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Products Liability--The Expansion of Fraud, Negligence, and Strict Tort Liability

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COMMENTS

Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability

The advances in recent years in the field of products liability have probably outshone, in both number and significance, the progress during the same period in most other areas of the law. These rapid developments in the law of consumer protection have been marked by a consistent tendency to expand the liability of manufacturers, retailers, and other members of the distributive chain for physical and economic harm caused by defective merchandise made available to the public. Some of the most notable progress has been made in the law of tort liability. A number of courts have adopted the principle that a manufacturer, retailer, or other seller[1] of goods is answerable in tort to any user of his product who suffers injuries attributable to a defect in the merchandise, despite the seller's exercise of reasonable care in dealing with the product and irrespective of the fact that no contractual relationship has ever existed between the seller and the victim.[2] This doctrine of strict tort liability, originally enunciated by the California Supreme Court in *Greenman v. Yuba Power Prods., Inc.*,[3] has been recognized by the American Law Institute in its *Second Restatement of Torts*.[4]

While judicial acceptance of this concept of strict tort liability has been proceeding apace, far less dramatic but equally significant developments have been occurring with respect to both negligence and fraud liability. The possibility of recovering for a seller's misrepresentations concerning his product has been enhanced by a plaintiff-oriented judicial redefinition of two elements of a cause of

1. "Seller" is used throughout this Comment in a generic sense to refer to any member of the distributive chain—manufacturer, distributor, or retailer.

2. The supreme courts of seven states appear to have adopted the basic concept of strict tort liability for injuries caused by defective products. See Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); Suvada v. White Motor Co., 210 N.E.2d 182 (Ill. 1965); Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); Wights v. Staff Jennings, Inc., 405 P.2d 624 (Ore. 1965); Ford Motor Co. v. Lonon, CCH PROD. LIAB. REP. ¶ 5491 (Tenn. Sup. Ct., Jan. 5, 1966); O'Brien v. Comstock Foods, Inc., 123 Vt. 461, 212 A.2d 69 (1963) (at least with respect to food producers). In four other states, state intermediate appellate courts or federal courts making "Erie-educated" guesses have said that strict tort liability is the law. See Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964) (Texas law); Chairaluce v. Stanley Warner Management Corp., 236 F. Supp. 385 (D. Conn. 1964); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965).

3. *Supra* note 2.

4. 2 RESTATEMENT (SECOND), TORTS § 402A (1965) [hereinafter cited as RESTATEMENT 2D].

action for fraud: defendant's knowledge of the falsity of his representation and plaintiff's reliance upon the deception.[5] At the same time, negligence liability has often come to resemble liability without fault as courts continue to deemphasize, as a prerequisite to the application of the doctrine of *res ipsa loquitur*, the rule that a defendant must have had, at the time of the mishap, exclusive possession and control of the instrumentality which caused a plaintiff's injury.[6] This Comment will particularize and analyze these and other developments relative to tort liability for defective products, with the objects of setting forth the present state of the law and of suggesting the general course that future developments should take.

I. Liability for Fraud

While products liability actions based upon a fraud theory have been relatively rare, a seller is clearly liable for both physical injury and economic loss sustained by someone acting in reliance upon the seller's culpable and material misrepresentations about his merchandise.[7] In order to recover on a fraud theory, a plaintiff must show (1) that the defendant made a representation of material fact concerning his product; (2) that the representation was false; (3) that the defendant "knew" when he made the representation that it was false; (4) that the defendant intended the plaintiff to rely upon the misrepresentation; (5) that the plaintiff did justifiably rely upon it; and (6) that the plaintiff suffered damage as a direct result of his reliance.[8]

Several of these six prerequisites to recovery on a fraud theory are potential obstacles to relief. Most troublesome can be the requirement that a plaintiff establish that a defendant knew of the inaccuracy of a particular representation. The House of Lords in *Derry v. Peek*[9] held that in order to satisfy his burden of proof on this issue a plaintiff must show that a defendant had made a misrepresentation with actual knowledge of its falsity or under circumstances showing that he was ignorant of, or had a reckless disregard for, its accuracy. In recent years American courts have increasingly emphasized a seller's liability for reckless misrepresentations.[10]

5. See generally Prosser, Torts § 104, at 731-36 (3d ed. 1964) [hereinafter cited as Prosser]. Keeton, *Fraud: The Necessity for an Intent To Deceive*, 5 U.C.L.A.L. Rev. 583 (1958).

6. See generally 1 Frumer & Friedman, Products Liability § 12.03(3) (1965) [hereinafter cited as Frumer & Friedman]; Prosser § 39, at 222-25.

7. 1 Hursh, American Law of Products Liability §§ 4.1-.5 (1961).

8. See Mercer v. Elliott, 208 Cal. App. 2d 275, 25 Cal. Rptr. 217 (Dist. Ct. App. 1962). See generally 1 Frumer & Friedman § 17.01, at 444-45.

9. 14 App. Cas. 337 (1889).

10. See Dixie Seed Co. v. Smith, 103 Ga. App. 386, 119 S.E.2d 299 (1961); Cunningham v. C. R. Pease House Furnishing Co., 74 N.H. 435, 69 Atl. 120 (1908); Jeanblanc, *Manufacturers' Liability to Persons Other Than Their Immediate Vendees*, 24 Va. L.

Moreover, it has become easier for a plaintiff to meet this requirement, for courts have become willing to infer the requisite degree of recklessness from proof that a misrepresentation was made by a defendant who merely lacked sufficient information on which to base his statements.[11] In other cases, plaintiffs may be required to show only that defendants *should* have known that certain representations were false.[12] Thus, while fraud is considered an intentional tort because the "knowledge" prerequisite to fraud recovery originally was satisfied only upon a showing that a defendant had an actual awareness of the falsity of his representation, these recent cases demonstrate that the "knowledge" element is being reduced close to the level of mere negligence.[13] There is also a substantial body of authority which suggests that some courts have completely abandoned the "knowledge" requirement and are willing to hold defendants liable for inaccurate representations although they had reasonably believed them to be true.[14] While most of these cases have dealt with representations made to the general public through advertising,[15] a few have involved suits between parties to transactions in which alleged misrepresentations were made only to individual buyers.[16]

Another potential obstacle to a consumer's recovery in an action for fraud is the requirement that his reliance upon an alleged misrepresentation must have been justifiable. In applying this rule,

REV. 134, 145 (1937). *But see* Universal C.I.T. Credit Corp. v. Sohm, 15 Utah 2d 262, 391 P.2d 293 (1964), in which the court, in requiring clear proof of "deliberate lies," appeared to place primary emphasis upon a defendant's subjective intent to mislead.

11. Nelson v. Healey, 151 Kan. 512, 99 P.2d 795 (1940); Sgarlata v. Carioto, 23 Misc. 2d 263, 201 N.Y.S.2d 384 (City Ct. 1960); Aaron v. Hampton Motors, Inc., 240 S.C. 26, 124 S.E.2d 585 (1962); see Keeton, *Fraud: The Necessity for an Intent To Deceive*, 5 U.C.L.A.L. REV. 583, 597 (1958). See also 3 RESTATEMENT, TORTS § 526, comment *d* (1934), stating that the fact that a reasonable man would have recognized a representation as false is some evidence, but not conclusive evidence, from which the maker's lack of honest belief may be inferred.

12. Graham v. John R. Watts & Son, 36 S.W.2d 859 (Ky. 1931); Evans v. Malone, 250 Miss. 214, 164 So. 2d 794 (1964) (dictum); Mayfield Motor Co. v. Parker, 222 Miss. 152, 75 So. 2d 435 (1954).

13. In addition to the relaxation of the knowledge requirement in a fraud action, there is the increasingly popular theory of liability for negligent misrepresentation, under which a plaintiff can recover in an ordinary negligence action for injuries resulting from his reliance on negligently used words. See generally 1 FRUMER & FRIEDMAN § 17.02; PROSSER § 102, at 719-24.

14. Strand v. Librascope, Inc., 197 F. Supp. 743, 745 (E.D. Mich. 1961); Yorke v. Taylor, 332 Mass. 368, 124 N.E.2d 912 (1955); Irwin v. Carlton, 369 Mich. 92, 119 N.W.2d 617 (1963). The leading case for this position is Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932). After retrial the defendant in *Baxter* appealed again. The court said: "If a person states as true material facts susceptible of knowledge to one who relies and acts thereon to his injury, if the representations are false, it is immaterial that he did not know they were false, or that he believed them to be true." 179 Wash. 123, 128, 35 P.2d 1090, 1092 (1934).

15. *E.g.*, Baxter v. Ford Motor Co., *supra* note 14.

16. *E.g.*, Irwin v. Carlton, 369 Mich. 92, 119 N.W.2d 617 (1963).

courts traditionally held that reliance upon a seller's expression of opinion regarding the capability or quality of particular goods was inherently unreasonable.[17] Of course, this conclusion merely represented a disguised application of the old "opinion rule," which stated that an action could be based only on misrepresentations of fact, as opposed to false or misleading statements of opinion.[18] Recently, however, courts have shown an increasing tendency to allow recoveries in fraud actions arising out of transactions in which reliance had been placed on a defendant's stated opinion concerning his products. Sometimes, a statement which once would have been considered an expression of opinion has been construed as a representation of fact or as an implied representation that the author had sufficient facts to justify his opinion, with the result that the representation could therefore be treated as if it were a statement of fact.[19] Other courts have been more candid in their attitude toward the opinion rule and have held that reliance upon a defendant's opinion was reasonable in certain circumstances, such as those in which a defendant had held himself out as an expert on a subject about which a plaintiff did not have equal knowledge.[20] The difficulties traditionally facing a plaintiff seeking to prove reliance have been further alleviated as it has become clear that a false representation need only have been a substantial factor in inducing a plaintiff to act as he did and thereby sustain his injury; it need not have been his sole motivation.[21]

Despite the attenuation of the knowledge and reliance requirements, however, it remains unlikely that fraud actions will become a major source of products liability, because a factual situation that forms the basis of an action for fraud is also likely to give rise to a claim for breach of warranty, since a large majority of successful fraud suits are based on affirmative misrepresentations of fact which

17. Lambert v. Sistrunk, 58 So. 2d 434 (Fla. 1952). In Stribling Bros. Mach. Co. v. Girod Co., 239 Miss. 488, 124 So. 2d 289 (1960), a seller's inaccurate statement that a marine engine would provide sufficient power to pull a boat and one or two loaded barges was held not to be an actionable misrepresentation, but merely a "general commendation."

18. As to the "opinion" and "puffing" rules generally, see PROSSER § 104, at 742-44.

19. Gentry v. Little Rock Road Mach. Co., 232 Ark. 580, 339 S.W.2d 101 (1960); Fowler v. Benton, 229 Md. 571, 185 A.2d 344 (1962); Smith v. Leppo, 360 Mich. 557, 104 N.W.2d 128 (1960); see RESTATEMENT 2D § 539 (Tent. Draft No. 10, 1964). The *Gentry* and *Smith* cases dealt with representations by automobile dealers to the effect that cars were in good condition.

20. Strand v. Librascope, Inc., 197 F. Supp. 743, 745 (E.D. Mich. 1961); Traylor Eng'r & Mfg. Co. v. National Container Corp., 45 Del. 143, 70 A.2d 9 (Super. Ct. 1951). Dean Prosser has pointed out that an expression of opinion may justifiably be relied upon if there is a special relationship of trust and confidence between the parties. PROSSER § 104, at 742. Such a relationship is, of course, rarely present in a products liability action.

21. Wennerholm v. Stanford Univ. School of Medicine, 20 Cal. 2d 713, 128 P.2d 522 (1942).

could easily have created express warranties.[22] The warranty theory is normally a more advantageous avenue of recovery than the fraud theory, because a plaintiff can establish his right to damages in a warranty action without meeting a knowledge requirement of any kind.[23] Nevertheless, there are advantages associated with the fraud remedy which might make it preferable to its warranty counterpart in a particular situation. For example, misrepresentations of opinion may be actionable on a fraud theory, whereas they are not likely to give rise to express warranties.[24] Privity of contract between plaintiff and defendant, often required in a warranty action, is not a prerequisite to a fraud recovery;[25] indeed, anyone whom a defendant could reasonably have expected to rely upon his misrepresentation may obtain fraud damages.[26] Moreover, disclaimers of liability, which can be effective to bar relief in warranty actions, do not prevent fraud recoveries. Since a particular misrepresentation constituting fraud usually induces a purchaser to enter into a contract, and since fraud vitiates the entire transaction with which it is associated, any disclaimers which might have been incorporated into the final agreement are inoperative.[27] Furthermore, it is possible for a plaintiff to recover punitive damages in a fraud action, whereas he can obtain only compensatory damages in a suit based on a warranty theory.[28] However, even in a fraud action punitive damages are generally recoverable only if a defendant can be shown to have had actual knowledge of the falsity of his representation or if other exceptional circumstances surrounded the transaction in question.[29] For

22. The other basis for fraud recovery is a misrepresentation created by a seller's failure to disclose material facts. Courts today regularly hold that a cause of action lies for nondisclosure. See Jenkins v. McCormick, 184 Kan. 842, 339 P.2d 8 (1959); Kaze v. Compton, 283 S.W.2d 204 (Ky. 1956). See also Seavey, *Caveat Emptor as of 1960*, 38 TEXAS L. REV. 439, 445 (1960).

23. See 1 FRUMER & FRIEDMAN § 16.01(1), at 358.1-360.

24. See UNIFORM COMMERCIAL CODE § 2-313; text accompanying notes 19-20 *supra*.

25. Barni v. Kutner, 45 Del. 550, 76 A.2d 801 (1950); Chitty v. Horne-Wilson, Inc., 92 Ga. App. 716, 89 S.E.2d 816 (1955); Pearl v. William Filene's Sons Co., 317 Mass. 529, 58 N.E.2d 825 (1945); Wechsler v. Hoffman-La Roche, Inc., 198 Misc. 540, 99 N.Y.S.2d 588 (Sup. Ct. 1950). Of course, as privity is abandoned as a prerequisite to a warranty recovery, this difference becomes less significant. See generally Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430 (1966).

26. 2 RESTATEMENT 2D § 310; *id.* § 531 (Tent. Draft No. 10, 1964). However, it would appear that an absolute stranger to a transaction would be denied a fraud recovery, on the ground that a defendant would not have intended him to rely on a representation. See PROSSER § 102, at 717.

27. Traylor Eng'r & Mfg. Co. v. National Container Corp., 45 Del. 143, 70 A.2d 9 (Super. Ct. 1951); Sanders, Inc. v. Chesmotel Lodge, Inc., 300 S.W.2d 239 (Ky. 1957); Super-Cold Southwest Co. v. Willis, 219 S.W.2d 144 (Tex. Civ. App. 1949). *Contra*, Vesey Associates, Inc. v. Regime Realty Corp., 35 Misc. 2d 353, 232 N.Y.S.2d 754 (Sup. Ct. 1961).

28. See UNIFORM COMMERCIAL CODE §§ 2-714, -715.

29. Treadwell Ford, Inc. v. Leek, 272 Ala. 544, 133 So. 2d 24 (1961); Brown v. Cahill, 157 So. 2d 871 (Fla. Dist. Ct. App. 1963); Craig v. Spitzer Motors, Inc., 109 Ohio App. 376, 160 N.E.2d 537 (1959).

example, one court sustained an award of punitive damages where, after the plaintiff had questioned the accuracy of the defendant's statement, the latter repeated it without having made any special effort to ensure that it was correct.[30]

Causes of action for both fraud and negligence also often arise from the same factual situation, since a product's defective condition about which a defendant made a misrepresentation may have been created by his negligence. In some of these instances, a fraud action may be preferable to a suit based on a negligence theory. Recovery for economic loss, as distinguished from loss arising from personal injury or property damage, is clearly permissible in a suit brought on a fraud theory, while it is doubtful that a negligence action would afford similar relief.[31] Punitive damages, likewise unavailable in a negligence action, may be recovered under some circumstances in a fraud suit.[32] Furthermore, since fraud is, at least nominally, an intentional tort, a plaintiff cannot be said to have been contributorily negligent in acting in reliance upon a fraudulent misrepresentation.[33] However, the advantage thereby accruing to a plaintiff is somewhat illusory, for his unjustifiable reliance upon such a misrepresentation will prevent his recovery.[34] Moreover, he may be held to have assumed the risk of any harm traceable to his reliance upon a fraudulent misrepresentation if he had discovered before the injury occurred that the representation was false but had nevertheless continued to rely upon it.[35]

II. Liability for Negligence

In contrast to the small number of products liability decisions dealing with the fraud theory are the many opinions discussing negligence principles. At the beginning of this century, however, negligence actions played a less significant role in the scheme of

30. Young v. Goodyear Serv. Stores, 244 S.C. 493, 137 S.E.2d 578 (1964).

31. See, *e.g.*, Quirici v. Freeman, 98 Cal. App. 2d 194, 25 Cal. Rptr. 217 (Dist. Ct. App. 1950); Graham v. John R. Watts & Son, 36 S.W.2d 859 (Ky. 1931); Sgarlata v. Carioto, 23 Misc. 2d 263, 201 N.Y.S.2d 384 (City Ct. 1960). For a discussion of the unavailability in negligence actions of a recovery for economic loss, see note 184 *infra* and accompanying text.

32. Generally speaking, negligent conduct does not give rise to an action for punitive damages. See Prosser § 2, at 9-10.

33. Hyma v. Lee, 338 Mich. 31, 60 N.W.2d 920 (1953); Weatherford v. Home Fin. Co., 255 S.C. 313, 82 S.E.2d 196 (1956); Jenness v. Moses Lake Dev. Co., 39 Wash. 2d 151, 234 P.2d 865 (1951). Fraud may in fact approach a negligence theory of liability. See note 13 *supra* and accompanying text.

34. See notes 17-21 *supra* and accompanying text. However, it is generally held that reliance is not unreasonable merely because the falsity of a representation might have been discovered by a reasonable investigation. See Yorke v. Taylor, 332 Mass. 368, 124 N.E.2d 912 (1955); Aaron v. Hampton Motors, Inc., 240 S.C. 26, 124 S.E.2d 585 (1962); 3 Restatement, Torts § 540 (1934).

35. Mercer v. Elliott, 208 Cal. App. 2d 275, 25 Cal. Rptr. 217 (Dist. Ct. App. 1962); Carmen v. Eli-Lilly & Co., 109 Ind. App. 76, 32 N.E.2d 729 (1941).

consumer protection, because, under the rule derived from *Winterbottom v. Wright*,[36] a plaintiff generally had to be in a direct contractual relationship with the manufacturer or supplier of the product which had caused his injury in order to recover damages from that producer or distributor. This so-called privity limitation was apparently based upon the misconception that any duty to a consumer which a manufacturer or a supplier could conceivably have violated had to have been one requiring affirmative action in inspecting a product for possible defects. Since such a duty of affirmative action could have arisen only from some special relationship between two parties, most notably that imposed by an actual contract between a seller and buyer, it was said that a consumer could recover from a seller only if the requisite relationship between them existed.[37] However, the duty owed by a producer or a distributor to a consumer could also have been regarded as that of refraining from placing defective merchandise on the market.[38] Viewed in this light, the error in the privity rule is apparent, since the duty to refrain from negligent action is a duty owed by every person to every other person regardless of the nature of the relationship between them.[39] After the decision in *MacPherson v. Buick Motor Co.*,[40] plaintiffs were largely emancipated from many of the restrictions imposed by the privity rule. In *MacPherson*, the court held that privity between a consumer-plaintiff and a manufacturer-defendant was not a prerequisite to recovery if the product which caused the plaintiff's injury was inherently or imminently dangerous. A product was said to fit this description if it was likely to be dangerous to human beings if negligently made. The *MacPherson* doctrine is now the law in all American jurisdictions.[41]

A. *Privity Beyond MacPherson*

Unfortunately, neither *MacPherson* nor its progeny have completely eliminated the somewhat specious privity issue from the law of negligence. It is apparent that a so-called "bystander," such as a

36. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

37. Huset v. J. I. Case Threshing Mach. Co., 120 Fed. 865 (8th Cir 1903).

38. See Huset v. J. I. Case Threshing Mach. Co., *supra* note 37, at 870, where the court, recognizing that the negligent manufacture of a product intended to affect human life gives rise to a cause of action despite a lack of privity between plaintiff and defendant if the negligence renders the merchandise imminently dangerous to life, said that *everyone* has a duty to avoid acts or omissions imminently dangerous to the lives of others.

39. Terry, *Negligence*, 29 HARV. L. REV. 40, 52 (1915).

40. 217 N.Y. 382, 111 N.E. 1050 (1916).

41. See 2 RESTATEMENT 2D § 395. Prosser lists Mississippi as a possible exception (PROSSER § 96, at 661), but the Mississippi Supreme Court appears recently to have adopted the rule by implication in holding that a wooden utility pole was not inherently dangerous within the meaning of the *MacPherson* doctrine. Triplett v. American Creosote Works, Inc., 251 Miss. 727, 171 So. 2d 342 (1965).

pedestrian injured by an automobile, may recover from a manufacturer, distributor, or retailer for injuries attributable to their negligence in dealing with a product only if the plaintiff was one who could reasonably have been expected to be endangered while the merchandise was being used in a lawful and foreseeable manner.[42] Less clear, however, is the extent to which the "inherently dangerous" limitation upon the *MacPherson* doctrine operates to foreclose relief to a plaintiff who is not in privity with a defendant. For some time a number of courts which held that the privity requirement remained a bar to recovery on a negligence theory when an injury-causing product was neither inherently nor imminently dangerous took a strict approach in determining which products were dangerous, ruling, for example, that goods such as a toy bow and arrow and a garage door were not dangerous.[43] Others required privity when recovery was sought for property damage unconnected with physical injury to a person, reasoning that, absent a showing of personal injury, a product defect could not be said to have created an unreasonable danger to human beings.[44] On the other hand, most courts have recently been quite liberal in refusing to invoke the privity rule as a bar to recovery in numerous instances in which liability was predicated upon the defective manufacture or assembly of products unlikely to cause any serious personal injury, as well as in cases in which damages were sought for property losses unconnected with personal injuries.[45] This modern tendency is founded upon a recognition of the anomaly of the existence of a privity requirement in tort actions. If this trend continues, the last vestiges of the privity limitation may soon disappear completely from the law of products liability.

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42. Benton v. Sloss, 38 Cal. 2d 399, 240 P.2d 575 (1952); McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 181 N.E.2d 430 (1962); Hills v. McGillorey, 402 P.2d 722 (Ore. 1965); see 2 RESTATEMENT 2D § 395, comment *i* at 330.

43. Gahimer v. Virginia-Carolina Chem. Corp., 241 F.2d 836 (7th Cir. 1957) (applying Indiana law) (fertilizer); Defore v. Bourjois, Inc., 268 Ala. 228, 105 So. 2d 846 (1958) (perfume bottle); Morris v. Toy Box Co., 204 Cal. App. 2d 468, 22 Cal. Rptr. 572 (Dist. Ct. App. 1962) (toy bow & arrow); Day v. Barber-Coleman Co., 10 Ill. App. 2d 494, 135 N.E.2d 231 (1956) (garage door); Lucette Originals, Inc. v. General Cotton Converters, Inc., 8 App. Div. 2d 102, 185 N.Y.S.2d 854 (1959) (fabric).

44. *E.g.*, Russell v. Sessime Clock Co., 19 Conn. Supp. 425, 116 A.2d 575 (Super. Ct. 1955).

45. Innocuous products: Larson v. United States Rubber Co., 163 F. Supp. 327 (D. Mont. 1958) (rubber boots); Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956) (lawn chair); Simmons Co. v. Hardin, 75 Ga. App. 420, 43 S.E.2d 553 (1947) (sofa bed with defective spring); Brown v. Bigelow, 325 Mass. 4, 88 N.E.2d 542 (1949) (hay used as feed). See generally Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 967-71 (1957). Property loss: Sabella v. Wisler, 59 Cal. 2d 21, 27 Cal. Rptr. 689, 377 P.2d 889 (1963) (damage to home due to subsidence); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (damage to building attributable to defective concrete blocks used in construction); Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952) (contaminated feed resulting in death of mink).

B. *The Basic Duty*

Since the liability under discussion is based upon negligent conduct, the standard by which the duties of manufacturers, retailers, and other members of the distributive chain are measured is essentially one of reasonable care under the circumstances. Behavior which fails to meet this test can become the basis of an assessment of damages for any injuries of which it is the proximate cause.[46]

Generally speaking, a manufacturer has a duty to use due care in the design, construction, and assembly of his products in order to ensure that his merchandise will not create an unreasonable risk of harm when used in a customary and foreseeable manner.[47] A similar duty is imposed by law upon the producer of a component which is destined to become a part of a final product manufactured by another.[48] However, these basic rules are qualified by the significant exception announced in *Campo v. Scofield*,[49] where the New York Court of Appeals held as a matter of law that a patent defect in a product could not give rise to liability for the harm which it had caused. A manufacturer was said to have no *duty* to prevent the existence of a patent defect, which might be either an intended or unintended condition which made a product unreasonably dangerous, even if he could have done so by using a fairly common safety device or by making a reasonable change in a product design. Therefore, the numerous courts which follow *Campo* hold that a manufacturer has a duty to use due care only to prevent the existence of hidden or latent defects in his product.[50] This excessively rigid view, which often prevents recovery for injuries caused by a defective product solely because the imperfection was patent, has been severely criticized.[51] Indeed, in a number of cases courts have refused to follow *Campo* and have held a manufacturer liable for injuries attributable to his failure to provide safety devices for his product despite the obviousness of the resulting defect.[52] These decisions may indicate

46. See 1 FRUMER & FRIEDMAN § 11.02 and authorities cited therein. The authors note that an issue of proximate cause is attended by essentially the same problems in a products liability suit as in other negligence actions. *Id.* § 11.02, at 210.6.

47. See generally 2 RESTATEMENT 2D § 395; Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 SW. L.J. 26 (1965).

48. *E.g.*, Jones & Laughlin Steel Corp. v. Matherne, 348 F.2d 394 (5th Cir. 1965) (applying Louisiana law).

49. 301 N.Y. 468, 95 N.E.2d 802 (1950). Here the alleged negligence was the defendant's failure to provide a device to prevent the plaintiff's hands from becoming caught in an onion-topping machine.

50. *E.g.*, Messina v. Clark Equip. Co., 263 F.2d 291 (2d Cir.) (applying New York law), *cert. denied*, 359 U.S. 1013 (1959); Murphy v. Corey Pump & Supply Co., 47 Ill. App. 2d 382, 197 N.E.2d 849 (1964); Stevens v. Dutbin-Durco, Inc., 377 S.W.2d 343 (Mo. 1964); Tyson v. Long Mfg. Co., 249 N.C. 557, 107 S.E.2d 170 (1959).

51. See, *e.g.*, 2 HARPER & JAMES, TORTS § 28.5 (1956); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 837-41 (1962).

52. Brandon v. Yale & Towne Mfg. Co., 220 F. Supp. 855 (E.D. Pa. 1963), *aff'd*, 342 F.2d 519 (3d Cir. 1965); Wagner v. Larson, 136 N.W.2d 312 (Iowa 1965).

the beginning of a trend toward a more flexible approach by which a manufacturer would be held to have a duty to prevent the creation of an obvious defect if the danger to which the imperfection gave rise could reasonably have been foreseen and avoided.[53] This view would allow a court to direct its attention to the important questions whether a manufacturer was negligent when he made a product which contained an obvious defect, whether a plaintiff was contributorily negligent in failing to discover the flaw, and whether he assumed the risk of suffering a particular injury caused by the defect if he had discovered the imperfection prior to his injury and appreciated the danger which it had created.[54]

Another issue relevant to the scope of a manfacturer's duty is the question of the degree of care which he must exercise in inspecting parts supplied by others and destined to become components of his own final product. The overwhelming weight of authority supports the proposition that a manufacturer of a final product has a duty to conduct reasonable tests and examinations to discover latent defects in components.[55] However, a number of recent cases have gone much further by holding a final-product manufacturer vicariously liable for injuries attributable to the negligence of the producer of a defective component even if the flaw was not discoverable by the use of due care.[56] Expansion of liability in this manner appears to be another modern trend and depends for its justification upon the judicial realization that a consumer normally does not know the identity of a component producer and consequently relies on the reputation and the skill of a final manufacturer.[57]

While a manufacturer clearly has a duty to use reasonable care in inspecting his entire final product to discover latent defects and must normally make an effort to detect similar imperfections in components produced by others and incorporated into his own

53. See 2 RESTATEMENT 2D § 398.

54. See James, *Products Liability*, 34 TEXAS L. REV. 44, 52 (1955).

55. Rauch v. American Radiator & Standard Sanitary Corp., 252 Iowa 1, 104 N.W.2d 607 (1960); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). There are a few jurisdictions in which it is held that the manufacturer is liable only for a negligent failure to inspect, thus focusing on the question whether his reliance on the skill of the component manufacturer was reasonable. DeFore v. Bourjois, 268 Ala. 228, 105 So. 2d 846 (1958). Cases on the manufacturer's liability for defective component parts are collected in Annot., 3 A.L.R.3d 1016 (1965).

56. Ford Motor Co. v. Mathis, 322 F.2d 267 (5th Cir. 1963) (applying Texas law); Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961) (applying California law); Markel v. Spencer, 5 App. Div. 2d 400, 171 N.Y.S.2d 770 (1958), *aff'd without opinion*, 5 N.Y.2d 958, 157 N.E.2d 713, 184 N.Y.S.2d 835 (1959).

57. Only in New Jersey, of the states in which courts have recently passed on the issue, has it been held that a manufacturer's negligence liability is limited to failure to inspect and test. Pabon v. Hackensack Auto Sales, Inc., 63 N.J. Super. 476, 164 A.2d 773 (App. Ct. 1960). *But cf.* Courtois v. General Motors Corp., 37 N.J. 525, 182 A.2d 545 (1962), where the final manufacturer was held liable for *breach of warranty* because of a defective component.

goods,[58] a retailer generally does not have the same obligation.[59] A well recognized exception to this general rule applies to an "ostensible manufacturer"—a retailer who holds himself out to the public, often through advertising or by branding merchandise with his own trademark, as the manufacturer of a particular product. Because a purchaser is considered likely to have relied upon his representations, an ostensible manufacturer is liable, just as if he were an actual manufacturer, for injuries arising from defects in any products which he sells.[60] Of more widespread importance than the liability of an ostensible manufacturer is the increasingly recognized duty of certain retailers to make reasonable inspections of the merchandise which they offer to the public. This obligation is said to exist when a dealer assists in the final assembly of a product, when he sells second-hand articles, and when he is a bailor of goods for immediate use.[61] The fact that a duty to inspect arises in these instances is indicative of an encouraging tendency on the part of many courts to give consideration to the specific factors involved in individual cases and to base their decisions upon realistic observations rather than merely following a general rule that retailers have no duty to inspect merchandise prior to sale. The justifications for the trend are sound. A dealer who takes part in the final assembly of a product must examine the merchandise because he, like a manufacturer, possesses special skills which should assist him in detecting defects and, more important, because he has the opportunity to make the inspection before the article is packaged.[62] A seller of second-hand goods is liable for harm attributable to his failure to make a reasonable examination because the prior use of the items increases the probability that they are defective.[63] A bailor of goods for immediate use must inspect them because he, too, is dealing in wares which may have become defective in the hands of previous users and, in addition, because his typical customer, the short-term

58. Jones & Laughlin Steel Corp. v. Matherne, 348 F.2d 394 (5th Cir. 1965) (applying Louisiana law); Sheward v. Virtue, 20 Cal. 2d 410, 126 P.2d 345 (1942).

59. DiPangrazio v. Salamonsen, 64 Wash. 2d 720, 393 P.2d 936 (1964); 2 RESTATEMENT 2D § 402.

60. Carney v. Sears, Roebuck & Co., 309 F.2d 300 (4th Cir. 1962) (applying Virginia law); Kasey v. Suburban Gas Heat, Inc., 60 Wash. 2d 468, 374 P.2d 549 (1962); 2 RESTATEMENT 2D § 400; *cf.* Santise v. Martins, Inc., 258 App. Div. 663, 17 N.Y.S.2d 741 (1940).

61. Final assembly: Workstel v. Stern Bros., 3 Misc. 2d 858, 156 N.Y.S.2d 335 (Sup. Ct. 1956); Bower v. Corbell, 408 P.2d 307 (Okla. 1965). Used goods: Heilig v. Studebaker Corp., 347 F.2d 686 (10th Cir. 1965) (applying Oklahoma law); Witt Ice & Gas Co. v. Bedway, 72 Ariz. 152, 231 P.2d 952 (1951); Ward v. Nance, 102 Ga. App. 201, 115 S.E.2d 781 (1960). Bailor for immediate use: McNeal v. Greenberg, 40 Cal. 2d 740, 255 P.2d 810 (1953); Forgione v. New York, CCH PROD. LIAB. REP. ¶ 5194 (N.Y. Ct. Cl. 1963).

62. Bower v. Corbell, *supra* note 61; McKinney v. Frodsham, 57 Wash. 2d 126, 356 P.2d 100 (1960).

63. Witt Ice & Gas Co. v. Bedway, 72 Ariz. 152, 231 P.2d 952 (1951).

lessee, is unlikely to inspect an article as thoroughly before accepting it as would a person who anticipates making a more significant and permanent investment by purchasing the item.[64]

In addition to the obligations already discussed, a duty is imposed upon both manufacturers and retailers to warn purchasers of any dangers associated with the handling of their products and to provide instructions adequate to enable consumers to use the goods in reasonable safety.[65] Of course, since his obligation in this regard is that of using due care, a seller must warn only of dangers of which he has knowledge and, if he has a duty to inspect his merchandise, those of which he should be aware when he sells a product, and then only if the hazards are unreasonably great.[66] Thus, in a typical case, a plaintiff suing the manufacturer of a deodorant was denied recovery for harm attributable to an allergy caused by the use of the defendant's product because the plaintiff failed to prove that she was a member of a substantial class of persons whom the manufacturer should have known to be allergic to his deodorant.[67] In other cases, evidence of prior safe use of a product has been admitted for the purpose of establishing that a hazard which gave rise to a plaintiff's injury need not have been anticipated and, therefore, need not have been the subject of a warning.[68] In theory, a seller should willingly perform his duty to advise and caution, for by providing sufficient warnings and instructions a seller may escape liability—at least to persons to whom the warnings and directions were communicated—for a product design which otherwise would create an unreasonable risk of harm.[69]

Closely related to the previously discussed decisions holding that a manufacturer has no duty to prevent the existence of an obvious defect in his product are those opinions indicating that neither a manufacturer nor a retailer has a duty to warn a consumer of patent defects in, or obvious dangers associated with the use of, particular

64. See 2 RESTATEMENT 2D § 408, comment *a* at 366.

65. Manufacturers: Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627 (1959). Retailers: J. C. Lewis Motor Co. v. Williams, 69 S.E.2d 816 (Ga. Ct. App. 1952); 2 RESTATEMENT 2D § 401. A similar duty has been imposed upon bailors. Monroe v. East Bay Rental Serv., 111 Cal. App. 2d 574, 245 P.2d 9 (1952). Cases dealing with the duty to warn are collected in Annot., 76 A.L.R.2d 9 (1961).

66. Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 SW. L.J. 26, 28 (1965).

67. Kaempfe v. Lehn & Fink Prod. Corp., 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964).

68. *E.g.*, Lilly v. J. A. Riggs Tractor Co., 386 S.W.2d 488 (Ark. 1965).

69. Foster v. Ford Motor Co., 139 Wash. 341, 246 Pac. 945 (1926); see Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 845-46 (1962). *But see* Crane v. Sears Roebuck & Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (Dist. Ct. App. 1963), in which a clearly visible warning on the label that a substance was *flammable* and gave off poisonous fumes was held insufficient to give notice that it was *combustible*.

merchandise.[70] The results in a number of these cases are clearly justifiable; for example, it would be superfluous to require a seller to warn of such a commonly known fact as that a person can be scalded by the contents of a vaporizer.[71] Yet there may be obvious dangers which, although unavoidable by the use of due care in the manufacture and design of the merchandise, are of such magnitude as to suggest that a consumer should be warned of their existence. Therefore, the proposition that a seller has no duty to warn a consumer of obvious defects is subject to the same criticism as is the principle that a manufacturer has no duty to use due care to prevent the existence of these flaws. Reliance on either rule diverts a court's attention from the more significant question whether the failure to remedy or warn of a defect was reasonable in light of all of the facts in a particular case.

The duty of a middleman, such as a wholesaler, a jobber, or a distributor, is similar to that of a retailer.[72] As in the case of a retailer, it is normally difficult to prove that a middleman was negligent; although he is liable for injuries caused by product defects of which he was aware,[73] he would seldom know of the dangers created by his products.[74] Moreover, a middleman usually does not have an obligation to inspect his goods for defects.[75] However, there has been at least one recent case in which the court relied largely upon the extent of the defendant middleman's experience and skill in order to find him liable for failing to warn a consumer of a product-related danger of which he should have been, but apparently was not, aware.[76]

C. *Res Ipsa Loquitur*

Plaintiffs employ *res ipsa loquitur* quite frequently in products liability suits against manufacturers; if they did not rely upon this doctrine they would experience great difficulty in proving that their adversaries failed to exercise due care in producing the merchandise in question, since most of the information relevant to the negli-

70. For a discussion of the duty to prevent the existence of obvious defects, see notes 49-54 *supra* and accompanying text.

71. Blissenback v. Yanko, 90 Ohio App. 557, 107 N.E.2d 409 (1951); *cf.* Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir.), *cert. denied*, 355 U.S. 855 (1957) (applying Virginia law); Baker v. Stewart Sand & Material Co., 353 S.W.2d 108 (Mo. Ct. App. 1961).

72. See 2 RESTATEMENT 2D § 402, where no distinction is made between the liability of a retailer and that of a middleman.

73. Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N.W. 48 (1913).

74. See, *e.g.*, Willey v. Fryogas Co., 363 Mo. 406, 251 S.W.2d 635 (1952).

75. See 1 FRUMER & FRIEDMAN § 20.02, at 569-70.

76. Blitzstein v. Ford Motor Co., 288 F.2d 738 (5th Cir. 1961) (applying Alabama law); see also 2 RESTATEMENT 2D § 402, suggesting that a middleman is relieved of liability for harm caused by a dangerous product which he distributed only if he neither knew or had reason to know that it was likely to be dangerous.

gence issue in a particular case is likely to be in the hands of the defendant manufacturer. If a plaintiff can invoke *res ipsa loquitur*, however, he can raise for a jury's determination the question of a defendant's negligence without offering any evidence to show a specific act of misconduct. Traditionally, courts have required that a plaintiff demonstrate the presence of three conditions relative to a particular accident before he may invoke *res ipsa* to aid in recovering from a particular defendant:[77] (1) the accident which allegedly caused plaintiff's injuries was one which would not ordinarily have occurred unless someone had been negligent; (2) the mishap was caused by an instrumentality "within the defendant's exclusive control"; and (3) the accident was not due to "some voluntary action or contribution of the plaintiff."[78] Whether the presence of these conditions has been shown in a particular case and, thus, whether *res ipsa* is applicable appear to be questions for the jury to answer with the assistance of proper instructions from the court, unless, of course, a judge believes as a matter of law that a jury cannot reasonably conclude from the evidence before it that the conditions existed.[79]

The presence of the first of the three conditions, that an accident was probably caused by someone's negligence, generally may be shown in one of two ways. If it is commonly known on the basis of experience that an event, for example the sale of a bottle of cola containing a putrified rodent, normally would not have occurred unless someone had been negligent, a jury is permitted to conclude upon the basis of its general knowledge that the event is attributable to negligence.[80] On the other hand, where such common knowledge is lacking, expert testimony may be employed to provide a sufficient basis for a jury to find that an accident was caused by negligence.[81] To establish the presence of the third condition, that the accident was not due to his voluntary action or contribution, a plaintiff need not prove that he was free from contributory negligence in dealing

77. In some instances, *res ipsa* may be invoked against multiple defendants. In these cases it is necessary for a plaintiff to show that an accident was caused by the negligence of some member of a particular group of defendants. See note 96 *infra* and accompanying text.

78. See 1 FRUMER & FRIEDMAN § 12.03(1), at 285-86; PROSSER § 96, at 671-72; Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 977 (1957). Some courts also say that *res ipsa* can be invoked only if a defendant has better access than a plaintiff to information relating to the cause of the accident in question. Johnson v. Latimer, 180 Kan. 720, 308 P.2d 65 (1957); Pilie v. National Food Stores, Inc., 148 So. 2d 391 (La. Ct. App. 1962), *aff'd*, 245 La. 276, 158 So. 2d 162 (1963).

79. See Seneris v. Haas, 45 Cal. 2d 811, 827, 291 P.2d 915, 924 (1955); PROSSER § 39, at 222.

80. See PROSSER § 39, at 221.

81. See, *e.g.*, Baker v. B. F. Goodrich Co., 115 Cal. App. 2d 221, 252 P.2d 24 (Dist. Ct. App. 1953); Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255, *rehearing denied*, 20 Wis. 2d 1, 122 N.W.2d 439 (1963). See generally Fricke, *The Use of Expert Evidence in Res Ipsa Loquitur Cases*, 5 VILL. L. REV. 59 (1959).

with the instrumentality of harm nor even that he did not participate in the events which led to the accident.[82] Indeed, it is sufficient if he only introduces evidence, such as testimony indicating that he used some degree of care in handling the instrumentality, which makes it probable that he was not the cause of the mishap.[83]

Once it has been shown both that the accident which allegedly caused his injury was one which would not normally have occurred without negligence and that the mishap was not attributable to his voluntary action, a plaintiff must still prove that the instrumentality of harm was within a particular defendant's "exclusive control" in order to provide a basis for an inference that it was that defendant's negligence, and not that of another person, which caused the accident. Taking a position which would prevent the application of *res ipsa loquitur* in the vast majority of products liability cases, some courts hold that a plaintiff can demonstrate the requisite degree of control only by proving that the defendant was in possession of the instrumentality of harm at the time of the accident.[84] On the other hand, a rapidly increasing number of courts recognize, at least in food and beverage cases, that the critical time to which the control requirement should relate is the time when the negligence with respect to the instrumentality occurred and not when the accident happened. Therefore, these courts permit a plaintiff to rely upon *res ipsa* once he has proved that the condition of the instrumentality had not changed from the time it left a defendant manufacturer's possession until the mishap.[85] In these courts the crucial issue is the quantity of proof required to establish that a plaintiff, and all others who dealt with the instrumentality after a particular defendant had relinquished control, exercised due care. If an accident is of a kind normally attributable to negligence and if no one who handled the instrumentality after the defendant was negligent, it is inferable that the defendant's negligence caused the mishap. While some courts have been unduly strict in finding a "fatal hiatus" in a plaintiff's evidentiary chain if he cannot account for the degree of care exercised toward a product during almost every minute after the merchandise left a defendant's possession, most appear to demand only that the evidence support an inference that the negligence

82. 1 FRUMER & FRIEDMAN § 12.03(4), at 306-08.

83. Zentz v. Coca-Cola Bottling Co., 39 Cal. 2d 436, 444-45, 247 P.2d 344, 348 (1952); Baker v. B. F. Goodrich Co., 115 Cal. App. 2d 221, 229, 252 P.2d 24, 29 (Dist. Ct. App. 1953).

84. Kapp v. Sullivan Chevrolet Co., 234 Ark. 395, 353 S.W.2d 5 (1962); Brookshire v. Florida Bendix Co., 153 So. 2d 55 (Fla. Dist. Ct. App. 1963), *cert. denied*, 163 So. 2d 881 (Fla. 1964).

85. *E.g.*, Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 458-60, 150 P.2d 436, 438-40 (1944). See generally the excellent discussion of control in 1 FRUMER & FRIEDMAN § 12.03(3), at 295-306.

which caused an accident is probably attributable to a particular defendant.[86]

Even in cases where a plaintiff's injury was allegedly caused by a product other than food or a beverage, a few courts have recently ruled that *res ipsa* is available regardless of a defendant's lack of control of the instrumentality of harm at the time of the accident.[87] In *Ryan v. Zweck-Wollenberg Co.*,[88] for example, the Wisconsin Supreme Court permitted a plaintiff to invoke *res ipsa* where the evidence showed that he had received an electric shock as a result of a short circuit in a factory-sealed unit of a refrigerator, although the component had left the hands of the defendant manufacturer three years before the accident. The court emphasized that the defect had arisen in a sealed unit which had never been opened and suggested that *res ipsa* would not have been applicable had the defect been in a component with which the plaintiff could have tampered, because it would then have been reasonable to infer that the defect had resulted from the plaintiff's use of the refrigerator.[89] Subsequent decisions involving *res ipsa* indicate that a defect in a sealed portion or non-moving part of a mechanism is far more likely to give rise to an inference of negligence on the part of the manufacturer than is a defect in an exposed component subject to mishandling or in a moving part susceptible to wear.[90] Another important factor relevant in determining the applicability of *res*

86. Illustrative of the strict approach of some courts are: Brookshire v. Florida Bendix Co., 153 So. 2d 55 (Fla. Dist. Ct. App. 1963); Dr. Pepper Bottling Co. v. Harris, 145 S.E.2d 288 (Ga. Ct. App. 1965); Phipps v. Carmichael, 376 S.W.2d 499 (Tenn. Ct. App. 1963). See also Kimmey v. General Motors Corp., 262 S.W.2d 530 (Tex. Civ. App. 1953), in which the court held that the mere fact that the plaintiff had left his car unattended for a few minutes prevented his use of *res ipsa* to recover for injuries incurred when the car exploded as he was adding gas less than twenty-four hours after he had bought the vehicle. The beverage cases demonstrate a vastly exaggerated judicial concern that an intervening party might have removed a bottle cap, inserted some foreign substance such as a piece of wire or an insect into the container, and then re-capped the bottle. While this is a possibility, it is a remote one, and certainly not of sufficient strength to justify denying plaintiff the use of *res ipsa*.

Illustrative of recent and more realistic decisions are: Southern Ariz. York Refrigeration Co. v. Bush Mfg. Co., 331 F.2d 1 (9th Cir. 1964) (applying California law); Greening v. General Air-Conditioning Corp., 233 Cal. App. 2d 545, 43 Cal. Rptr. 662 (Dist. Ct. App. 1965); James v. Childs, 166 So. 2d 77 (La. Ct. App. 1964).

87. *But see* Haas v. Carrier Corp., 339 S.W.2d 727 (Tex. Civ. App. 1960), which appears to limit the relaxation of the control requirement to food and beverage cases.

88. 66 Wis. 630, 64 N.W.2d 226 (1954).

89. *Id.* at 639, 64 N.W.2d at 231.

90. Among the cases in which *res ipsa* was successfully invoked are Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963) (applying Vermont law); Plunkett v. United Elec. Serv., 214 La. 145, 36 So. 2d 705 (1948). For instances where courts have refused to permit a plaintiff to invoke *res ipsa*, see Vandercook & Son, Inc. v. Thorpe, 322 F.2d 638 (5th Cir. 1963) (applying Florida law); Bolander v. Northern Pac. R.R., 63 Wash. 2d 659, 388 P.2d 729 (1964); Wojciuk v. United States Rubber Co., 19 Wis. 2d 224, 120 N.W.2d 47 (1963).

ipsa when a particular defendant did not have possession of the instrumentality of harm at the moment of the accident is the length of time which had elapsed between the defendant's relinquishment of possession and the mishap. Obviously, the shorter this period has been, the more likely is the inference that his negligence caused the accident.[91] Of course, these notions of time lags, sealed units, and moving parts should not be permitted to crystallize into rigid formulae governing the application of *res ipsa* in every situation where a defendant lacked control of the instrumentality at the time of injury; they should be treated merely as factors which aid in determining the answer to the critical question whether the "balance of probabilities" points toward the negligence of a particular defendant, and not that of another person, as the cause of the harm.[92] These factors are also helpful in deciding whether it is likely that a particular accident was caused by negligence at all rather than by normal product fatigue.

Once it has been determined that *res ipsa* can be invoked against a particular defendant, there remains the question of what effect reliance on the doctrine will have upon the outcome of the litigation. The prevailing and better view is that *res ipsa* gives rise to an inference of negligence on the part of the defendant, an inference which the trier of fact may either accept or reject.[93] The other position, that *res ipsa* raises a rebuttable presumption of negligence, could lead to the conclusion that the jury is foreclosed from considering the issue of negligence if, in attempting to show that he used due care, the defendant introduces enough evidence to rebut the presumption of negligence.[94] His evidence would ordinarily show only

91. Cases in which a court relied on the brevity of the elapsed time to permit the use of *res ipsa:* Necaise v. Chrysler Corp., 335 F.2d 562 (5th Cir. 1964) (applying Mississippi law) (car driven 15 miles); Plunkett v. United Elec. Serv., 214 La. 145, 36 So. 2d 705 (1948) (two days); Peterson v. Minnesota Power & Light Co., 207 Minn. 387, 291 N.W. 705 (1940) (two weeks). Cases in which a court emphasized the length of the intervening period and ruled that *res ipsa* was inapplicable: Vandercook & Son, Inc. v. Thorpe, 322 F.2d 638 (5th Cir. 1963) (4½ months); Walker v. Vail *ex rel.* Liberty Mut. Ins. Co., 203 Md. 321, 101 A.2d 201 (1953) (25 days); Bolander v. Northern Pac. R.R., 63 Wash. 2d 659, 388 P.2d 729 (1964) (two years and 136,000 miles).

92. See Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960) (applying Texas law) (defective blasting equipment); Mahoney v. Hercules Powder Co., 221 Cal. App. 2d 353, 34 Cal. Rptr. 468 (Dist. Ct. App. 1963) (defective blasting equipment).

93. Reynolds Metals Co. v. Yturbide, 258 F.2d 321 (9th Cir.), *cert. denied*, 358 U.S. 840 (1958) (applying Oregon law); Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 687, 268 P.2d 1041, 1044 (1954); see 1 FRUMER & FRIEDMAN § 12.03(6). *But see* PROSSER § 96, at 672, noting a few cases in which a defendant obtained a directed verdict after introducing proof of due care. On the other hand, there are some cases that indicate that once *res ipsa* is permitted to be invoked, the burden of proof on the negligence issue shifts to the defendant; these cases, however, often appear to be referring only to the burden of going forward with the evidence, not the ultimate burden of persuasion. See, *e.g.*, Dr. Pepper Bottling Co. v. Whidden, 227 Ark. 13, 296 S.W.2d 432 (1956).

94. See Ryan v. Zweck-Wollenberg Co., 266 Wis. 630, 649, 64 N.W.2d 226, 236 (1954).

that he normally used due care in the conduct of his business and not that he was free of negligence with respect to the manufacture or sale of the specific product alleged to have caused the plaintiff's injury. Thus, evidence of due care should not automatically keep a case from the jury, but should merely present another factor for it to consider, together with the inference of negligence raised by *res ipsa*, in determining the ultimate question of the defendant's liability.[95]

At this juncture, some general observations concerning *res ipsa loquitur* warrant brief consideration. First, in some jurisdictions a plaintiff may not be precluded from relying on *res ipsa* simply because he cannot demonstrate that an accident was caused by the malfeasance of a particular member of a group of defendants (for example, a manufacturer and a retailer) where it seems clear that it was the result of the negligence of some member of the group. If *res ipsa* is held applicable in such a case, in order to escape liability each possible tortfeasor must establish that his conduct was not responsible for the mishap.[96] Second, the presence of the three conditions which must be shown to have existed if *res ipsa* is to be invoked need not be demonstrated with certainty. Indeed, a plaintiff is required to show only that the "balance of probabilities" suggests that his injury was caused by negligence, that the negligence is attributable to a particular defendant or group of defendants, and that the plaintiff did not "voluntarily contribute to the accident."[97] Third, it would appear that *res ipsa* is largely a device for the employment of circumstantial evidence to create an inference of negligence.[98] The close relationship between the doctrine of *res ipsa* and the use of circumstantial evidence is apparent from the fact that those few courts which claim never to apply *res ipsa* often use circumstantial evidence to arrive at results identical to those which they would have reached had they allowed plaintiffs to invoke *res ipsa*.[99] Finally, and most important, it seems that, despite the theoretical arguments about the procedural effect of *res ipsa*, the practical consequence of employing the doctrine is that negligence responsibility is pushed far in the direction of strict liability—liability not based on negligent conduct. This is primarily due to the power of juries, which are often sympathetic to plaintiffs, to decide that an

95. See 1 FRUMER & FRIEDMAN § 12.03(7), at 317-18.

96. See Otis Elevator Co. v. Seale, 334 F.2d 928 (5th Cir. 1964) (applying Louisiana law); Dement v. Olin-Mathieson Chem. Corp., 282 F.2d 76 (5th Cir. 1960) (applying Texas law); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944); Bond v. Otis Elevator Co., 388 S.W.2d 681 (Tex. 1965).

97. Greening v. General Air-Conditioning Corp., 233 Cal. App. 2d 545, 553, 43 Cal. Rptr. 662, 668 (Dist. Ct. App. 1965).

98. See 1 FRUMER & FRIEDMAN § 12.03(1), at 284.

99. See, *e.g.*, Shepherd v. United States Fidelity & Guarantee Co., 233 S.C. 536, 106 S.E.2d 381 (1958); Sam White Oldsmobile Co. v. Jones Apothecary, Inc., 377 S.W.2d 834 (Tex. Civ. App. 1960).

inference of negligence raised by *res ipsa* has not been dispelled, regardless of the nature and the amount of evidence introduced by a defendant to show that he exercised due care.[100] Therefore, as the doctrine of *res ipsa* becomes increasingly available, largely because of liberal interpretation of the "exclusive control" condition, in cases involving a wide variety of defective products, a seller's liability for injuries caused by his merchandise has slowly been expanded toward strict liability, but under the guise of negligence responsibility.

D. *Defenses*

The defenses of contributory negligence and assumption of risk are available in products liability negligence cases just as in other negligence actions. In products liability litigation, however, some of the most elementary fact situations normally associated with the concept of contributory fault are often discussed in terms of duty. Courts state that a defendant retailer or manufacturer had no duty to prevent the existence of, or warn about the presence of, an obvious defect in his product, rather than that a plaintiff was contributorily negligent in using the merchandise despite its having an obvious defect.[101] Similarly, it is often said that a defendant had no duty to anticipate that his product would be used in an unforeseeable manner or that his conduct, although negligent, was not the proximate cause of an injury attributable to an unforeseeable use of his product, rather than that a plaintiff was contributorily negligent in so using it.[102] Because of the courts' duty-oriented approach toward the issues of obviousness of defect and foreseeability of use, these questions are discussed elsewhere in the comment.[103]

When an issue which is essentially one of contributory fault is not framed in terms of duty, the possibility that a defendant might escape liability is reduced; although a question related to a defendant's duty is normally determined by the court, one of contributory fault is ordinarily resolved by jurors who are likely to be sympathetic to the plaintiff.[104] Illustrative of the general inefficacy of the contributory negligence defense are the contaminated-bottle cases, in which plaintiffs are rarely found to have been contributorily negligent in failing to discover the presence of foreign substances

100. See Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 463, 150 P.2d 436, 440 (1944) (concurring opinion of Traynor, J.).

101. *E.g.*, Murphy v. Corey Pump & Supply Co., 47 Ill. App. 2d 382, 197 N.E.2d 849 (1964).

102. *E.g.*, Hentschel v. Baby Bathinette Corp., 215 F.2d 102 (2d Cir. 1954), *cert. denied*, 349 U.S. 923 (1955) (applying New York law).

103. As to obvious dangers, see notes 49-54 *supra* and accompanying text; as to foreseeability of use, see notes 197-200 *infra* and accompanying text.

104. See PROSSER § 36, at 207.

in bottles.[105] Closely associated with this defense is that of assumption of risk. The recent trend in all negligence cases, and particularly in products liability actions, has been to limit the availability of the latter principle to those situations in which a plaintiff had in fact realized the nature of the hazard created by a defendant's negligence and could therefore be said to have impliedly consented to assume the risk.[106] However, this restriction is usually of little more than academic significance, for even if it cannot be established that a plaintiff actually realized the nature of the risk involved before he used a product, he can still be barred from recovery by a finding that he was contributorily negligent in failing to discover the danger and guard against it.[107]

III. Strict Tort Liability

A person is said to be strictly liable if he is legally responsible for the consequences of his conduct whether or not it was negligent. In the context of consumer protection, a seller is strictly liable if he must respond in damages to one who sustained an injury due to a defect[108] in the seller's product although the presence of the defect cannot be attributed to the seller's negligence. The burden of strict liability is not new to the seller of defective merchandise; he has long been responsible for breaching an express or implied warranty irrespective of a showing of negligence.[109] Moreover, a manufacturer's negligence responsibility and, to a lesser extent, that of a retailer have come to resemble strict liability because of the increased availability of the doctrine of *res ipsa loquitur*.[110] More recently, however, beginning with the California Supreme Court's decision in *Greenman v. Yuba Power Prods., Inc.*,[111] and continuing with the adoption of section 402A of the *Second Restatement of*

105. See, *e.g.*, Hope Coca-Cola Bottling Co. v. Jones, 222 Ark. 52, 257 S.W.2d 272 (1953); Boyd v. Coca-Cola Bottling Works, 132 Tenn. 23, 177 S.W. 80 (1915). However, numerous plaintiffs have been denied relief on the ground that their use of a product, although foreseeable, constituted contributory negligence. See, *e.g.*, Odekirk v. Sears Roebuck & Co., 274 F.2d 441 (7th Cir. 1960); Loser v. E. R. Bacon Co., 201 Cal. App. 2d 387, 20 Cal. Rptr. 221 (Dist. Ct. App. 1962).

106. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 Yale L.J. 816, 873 (1962), citing Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950). See also Bullock v. Benjamin Moore & Co., 392 S.W.2d 10 (Mo. Ct. App. 1965). For a further discussion of contributory negligence, assumption of risk, and disclaimers, see notes 187-96 *infra* and accompanying text.

107. Tralli v. Triple X Stores, 19 Conn. Supp. 293, 112 A.2d 507 (Super. Ct. 1954); Barbe v. Barbe, 378 P.2d 314 (Okla. 1963).

108. For a discussion of what constitutes a defect, see notes 127-44 *infra* and accompanying text.

109. See Comment, *The Contractual Aspect of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 Mich. L. Rev. 1430 (1966).

110. See notes 77-100 *supra* and accompanying text.

111. 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962).

Torts,[112] there has been developing a concept of true strict liability in tort, a theory which is as unrelated to the principle of warranty responsibility as it is to the doctrine of *res ipsa*. Strict tort recovery is unhampered by the trappings of warranty law, such as the rules relating to privity of contract and notice of breach.[113] Similarly, reliance upon the strict tort theory serves to avoid many of the evidentiary problems associated with an attempt to invoke *res ipsa*.[114]

The numerous arguments in support of and in opposition to this new concept of strict tort liability have been set forth at great length in the legal literature.[115] It suffices here merely to outline those which have been well received by the courts. Foremost among them are the propositions enunciated by Justice Traynor in his concurring opinion in *Escola v. Coca-Cola Bottling Co.*,[116] where he urged that the cost of an injury attributable to a defective product ought to be borne by the manufacturer for two reasons. First, the producer created the risk of harm by placing the merchandise on the market.[117] Second, he can distribute the cost more efficiently than can a consumer, for a producer can carry insurance to cover any losses resulting from his strict liability and offset his expenses by raising the price of his goods.[118] These rationales are similar to

112. 2 RESTATEMENT 2D § 402A provides:

(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.

113. See Comment *supra* note 109, at 1442-52.

114. See notes 77-100 *supra* and accompanying text.

115. For discussions by writers favoring strict liability, see Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); Dickerson, *The Basis of Strict Products Liability*, 17 BUS. LAW. 157 (1961); Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119 (1958); James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957); Keeton, *Products Liability —The Nature and Extent of Strict Liability*, 1964 U. ILL. L.F. 693; Lascher, *Strict Liability in Tort for Defective Products*, 38 SO. CAL. L. REV. 30 (1965); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

For arguments in opposition to the strict liability concept, see Condon, *Restatement or Reformation?*, 17 BUS. LAW. 167 (1961); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957); Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965).

116. 24 Cal. 2d 453, 150 P.2d 436 (1944).

117. *Id.* at 462, 150 P.2d at 440.

118. *Ibid.* See also Putnam v. Erie City Mfg. Co., 338 F.2d 911, 914 (5th Cir. 1964) (applying Texas law); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

those supporting the more traditional form of strict tort liability imposed upon persons who conduct injurious ultrahazardous activities, since this type of responsibility is also frequently justified on the grounds that the parties strictly liable have sought to gain the profits associated with their endeavors and are in a better position than their victims to distribute the costs related to injuries stemming from their activities.[119]

Another reason advanced in favor of the new strict tort doctrine is that a manufacturer has the greatest ability to control the danger created by a defective product.[120] Other courts have emphasized that a consumer relies upon a manufacturer's representation, implicit in his act of placing merchandise on the market, that his goods are reasonably safe for their intended uses.[121] In addition, the strict tort approach makes unnecessary the series of warranty actions which frequently arise when an injured consumer cannot bring a suit for breach of warranty against a manufacturer of a defective product because the plaintiff is not in privity of contract with the producer. The plaintiff often recovers on a warranty theory from the retailer, who then brings suit on the same theory against the manufacturer or the distributor, with whom the retailer is in privity.[122] The same ultimate result may be reached under the strict tort doctrine in a single suit, for since privity between a plaintiff and a defendant is not a prerequisite to recovery on this theory, an injured consumer can bring his action directly against the most affluent member of the distributive chain.[123]

Most of the reasons which justify the imposition of strict tort liability upon manufacturers also support the similar treatment of retailers and distributors, since they participate in the creation of any risk attributable to a defective product by helping to bring the merchandise to the consumer. Certainly a buyer relies upon a retailer as well as a manufacturer to supply only safe merchandise. However, the strict tort theory is unlikely to cause a significant expansion of retailers' liability, unless it be in regard to their responsibility to injured bystanders, because a retailer is normally in privity with an injured consumer and is thus strictly liable to him for a

119. See Fletcher v. Rylands, 3 H. & C. 774, 159 Eng. Rep. 737 (Ex. 1865), *aff'd*, L.R. 3 H.L. 330 (1868); PROSSER § 77, at 509. See generally EHRENZWEIG, NEGLIGENCE WITHOUT FAULT 47-62 (1951).

120. Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (concurring opinion); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 379, 161 A.2d 69, 80 (1960). *But see* Gillam, *supra* note 115, at 158, suggesting that increased liability is unlikely significantly to influence business policy toward achieving high quality and toward the adjustment of losses stemming from failures to meet such standards.

121. Putnam v. Erie City Mfg. Co., 338 F.2d 911, 914 (5th Cir. 1964) (applying Texas law); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 64, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1962).

122. Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 62, 207 A.2d 305, 310 (1965).

123. See note 173 *infra* and accompanying text.

breach of warranty.[124] Whatever the reasons, it is apparent that the theory of strict tort liability of sellers of defective products is rapidly becoming the law in a significant number of jurisdictions.[125]

A. *The Requirement of a Defect*

In a suit based upon the theory of a seller's strict liability in tort, the concept of negligence no longer provides a means by which a defendant's liability can be limited. In order to ensure that the extent of a seller's responsibility remains reasonably proportionate to the risk which he creates by placing a defective product on the market, it was necessary to develop another method for limiting his liability. Therefore, the principle was established that, in order for a plaintiff in a products liability suit to obtain relief on the strict tort theory, a defendant's merchandise must have been in a defective condition when it left the latter's hands.[126] Furthermore, a product is considered defective only if it is unreasonably dangerous to either the user or his property when used in a normal manner.[127] Thus, in order to establish that a particular product can be the basis of a strict tort recovery, a plaintiff must: (1) show a specific injurious condition associated with the merchandise, such as faulty brakes on an automobile; (2) demonstrate that this condition made the product unreasonably dangerous to persons or property; and (3) show that the condition existed when the product was under the defendant's control.[128]

When the particular injurious condition alleged is one of design, as distinguished from a specific condition arising in the construction or assembly of a product, proving that this condition existed when the product left the manufacturer's hands is relatively simple; since the merchandise is likely to have been made just as the maker intended, the plaintiff can usually rely on the manufacturer's design specifications.[129] In such a situation, the only difficult question is whether that condition made the article unreasonably dangerous. But if the alleged specific injurious condition arose in the construc-

124. See UNIFORM COMMERCIAL CODE § 2-318; see also notes 173-80 *infra* and accompanying text, where it is suggested that the foreseeable bystander should be protected by the strict tort theory.

125. See cases cited note 2 *supra* and Wade, *supra* note 115, at 11-13.

126. See 2 RESTATEMENT 2D § 402A; Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855, 858 (1963).

127. 2 RESTATEMENT 2D § 402A, comments *h* and *i* at 351-52.

128. See Jakubowski v. Minnesota Mining & Mfg. Corp., 42 N.J. 177, 199 A.2d 826 (1964), in which the plaintiff, injured by an allegedly defective abrasive disk, was denied recovery because he had not successfully excluded the possibility that the defect had arisen during the use of the disk. See generally 2 RESTATEMENT 2D § 402A and comment *g*, at 351.

129. For a discussion of various types of design defects, see Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 820-29 (1962).

tion, assembly, or distribution of a product, it is more difficult for the plaintiff to prove the nature of the condition, since he cannot rely solely on the design specifications. He normally must introduce evidence to show that the particular condition actually existed in the very piece of merchandise which he alleges to have been defective, such as evidence tending to show that the screws in the power saw that he bought were loose at the time of purchase.[130] However, there has been at least one case, *Vandermark v. Ford Motor Co.*,[131] in which a court held that the existence of the particular condition alleged by the plaintiff as the cause of an automobile accident could be inferred from the circumstances surrounding the accident. In *Vandermark*, more conclusive evidence was impossible to obtain because the front end of the automobile was demolished in the accident.

The problems associated with an attempt to establish that a product was defective when it left the hands of a particular defendant are closely analogous to those previously discussed which arise when a plaintiff, in an effort to invoke *res ipsa loquitur*, tries to show that a defendant had control of an instrumentality of harm at a particular time. Therefore, some of the rules governing the application of *res ipsa* would appear to be relevant in a strict tort case with respect to proving when a particular condition arose.[132] Factors such as the time lapse between a defendant's relinquishment of control of the offending merchandise and a plaintiff's injury, the nature of the alleged condition, and the nature of the product should all be considered in answering the crucial question whether the particular condition existed when the article left the defendant's hands.[133]

Once it has been established that a specific injurious condition existed when a product left a particular defendant's hands, a plaintiff must still prove that the presence of the condition made the article unreasonably dangerous to the typical user or to his property. It is of course impossible to suggest rigid criteria for determining whether a particular product was rendered unreasonably dangerous. The facts of each case must be considered carefully, bearing in mind

130. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); see, *e.g.*, Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964); Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

131. 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

132. See the discussion of control in *res ipsa loquitur* cases, notes 84-92 *supra* and accompanying text.

133. See Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964), in which it was held that a jury could infer from circumstantial evidence both that a defect existed and that it had existed when the offending product was sold to the plaintiff. Obviously thinking of the implications of *Vandermark*, one author has predicted the slow erosion of the requirement that a plaintiff must prove the existence of a defect in order to recover on the strict tort theory. Cowan, *supra* note 115, at 1094.

a variety of factors including the utility of the product in question despite its defect, the magnitude of the risk created by the defect, the possibility that the plaintiff could have avoided injury by using the product in a more reasonable manner, and the availability of a safer substitute for the product.[134] Obviously, these factors are highly similar to those which are significant in determining whether particular conduct was negligent. Indeed, the crucial distinction between negligence liability and strict tort responsibility is that, under the strict tort theory, a seller whose product was in a defective condition because it created an unreasonable risk of harm is, *for that reason alone,* liable for injuries caused by the defect.[135] On the other hand, a seller must respond in damages on a negligence theory only if it is shown that the unreasonable risk created by his product is attributable to some failure on his part to exercise due care.[136]

In the vast majority of products liability suits resulting in plaintiffs' verdicts, it has been relatively easy to determine that a product was unreasonably dangerous.[137] Difficulties in applying the "unreasonably dangerous" standard arise most frequently when the product in question is unavoidably unsafe (for example, a drug which causes injurious side effects but which also provides the only means of curing a serious disease). Such an unavoidably unsafe item ought to be held not unreasonably dangerous only if the risks which it creates are outweighed by the beneficial results anticipated from its use and if no safer alternative means to accomplish these ends are available.[138] In measuring the hazards created by merchandise, especially drugs and cosmetics, courts have had to deal with the problem of the varying sensitivities of individuals. It appears well settled that a product will not be considered to have been unreasonably dangerous merely because a consumer had an abnormal, albeit serious, reaction to its ingredients.[139] Even an article containing an ingredient to which a substantial number of people are allergic is not necessarily defective, for adequate warnings and instructions concerning the use of the item may serve to remove it from the "unreasonably dangerous" category.[140]

134. These and other factors are suggested in Wade, *supra* note 115, at 17.

135. See 2 RESTATEMENT 2D § 402A.

136. See James, *Products Liability,* 34 TEXAS L. REV. 44, 72-74 (1955).

137. *E.g.,* Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964) (wheel chair with broken fork stem); Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962) (power saw with loose screws).

138. 2 RESTATEMENT 2D § 402A, comment *k* at 353-54; see Traynor, *The Ways and Meanings of Defective Products and Strict Liability,* 32 TENN. L. REV. 363, 368 (1965). On the special problems associated with drug cases generally, see the excellent and exhaustive discussion in Rheingold, *Products Liability—The Ethical Drug Manufacturer's Liability,* 18 RUTGERS L. REV. 947 (1964).

139. Kaempfe v. Lehn & Fink Prod. Corp., 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964); see Noel, *Products Liability of Retailers and Manufacturers in Tennessee,* 32 TENN. L. REV. 207, 258-61 (1965), and authorities cited therein.

140. 2 RESTATEMENT 2D § 402A, comment *j* at 353.

Furthermore, an article is unlikely to be found "unreasonably dangerous" unless it creates a risk beyond that which would have been contemplated by a typical purchaser possessing the knowledge of the product's characteristics which was common to the community.[141] Cigarettes are therefore probably not defective although they may cause cancer, for it is now well known that cigarette smoking can lead to cancer.[142] Yet this hazard was not common knowledge a few years ago, as the cigarette manufacturers themselves admitted when they argued at that time that they should be relieved of warranty liability for harm attributable to cancer caused by cigarette-smoking on the ground that even they were unaware that their product was a carcinogen.[143] If, as in some of the cigarette cases currently before the courts, a plaintiff used an article and incurred his injury when it was not commonly known that a particular risk was associated with the product, it is consistent with the rationale of strict tort liability that the manufacturer be held responsible for injuries related to that unknown hazard, if it made the merchandise unreasonably dangerous, since he created the danger by placing his product on the market and since the victim was unable to guard against a risk of which he was unaware.[144]

B. *Causation*

A seller is strictly liable in tort only if a defect in his product actually caused the injury in question.[145] The concept of causation involves two issues—cause in fact and proximate cause—which are essentially the same as the similarly denominated issues arising in the context of negligence litigation. Therefore, they should be resolved by reference to many of the same considerations taken into account in deciding the equivalent questions in negligence cases.[146] The courts apparently already give great weight to these factors in determining the issues of cause in fact and proximate cause in actions brought on the traditional theory of strict tort liability for harm attributable to unduly dangerous activities, for an actor's responsi-

141. *Id.*, comment *i* at 352. *But see* Traynor, *supra* note 138, at 371: "Were a consumer deemed to assume all commonly known risks, we would come full circle round to the problem generated by the disclaimer of warranty . . . ." It is to be noted that Chief Justice Traynor chooses to deal with the problem of the generally known risk in terms of assumption of risk, while the *Second Restatement* handles the same question in its definition of a defective product.

142. 2 RESTATEMENT 2D § 402A, comment *i* at 352.

143. See Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963); Green v. American Tobacco Co., 154 So. 2d 169 (Fla. 1963). For a general discussion of the cigarette cases, see Jaeger, *Manufacturer's Liability: Recent Developments*, 48 MARQ. L. REV. 293 (1964-65).

144. See Green v. American Tobacco Co., *supra* note 143.

145. See 2 RESTATEMENT 2D § 402A.

146. *Compare* Gerber v. McCall, 175 Kan. 433, 264 P.2d 490 (1953) (negligence), *with* Golden v. Amory, 329 Mass. 484, 109 N.E.2d 131 (1952) (strict tort theory).

bility in such cases exists only for the benefit of persons who were foreseeably threatened as well as actually injured by his conduct, and then only in relation to the kinds of damage which could reasonably have been expected to result from his activities.[147]

In order to satisfy his burden of proof on the issue of cause in fact, a plaintiff must of course establish, through the use of expert testimony or circumstantial evidence, that the alleged defect in a defendant's product was actually responsible for his injury.[148] With regard to the more complex issue of proximate cause, rulings in both negligence and traditional strict liability cases suggest that in practice it would probably require an extremely bizarre factual situation to induce a court to deny recovery on the ground that the injury in question was not reasonably foreseeable, if a plaintiff had already established the existence of a defect as well as causation in fact.[149] Cases such as *Hatch v. Ford Motor Co.*,[150] in which the foreseeable risk arising from the protrusion of a hood ornament from the front of a car was held to have been only the danger that someone might be hurt while the automobile was in motion and not the hazard that a pedestrian might be injured in falling against the car while it was parked, are unusual and probably incorrectly decided.[151]

A dispute over the proximate cause issue in a given case is less likely to arise from a defendant's claim that the type of injury involved was unforeseeable than from his contention that, although his product was defective and the plaintiff's injury is attributable

147. See Madsen v. East Jordan Irrigation Co., 101 Utah 552, 125 P.2d 794 (1942); PROSSER § 77, at 535; Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001, 1009 (1932). *But see* PROSSER § 77, at 533, where it is suggested that, in a case brought on a strict liability theory, the proximate-cause standards should be more restrictive than in a negligence action, since a defendant in an action of the former type need not have been negligent and thus, in the author's view, may have violated no social standard.

148. In Butler v. Schacht Contracting Co., 20 App. Div. 2d 520, 244 N.Y.S.2d 511 (1963), causation was held not to have been established by proof that a heating unit was defective in the high-fire position, when it had been on low-fire before and during the accident. See also Ellis v. H. S. Finke, Inc., 278 F.2d 54 (6th Cir. 1960) (applying Tennessee law); Bloomquist v. William H. Ziegler Co., 270 Minn. 229, 133 N.W.2d 484 (1965). In Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964), the evidence that plaintiff's car suddenly and unexpectedly swerved and crashed into a wall, together with expert opinion testimony that the accident probably resulted from a defective brake cylinder, was sufficient to allow the jury to infer causation, despite the fact that damage to the car prevented the introduction of any more conclusive evidence that the cylinder was defective. See also Lindroth v. Walgreen Co., 407 Ill. 121, 94 N.E.2d 847 (1950), in which a melted vaporizer and the burned condition of the chair on which it rested was sufficient to prove that the vaporizer was the cause of a fire.

149. See, *e.g.*, Lynch v. Fisher, 34 So. 2d 513 (La. Ct. App. 1948); Ryan v. New York Central R.R., 35 N.Y. 210 (1866); Madsen v. East Jordan Irrigation Co., 101 Utah 552, 125 P.2d 794 (1942).

150. 163 Cal. App. 2d 393, 329 P.2d 605 (Dist. Ct. App. 1958).

151. See Noel, *supra* note 129, at 856-59.

to the defect, he has been relieved of responsibility for the accident by the intervention of a factor over which he had no control, such as an act of nature or the conduct of a third person. Apparently no court has yet considered the question of intervening cause in the context of the doctrine of strict tort liability for defective products. However, the rule applicable in actions brought on theories of either negligence of a third party should not serve to exonerate a seller, ities appears to be that a defendant is relieved of liability only by the intervention of those acts of nature or of third parties which he could not reasonably have foreseen.[152] There is no reason why the same principle should not be applied in a products liability case based on the new strict tort doctrine. Thus, the mere intervening negligence of a third party should not serve to exonerate a seller, since courts in both negligence and traditional strict tort liability cases have generally taken the position that intervening negligence is foreseeable and therefore must be taken into account by an actor in anticipating the risks likely to result from his conduct.[153] On the other hand, a number of decisions indicate that a seller is relieved of possible liability for injuries caused by a flaw in his product if a buyer having actual knowledge of the presence of the imperfection gives the merchandise to a third person without warning the transferee about the imperfection and without attempting to remedy it.[154] The courts apparently believe that the act of intentionally passing on an article known to be defective is so grossly negligent that it is unforeseeable. While such gross negligence on the part of a buyer should probably relieve a seller of even strict tort liability, it would seem that convincing proof that the buyer knew of the presence of a defect should be required in order to ensure that the seller is not relieved of liability when the buyer was merely foreseeably negligent in failing to discover the defect.

C. *Persons Liable*

According to a literal interpretation of the *Second Restatement*, only a "seller" can be strictly liable in tort for injuries attributable to defective products, and the word "seller" is said to include, besides a restaurateur, only a manufacturer, wholesaler, retailer, or

152. See Cohen v. Brockton Sav. Bank, 320 Mass. 690, 71 N.E.2d 109 (1947); Bratton v. Rudnick, 283 Mass. 556, 186 N.E. 669 (1933); PROSSER § 77, at 537. *But see* 2 RESTATEMENT, TORTS § 522 (1934), indicating that a defendant remains liable despite proof of unexpected intervening causes, such as acts of nature or of animals, or the innocent, negligent, or reckless conduct of a third person.

153. Negligence: Guffie v. Erie Strayer Co., 350 F.2d 378 (3d Cir. 1965); Hills v. McGillorey, 402 P.2d 722 (Ore. 1965). Strict liability: Kliebenstein v. Iowa Ry. & Light Co., 193 Iowa 892, 188 N.W. 129 (1922).

154. McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 181 N.E.2d 430, 226 N.Y.S.2d 430 (1962); Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840 (1946).

other middleman.[155] This comparatively narrow definition suggests that the authors of the *Restatement* felt that other persons engaged in the distribution of products to the public, especially lessors of goods, were not liable on the new strict tort theory for injuries caused by their defective products. However, the recent trend has been to hold lessors liable for breaches of implied warranties, despite the traditional view that warranties arose only in connection with actual sales of merchandise.[156] Indeed, there may even be better grounds for finding a lessor strictly liable on either a tort or a warranty theory than for imposing such liability upon a retailer, for a lessee is less likely to inspect the goods he uses or to guard against the presence of possible defects in them than is a purchaser.[157] Consequently, every court which has considered the issue seems to have applied the strict tort theory to lessors on the ground that the *Restatement*'s definition of the term "seller" is illustrative rather than all-inclusive.[158] However, one who furnishes services is generally considered not to be strictly liable in tort for the reason that he is not a "supplier" within the meaning of the rule that such liability is imposed only upon the "suppliers" of defective products.[159] However, persons who use defective goods in the course of performing services, such as a beautician who uses a defective hair rinse, should be strictly liable for injuries caused by goods which they employ, since they in effect sell these goods as well as their services.[160]

Another significant question with which courts have had to deal is whether strict tort liability should be imposed upon a manufacturer of a defective component which was incorporated, in a condition substantially unchanged from that in which it had left the manufacturer's hands, into a final product made by another. The authors of the *Restatement* expressed no formal opinion on this issue, apparently because of an absence of pertinent authority.[161] However, they did indicate that they saw no reason why the manufacturer of

155. 2 RESTATEMENT 2D § 402A, comment *f* at 350.

156. See Annot., 68 A.L.R.2d 850, 854-59 (1959), and cases collected therein.

157. See text accompanying note 64 *supra*.

158. See Delaney v. Towmotor Corp., 339 F.2d 4, 6 (2d Cir. 1964). See also Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

159. 2 RESTATEMENT 2D § 402A. Similarly, in the context of products liability, an implied warranty generally arises only from a sale of goods and not from a performance of a service. Epstein v. Giannattasio, 25 Conn. Supp. 109, 197 A.2d 342 (C.P. 1963).

160. See 2 RESTATEMENT 2D § 402A, comment *f* at 350-51. See also Rapson, *Products Liability Under Parallel Doctrines*, 19 RUTGERS L. REV. 692, 697 (1965), where it is argued that the rationale underlying the strict tort theory supports the extension of the doctrine to provide compensation to a consumer for injuries received as a result of services rendered in an unreasonably dangerous manner, whether or not a product is supplied in connection with the service.

161. 2 RESTATEMENT 2D § 402A, caveat (3) at 348.

a defective component which caused an accident should not be strictly liable to the victim, for it was the manufacturer's product which created the risk of injury and brought about the harm.[162] This reasoning was recently adopted by the Illinois Supreme Court, which applied the strict tort theory in a suit against the manufacturer of a defective brake system incorporated without substantial change into a truck made by another.[163] Nevertheless, the majority of the courts considering the issue have refused to hold a component producer strictly liable in similar circumstances, largely because the consumer has been considered adequately protected by the final product manufacturer's strict liability for injuries caused by any defect in his assembled merchandise, even a defect in a component made by another.[164]

While the courts have been relatively unwilling to burden a component producer with strict liability, it appears that a manufacturer of a final product is not necessarily relieved of strict liability for injuries caused by defects in his merchandise merely because it has undergone some minor processing after leaving his control. Thus, an automobile maker was held strictly liable for injuries caused by defective brakes although it was not certain that the defect arose in the course of manufacture rather than while the car was being serviced by a dealer just prior to sale.[165] A manufacturer probably remains strictly liable unless the change undergone by his product after leaving his control is very substantial, in which case the subsequent processor would be made to assume the burden of strict liability for any defect in the merchandise as processed, even one which arose at the manufacturing stage.[166]

A final consideration involves the strict tort liability of a retailer or a distributor who had no connection with the actual manufacture and assembly of a defective product. Clearly, under the *Restatement* formulation such a seller is strictly liable for an injury caused by any defect existing when he sold the merchandise.[167] However, at least one court has refused to hold a wholesaler strictly liable in such a situation, on the ground that he was merely an innocent link in

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162. *Id.*, comment *q* at 358.

163. Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

164. Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447 (S.D.N.Y. 1964); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

165. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964); *cf.* Alvarez v. Felker Mfg. Co., 230 Cal. App. 2d 987, 41 Cal. Rptr. 514 (Dist. Ct. App. 1964). The authors of the *Restatement* took no official position on the question whether a manufacturer is strictly liable for any defect if his product was intended to undergo some change before it reached the consumer. 2 RESTATEMENT 2D § 402A, caveat (2) at 348.

166. See 2 RESTATEMENT 2D § 402A, comment *p* at 357.

167. *Id.*, comment *f* at 350.

the chain between the manufacturer and the injured consumer.[168] Although the burden of strict liability is considerably greater than that imposed on a retailer or a wholesaler under traditional negligence principles, the view under which a retailer and a distributor are held strictly liable for injuries caused by a defective product which they distributed is consistent with the rationale behind the new theory of strict tort liability, for they are both part of the distributive enterprise which has created a risk of injury by placing defective merchandise on the market.[169] Consequently, many courts have applied the strict tort doctrine to retailers and distributors.[170] One of the greatest practical reasons for imposing strict tort liability upon a retailer and a distributor as well as a manufacturer is that it may be difficult for a plaintiff to obtain service of process on a manufacturer who is either unknown or, if no long-arm statute is available, beyond the reach of the courts in the state in which the plaintiff resides or the injury occurred.[171] Of course, any member of the distributive chain found liable to a consumer should have rights of contribution or indemnity against other members of the chain if it is determined that another seller was either partially or primarily responsible for the injury-causing defect.[172]

D. *The Bystander*

The law is clear that a plaintiff is not barred from recovery on a strict tort theory merely because he was not in privity of contract with a defendant seller. Strict tort protection extends to any user or consumer of a defective article.[173] Thus, recovery has been allowed against a manufacturer of a defective product even though the plaintiff had purchased the merchandise from another seller.[174] Indeed, a successful plaintiff need not be a purchaser of the offending product, since members of the family of an ultimate purchaser, as well as his employees, have all recovered under the strict tort theory.[175] On the

168. Price v. Gatlin, 405 P.2d 502 (Ore. 1965).

169. See 2 RESTATEMENT 2D § 402A, comment *c* at 349-50. Under negligence principles, retailers often do not even have a duty to inspect merchandise for defects. See notes 59-64 *supra* and accompanying text.

170. In Canifax v. Hercules Powder Co., 46 Cal. Rptr. 552 (Dist. Ct. App. 1965), a jobber through whom the order had been placed but who had never had possession of the defective goods, which had been shipped directly from the manufacturer to the consumer, was held strictly liable.

171. See Price v. Gatlin, 405 P.2d 502, 509 (Ore. 1965) (dissenting opinion). As to jurisdictional problems generally, see Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028 (1965).

172. For a discussion of questions of contribution and indemnity, which will become more important as strict tort liability is increasingly placed upon all members of the distributive chain, see 2 FRUMER & FRIEDMAN § 44.

173. See 2 RESTATEMENT 2D § 402A, comment *l* at 354.

174. Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964).

175. Members of the family: Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); Wights v. Staff Jennings, Inc., 405 P.2d 624 (Ore.

other hand, the cases demonstrate an unwillingness to extend strict tort coverage to every class of person who has traditionally been allowed relief on a negligence theory.[176] For example, courts have denied strict tort protection to an injured bystander—a person who had been in no special relationship with a particular user but who had been hurt by a defective product under the user's control.[177] However, the rationale underlying strict tort liability suggests that a bystander ought to be protected if it was possible for a seller to foresee that he could be injured, since the danger to him was then just as much a part of the risk created by the distribution of a defective product as was the hazard to an actual consumer.[178] Courts have been primarily concerned with what they have seen as the potential for excessive liability inherent in extending strict liability protection to a bystander.[179] Yet by not holding a seller of a defective product strictly liable in tort to an injured bystander, they have failed to give full effect to one of the most significant features of the strict tort theory. Moreover, these courts would not permit the realization of the full potential of the strict tort concept vis-à-vis the warranty theory. Despite several recent decisions to the contrary, it is at present relatively clear that the privity doctrine prevents the extension of warranty protection to the typical bystander.[180]

E. *Economic Loss*

In approving the application of the strict tort theory against a seller only where his product was "unreasonably dangerous to per-

1965). Employees: Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964); Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Canifax v. Hercules Powder Co., 46 Cal. Rptr. 552 (Dist. Ct. App. 1965); Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965).

176. The bystander clearly has a negligence remedy. See note 42 *supra* and accompanying text.

177. Mull v. Colt & Co., 31 F.R.D. 154 (S.D.N.Y. 1962); Berzon v. Don Allen Motors, Inc., 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (1965); Wights v. Staff Jennings, Inc., 405 P.2d 624, 628-29 (Ore. 1965) (dictum).

178. Most writers appear to agree that strict tort protection should be extended to foreseeable bystanders. See, *e.g.*, James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 925 (1957); Lascher, *Strict Liability in Tort for Defective Products*, 38 SO. CAL. L. REV. 30, 55 (1965); Comment, 64 COLUM. L. REV. 916 (1964).

179. See, *e.g.*, Wights v. Staff Jennings, Inc., 405 P.2d 624, 628-29 (Ore. 1965), where the court stated that if strict liability for injuries caused by the conduct of an enterprise were to be extended to protect a bystander, there would be good reason for limiting recoveries through a statutory plan of compensation.

180. Kuschy v. Norris, 25 Conn. Supp. 383, 206 A.2d 275 (Super. Ct. 1964); Rodriguez v. Shell's City, Inc., 141 So. 2d 590 (Fla. Dist. Ct. App. 1963). *But see* Connolly v. Hagi, 24 Conn. Supp. 198, 188 A.2d 884 (Super. Ct. 1963), where a gas station attendant injured by a customer's car because of a defect in its transmission was allowed to recover for breach of warranty against the manufacturer; *cf.* Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965).

sons or to property," the authors of the *Second Restatement* apparently believed that a seller was not under any circumstances strictly liable in tort for a purely economic loss—a loss other than that occasioned by personal injury or damage to property other than the defective product itself—attributable to the inferior quality of his merchandise or to his product's unsuitability for a particular purpose.[181] However, the New Jersey Supreme Court recently held that the manufacturer of office carpeting was strictly liable in tort to a purchaser for an amount equal to the difference between the price paid for a carpet and its value in the inferior condition in which it was delivered.[182] On the other hand, the California Supreme Court, in lengthy dicta in a opinion by Chief Justice Traynor, said that a truck manufacturer would not be strictly liable in tort for economic loss (in this instance the full purchase price and lost profits) attributable to the substandard condition of one of his vehicles.[183]

The position taken by the California court and implicit in the language of the *Restatement* is consonant with the general rule in negligence actions, for most courts refuse to allow negligence recovery for any economic loss, in particular one unconnected with either personal injury or damage to property other than the allegedly substandard product itself.[184]

The justification for the denial of tort relief for purely economic losses appears to lie in the difference in judicial attitudes toward personal injury and property damage on the one hand and economic loss on the other. Because the former kinds of harm place a particularly heavy out-of-pocket financial burden upon a plaintiff, the risk of loss from personal injury and property damage accidents should be shifted by means of the strict tort theory to the enterprise which creates the risk.[185] On the other hand, allocation of the generally less

181. See 2 RESTATEMENT 2D § 402A, comment *g* at 351.

182. Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965). The court relied primarily on Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962), an implied warranty case. Recovery for economic loss is clearly allowable in actions for breach of an implied warranty. See, *e.g.*, Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965).

183. Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (Sup. Ct. 1965); *accord*, Price v. Gatlin, 405 P.2d 502 (Ore. 1965).

184. Karl's Shoe Store, Ltd. v. United Shoe Mach. Corp., 145 F. Supp. 376 (D. Mass. 1956); Donovan Constr. Co. v. General Elec. Co., 133 F. Supp. 870 (D. Minn. 1955); Trans World Airlines, Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S.2d 284 (Sup. Ct. 1955); Poldon Eng'r & Mfg. Co. v. Zell Elec. Mfg. Co., 1 Misc. 2d 1016, 155 N.Y.S.2d 115 (City Ct. 1955). See also PROSSER § 96, at 663. *But see* Lang v. General Motors Corp., 136 N.W.2d 805 (N.D. 1965), holding that a remote buyer may recover on either a warranty or a tort theory for economic loss.

185. See Price v. Gatlin, 405 P.2d 502, 503-04 (Ore. 1965) (concurring opinion); see generally Comment, 114 U. PA. L. REV. 539 (1966). Particular judicial concern for compensating a victim who suffered personal injury or property damage is evident in other areas of tort law. *Compare* 2 RESTATEMENT 2D § 310 (conscious misrepresentation threatening physical harm), *with id.* § 531 (Tent. Draft No. 10, 1964) (misrepresentation leading to pecuniary loss).

burdensome risk of purely economic loss should be the subject of warranty law, since a seller should not be liable for loss-of-bargain damages unless his product fails to perform as he promised, at least implicitly, that it would. In addition, statutes such as the Uniform Commercial Code were intended to deal expressly with the problem of commercial loss.[186]

F. *Defenses*

A number of the defenses available to a seller in a warranty action are clearly irrelevant when a suit is based upon a strict tort theory. Since strict tort liability does not depend upon a seller's express or implied representation concerning the quality of his goods, the fact that a plaintiff did not rely on such a representation where one was made is no defense to a strict tort recovery.[187] Privity of contract between plaintiff and defendant is not a prerequisite to recovery on a strict tort theory.[188] A plaintiff seeking a strict tort recovery need not have given a defendant notice of the existence of a defect or of the fact that injuries were caused by it, whereas notice of breach of warranty is required by the Uniform Sales Act and, in some circumstances, by the Uniform Commercial Code.[189] Furthermore, it seems certain that a seller cannot, by inserting an exculpatory clause in a sales contract, protect himself from strict tort liability in the manner in which he can guard, at least to some extent, against negligence and warranty liability.[190] This result is particularly appropriate because most disclaimers encountered in products liability cases have been terms contained in standard printed con-

186. See Keeton, *Products Liability—The Nature and Extent of Strict Liability*, 1964 U. ILL. L.F. 693, 696-97; Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 373 (1965).

187. Chairaluce v. Stanley Warner Management Corp., 236 F. Supp. 385 (D. Conn. 1964); 2 RESTATEMENT 2D § 402A, comment *m* at 355.

188. See text accompanying note 173 *supra*.

189. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 61, 27 Cal. Rptr. 697, 377 P.2d 897 (1962); Wilson v. Modern Mobile Homes, Inc., 376 Mich. 342, 137 N.W.2d 144 (1965); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 68, 207 A.2d 305, 313 (1965). There is some suggestion in *Greenman, supra*, that a notice requirement may still be appropriate in strict tort actions among immediate parties to a commercial transaction. To the extent that these would be actions for economic loss, they would probably have to be based on a warranty theory; the notice requirements would then apply according to traditional warranty principles. See generally UNIFORM SALES ACT § 49; UNIFORM COMMERCIAL CODE § 2-607(3). However, it is doubtful that a notice requirement should be imposed upon a dealer physically injured by a product which he regularly handles merely because he is a commercial party.

190. Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964); Seely v. White Motor Co., 45 Cal. Rptr. 17, 22, 403 P.2d 145, 150 (Sup. Ct. 1965) (dictum); 2 RESTATEMENT 2D § 402A, comment *m* at 356; *cf.* UNIFORM COMMERCIAL CODE § 2-316. The effectiveness of disclaimers of negligence liability has been greatly circumscribed in recent years by decisions strictly construing exculpatory agreements and holding that liability for violation of a duty imposed by statute cannot be disclaimed. *E.g.*, Aerial Agricultural Serv. v. Richard, 264 F.2d 341 (5th Cir. 1959); Hunter v. American Rentals, Inc., 189 Kan. 615, 371 P.2d 131 (1962).

tract forms imposed upon plaintiffs who were in bargaining positions vastly inferior to those of the defendants.[191]

Finally, there remain the intricately intertwined issues of foreseeability of use, contributory negligence, and assumption of risk, all of which may be said to involve questions of contributory fault. Since the pertinent decisions have been few, the law of contributory fault applicable in strict products liability actions is not settled; however, some aspects of it have been clarified. The defense of assumption of risk, based upon the fact that a plaintiff has voluntarily exposed himself to a known hazard, is available in strict tort actions just as it is in negligence suits and in actions arising from the miscarriage of an ultrahazardous activity.[192] Yet recent negligence decisions have demonstrated a growing tendency on the part of the courts to say that a plaintiff has assumed a risk associated with a defective product only if there is strong evidence that, when he used the merchandise, he both knew of the defect and appreciated the nature of the danger which it created.[193] No lower a standard of proof can be required in a strict tort case, since it would be anomalous to say that one has assumed a risk the nature of which he was unaware. The theoretical distinction between the doctrine of assumption of risk and that of contributory negligence—that the latter defense rests upon a simple showing that a plaintiff dealt with a product in something less than a reasonably prudent manner—may not have much significance in negligence actions, since facts insufficient to constitute assumption of risk may nevertheless show that a plaintiff was contributorily negligent and thus still prevent him from recovering for his injuries.[194] However, the difference between assumption of risk and contributory negligence may be of crucial importance in a suit based on the strict tort theory, for it appears that contributory negligence does not prevent recovery in a strict tort action, at least where the alleged negligence consists merely of a failure to use due care to discover a product defect or, if the defect

191. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 390, 161 A.2d 69, 87 (1960). It has been suggested that the only possible way to preserve exculpatory clauses in the future will be to offer the consumer a two-price option, one price with a disclaimer and a higher price without it. Keeton, *Assumption of Products Risks*, 19 Sw. L.J. 61-65 (1965). However, the author admits that he is uncertain whether such an arrangement would make a disclaimer of strict tort liability effective. *Ibid.*

192. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965); 2 RESTATEMENT 2D § 402A, comment *n* at 356. As to assumption of risk in suits arising out of the miscarriage of an ultrahazardous activity, see 3 RESTATEMENT, TORTS § 523 (1934). Assumption of risk is also a defense to warranty liability. PROSSER § 97, at 656.

193. See Bullock v. Benjamin Moore & Co., 392 S.W.2d 10 (Mo. Ct. App. 1965); Lascher, *supra* note 178, at 54; Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 873 (1962). Compare Pritchard v. Liggett & Myers Tobacco Corp., 350 F.2d 479 (3d Cir. 1965) (warranty action).

194. For a discussion of this distinction in the context of negligence actions, see notes 106-07 *supra* and accompanying text.

was discovered, to use due care to guard against possible injury.[195] This position is consistent with the law dealing with strict liability for breach of warranty and for the miscarriage of an ultrahazardous activity.[196]

One of the most valuable defenses available to a defendant in a strict tort suit is a provable claim that the plaintiff was injured because an allegedly defective product was being used in an abnormal manner at the time of injury. The authors of the *Restatement* have apparently chosen to deal with the problem of abnormal use through the fundamental principles of strict liability rather than through the concept of contributory negligence. They define a defective article as one which, when sold by a particular defendant, was unsafe for normal use and consumption; if the plaintiff's abnormal use of the product were a proximate cause of his injury, there would be no initial basis for imposing strict tort liability on the seller, since he is only bound to make his product safe for normal use.[197] On the other hand, a number of courts, including the Supreme Court of New Jersey, treat the question of a plaintiff's use of a product as raising an issue of contributory fault rather than one of a seller's initial liability. They hold that a plaintiff's unreasonable use of a product constitutes contributory negligence and thus bars him from recovering in a suit premised on a strict tort theory for injuries attributable to that use.[198]

The approaches adopted by the *Restatement* and the New Jersey court are obviously similar. Both views, although theoretically different, normally lead to the same result—that a seller is relieved of liability for injuries caused by an abnormal use of his product. However, there are reasons to prefer the *Restatement*'s approach. First, the *Restatement* formulation stresses the question whether the use of the product was abnormal rather than whether it was negligent. Although a negligent use of a product is generally abnormal as well, the *Restatement* view may dispose more satisfactorily of a situation in which the handling of a product at the time of injury, while negligent, was also so commonplace as to constitute a normal use of the article. Under the *Restatement* view, a seller arguably would at least have to caution against dealing with the product in such a manner in order to make his product "reasonably safe for normal use"; if he failed to give such a warning, his product would be defective and

195. See PROSSER § 97, at 684; 2 RESTATEMENT 2D § 402A, comment *n* at 356. See also Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965) (dictum).

196. Warranty: see, *e.g.*, Kassouf v. Lee Bros., Inc., 209 Cal. App. 2d 568, 26 Cal. Rptr. 276 (Dist. Ct. App. 1962); PROSSER § 95, at 656. Miscarriage of ultrahazardous activities: see PROSSER § 78, at 539; 3 RESTATEMENT, TORTS § 524 (1934).

197. 2 RESTATEMENT 2D § 402A, comment *h* at 351.

198. See Maiorino v. Weco Prods. Co., 45 N.J. 570, 214 A.2d 18 (1965).

he would be strictly liable for injuries caused by the normal, but negligent, use.[199] However, a court following the New Jersey view may merely deny recovery in such a situation on the ground that the plaintiff was contributorily negligent in his handling of the product, but may entirely neglect to consider whether his use of the article was normal. A second reason to prefer the *Restatement*'s position is that, in order to bar him from recovery, the New Jersey approach would require proof that the alleged contributory negligence was attributable to the person actually seeking relief.[200] Such a requirement would be inconsistent with the principles of the new strict tort doctrine. Since a product is considered defective only when unfit for normal use, a seller should not be liable for an injury caused by an abnormal use of his product, even if he cannot attribute that use to a particular plaintiff.[201]

IV. Conclusion

It is apparent that tort law opens to a consumer a number of avenues of recovery against members of a distributive chain for injuries caused by defects in their products. An action based upon fraudulent misrepresentations by a seller, although a relatively infrequent occurrence, presents noteworthy possibilities of recovery for economic loss and may even lead to an award of punitive damages, once a plaintiff overcomes some diminishing but still significant problems associated with proving that the defendant knew the falsity of his representations and the plaintiff himself relied upon them. The opportunities for recovery on a negligence theory are already extensive and are apparently growing due to the recent trend toward the expansion of some aspects of various sellers' obligations to the consuming public, such as a retailer's duty to inspect his merchandise and a manufacturer's responsibility to guard against the existence of obvious defects in his product. Furthermore, courts have recently shown an increased willingness to apply the doctrine of *res ipsa loquitur* to situations in which defendants did not actually have exclusive control of the instrumentalities of harm at the time of the accidents. Finally, a seller's responsibility is being remarkably broadened by the developing doctrine of strict liability in tort for injuries caused by defective products. To be sure, there are a num-

199. See Simpson Timber Co. v. Parks, 34 U.S.L. Week 2339 (9th Cir. Dec. 3, 1965), in which a door manufacturer who had packaged his merchandise for export without warning that the containers could cave in was held liable to a longshoreman who fell while standing on a layer of packages. The court said that the doctrine of intended use is really an adaptation of a foreseeability test, and that the real question was whether the manufacturer should have known that the packaged doors might be stepped on in the process of loading cargo. See also 2 Restatement 2d § 402A, comment *h* at 351-52.

200. See Prosser § 73, at 501.

201. See Swain v. Boeing Airplane Co., 337 F.2d 940 (2d Cir. 1964) (applying New York law), *cert. denied*, 380 U.S. 951 (1965).

ber of recent indications that this strict tort liability does not entail absolute responsibility and that courts are trying diligently to mark out the bounds of a seller's obligation. These limits will probably be found primarily in the requirements that the product which caused a plaintiff's injury must have been defective and that the defect must have existed when the product left the control of a defendant seller.[202] However, there are other approaches for restricting a seller's responsibility. Some courts have already limited liability through the application of concepts of contributory fault or have denied strict tort recovery to certain classes of plaintiffs, such as bystanders, or for certain types of harm, such as purely economic losses. Others have refused to apply strict tort liability to certain members of the distributive chain, such as manufacturers of components incorporated into final products manufactured by another.[203] As the law of strict liability continues to develop, the direction which it will take will be determined by the delineation of these limitations upon the extent of the seller's liability.

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202. Jakubowski v. Minnesota Mining & Mfg. Corp., 42 N.J. 177, 199 A.2d 826 (1964); Kaempfe v. Lehn & Fink Prod. Corp., 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964).

203. *E.g.*, Seely v. White Motor Co., 45 Cal. Rptr. 17, 403 P.2d 145 (Sup. Ct. 1965) (economic loss); Maiorino v. Weco Prods. Co., 45 N.J. 570, 214 A.2d 18 (1965) (contributory fault); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963) (manufacturer of component); Wights v. Staff Jennings, Inc., 405 P.2d 624 (Ore. 1965) (bystander).