps v. General Motors Corp., 278 Md. at 350, 363 A.2d at 962.
146. 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).
147. 2 FRUMER & FRIEDMAN, *supra* note 43, § 16A[1] at 3-237.
148. 278 Md. 337, 363 A.2d 955 (1976).