PRODUCTS LIABILITY: A SYNOPSIS

The endeavor of products liability law is to allocate the costs of injuries caused by defective products between manufacturers or sellers and consumers. Judical formulae which have been devised to effect this allocation have undergone and will continue to undergo modifications as pressure is applied by one side or the other. If the allocation process is viewed as a continuum, the doctrine of *caveat emptor* represents that end of the continuum most favorable to sellers in that the risk of injury is placed entirely upon the buyer or consumer. Strict liability represents the other end of the continuum, as that continuum is delineated by current jurisprudence, and places much of the cost of injuries from defective products upon the seller or manufacturer. The purpose of this presentation is to review the current theories of recovery which are available to the consumer who is injured by a defective product.

A basic tenet of common law is that losses should be borne by the person who incurs them unless there is some valid reason for shifting the loss to another. A theory or legal justification is a prerequisite to the transfer of a loss. Today there are three such theories available to the plaintiff in a products liability case: first the theory of negligence by the defendant, and second the breach of a commercial code warranty by the defendant, and third, the theory of strict tort liability. The initial portion of the discussion will be devoted to a brief overview of the scope and limitations of these three theories as they relate to products liability.

A second basic principle of the common law is that the plaintiff has to prove his case. Unless this is done, a favorable theory will be of little assistance to a plaintiff in his effort to transfer his loss to the defendant. The differences in the proof requirements of the three theories of product liability will comprise the second and third parts of the discussion.

I. The Plaintiff's Theories of Recovery

A. *Negligence*

The theory of negligence is one step removed from the doctrine of *caveat emptor.* Under negligence law the seller must exercise care to assure that the goods which he sells do no harm to the buyer.[1] This obligation to exercise care is often called a duty of care. If the seller does not exercise the requisite amount of care, he will have breached his duty, and if damages are suffered by the defendant as a result of that breach the plaintiff is liable. This imposition of a duty of care upon the seller represents a departure from the original rule of *caveat emptor.* In recognition of that fact the courts historically held a seller liable only for harm

[1] W. Prosser, Law of Torts 648 (3rd ed. 1964).

done to buyers. The existance of a contract between the buyer and the seller constituted the judicial justification for the deviation from *caveat emptor*.[2] Subsequently, the seller's duty was expanded to include a duty of care for the benefit of the general public, if the article he sold was "inherently" dangerous, presumably upon the theory that the seller was in a better position to alleviate the harm. This was the rule until 1916 when *MacPherson v. Buick Motor Company*[3] defined inherently dangerous to include everything that was dangerous if negligently made, and in effect created a general duty of care to the public on the part of the seller. Today a seller of goods is under an obligation imposed by law to exercise the care of a reasonable man to assure that the goods he produces do no harm to consumers.[4]

This brief historical summary of negligence law indicates that there are two aspects to the problem of allocating losses. First there is the problem of delineating the class of persons who are to be relieved of losses. Historically, only immediate buyers from sellers could transfer their losses to the seller; today all forseeable consumers have access to that privilege. The second aspect of risk allocation, the criterion of liability, limits the ability to shift losses to sellers under negligence law. The standard imposed upon the seller under negligence law is only a duty to exercise ordinary care. Therefore if the seller exercises the required amount of care, the buyer may not recover. If the objective is to impose greater liability upon the seller for the losses incurred by consumers, the duty to exercise care must be replaced by a standard imposing liability in more absolute terms. Such a standard is available from another area of the law, but this standard has its own built-in limitations.

B. *Contractural Commercial Code Warranty*

A warranty is an affirmation or a promise. It is not a fault concept which will be satisfied if the seller puts forth his best effort. If the terms of the warranty are not fulfilled, the warrantor is liable. Although warranties were part of the common law,[5] they were codified along with the rest of sales law when the various states adopted the Uniform Sales Act.[6] Through this process of codification, warranties became identified with contracts and with statutory law in the early part of the 1900's. Section 15(2) of the Sales Act, and its successor, Section 2-314 of the Uniform Commercial Code, contain the warranty of merchantability which is of

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[2] *See* Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (1842); W. PROSSER, LAW OF TORTS § 96 (3rd ed. 1964).

[3] 217 N.Y. 382, 111 N.E. 1050 (1916).

[4] W. PROSSER, LAW OF TORTS 648 (3rd ed. 1964).

[5] *See* Rogers & Co. v. Niles & Co., 11 Ohio St. 48 (1860).

[6] The UNIFORM SALES ACT was adopted in Ohio in 1908, Act of May 9, 1908, 99 Laws of Ohio 413-35.

particular interest to consumers in product liability actions.[7] The warranty of merchantability, unless excluded, is an implicit part of every contract between a buyer and a seller, and provides generally that the seller warrants that the goods are fit for the purpose for which such goods are normally used.[8] This warranty is a term of the contract implied by law. Therefore if the consumer has the benefit of a warranty of merchantability, the exercise of care by the seller will not relieve the seller of liability.

The Uniform Sales Act however was not designed for the benefit of consumers, and the warranty of merchantability by its terms was limited to buyers and sellers as defined, thus requiring privity of contract.[9] This requirement of privity was somewhat liberalized by the Uniform Commercial Code, which provides that members of the buyer's family and guests in the buyer's home may take advantage of any warranty existing between the buyer and the seller.[10] Two other provisions of the commercial codes presented difficulty for the consumer who was injured by a defective product. One was the requirement that the defendant be given notice of the breach of implied warranty within a reasonable period of time,[11] and the other was a provision which allows the seller to disclaim all warranties, including the warranty of merchantability, by giving appropriate notice.[12]

C. *Strict Liability In Tort*

Even with the possibility of two alternative remedies, negligence and the commercial code warranty of merchantability, the consumer at least in theory was not in a good position to collect if he was injured by a defective product. Under negligence law the seller could escape liability by exercising reasonable care. Further, the consumer had to prove that the seller was negligent which was sometimes difficult even with the help of *res ipsa loquitur*. If the buyer brought his action against the retailer it was often discovered that the retailer was simply not negligent.[13] If the

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[7] The UNIFORM COMMERCIAL CODE, hereafter cited as U.C.C., replaced the UNIFORM SALES ACT in Ohio in 1962, Act of May 18, 1961, 129 Laws of Ohio 13-183.

[8] *See* U.C.C. § 2-314, OHIO REV. CODE ANN. § 1302.27 (Page 1962). Section 15(2) of the UNIFORM SALES ACT provided:

> Where the goods are bought by description from a seller who deals in goods of that description . . . there is an implied warranty that the goods shall be of merchantable quality.

[9] *See* § 76 of the UNIFORM SALES ACT for definitions of the terms buyer and seller as they are used in the Act.

[10] U.C.C. § 2-318, OHIO REV. CODE ANN. § 1302.31 (Page 1962).

[11] UNIFORM SALES ACT § 49; U.C.C. § 2-607(3), OHIO REV. CODE ANN. § 1302.65 (Page 1962).

[12] UNIFORM SALES ACT § 71; U.C.C. § 2-316, OHIO REV. CODE ANN. § 1302.29 (Page 1962).

[13] See text accompanying note 44 *infra*.

consumer tried to collect from the manufacturer, it was hard to prove that the manufacturer was negligent in his manufacturing process.

The primary problem with the Uniform Sales Act warranty of merchantability was that very few consumers could obtain its benefit because of the requirement of privity of contract. If the father purchased food, only the father had privity of contract, not the members of his family, until this requirement was liberalized by the U.C.C.[14] Further there was always the chance that the warranty would be lost by a failure to give notice or by a disclaimer of the seller.

An action for negligence then had the advantage of providing a cause of action for a large class of consumers while it had the disadvantage of allowing sellers to escape liability upon a showing that reasonable care was exercised. The warranty of merchantability had the advantage of imposing absolute liability upon the seller, but its disadvantage was that it was unavailable to many consumers. The solution was to take the best parts of both theories, combine them, and create a new theory for consumers, strict liability in tort. Although the actual process was not nearly as simple as the above presentation might make it appear, this is essentially what happened.

1. "Implied Warranty" in Tort

In Ohio as in most other states[15] the most serious pressure for a consumer remedy which did not contain the pitfalls of negligence and commercial code warranties came in cases where consumers were injured by defective food. In 1928 an Ohio court of appeals came up with the theory that the consumer was a beneficiary of the commercial code warranty of merchantability existing between the retailer and the manufacturer.[16] Through this device the court was able to provide a remedy which imposed absolute liability upon the manufacturer for the sale of defective products, and a remedy which was at the same time available to numerous consumers. The Ohio Supreme Court disagreed however, and continued to hold that the only warranties which the law would recognize were those provided by the Uniform Sales Act, and those warranties required privity of contract.[17]

Courts in other states however, assisted the consumers cause by determining that warranties were not the exclusive providence of contracts and commercial codes.[18] It was pointed out that "in the beginning" an action for breach of warranty was a *tort* action to give relief for the

[14] *See* Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935).

[15] *See* W. PROSSER, LAW OF TORTS 674 (3rd ed. 1964).

[16] Ward Baking Co. v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

[17] Welsh v. Ledyard, 167 Ohio St. 57, 146 N.E.2d 299 (1957).

[18] *See, e.g.*, Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).

breach of a duty assumed by the seller.[19] Once the courts discovered this standard of liability the remaining task was to provide some rationalization for attaching the standard to the manufacturer of goods. Two explanations emerged. One was that through his advertising and other selling activity the seller made his warranty directly to the consumer, and the other was that the warranty ran with the goods.[20]

The doctrine of "implied warranty in tort" developed in Ohio along the same lines as it had in other states. In *Rogers v. Toni Home Permanent Company*[21] a tort warranty was formulated and was imposed upon the manufacturer because of his advertising to consumers. In *Lonzrick v. Republic Steel Corporation*,[22] the Ohio Supreme Court completed the evolution by dropping the advertising rationalization.

The "implied warranty in tort" which the Supreme Court announced is a warranty of merchantability. This means that the goods must be fit for the ordinary purposes for which such goods are used.[23] The standard of liability thus imposed is the same as it was under the U.C.C. warranty of merchantability. Unlike the U.C.C. warranty of merchantability, the "implied warranty in tort" does not require privity of contract and generally is available to all consumers. In short, strict liability was imposed upon the seller under the rationalization of an "implied warranty in tort." The important characteristics of an "implied warranty in tort" as that term has been developed by the courts are first, that liability is imposed upon the seller or manufacturer regardless of the amount of care exercised by him, and second that this liability is imposed for the benefit of all those consumers whose presence could be anticipated.[24]

2. The Restatement § 402A

Earlier it was indicated that warranties, through the process of codification in the commercial codes, had become identified with the subject of contracts. Although the "implied warranty in tort" has little in common with the commercial code warranties, confusion developed because of the common usage of the word warranty. To eliminate this confusion and in recognition of the fact that "[i]t would be far simpler if it were simply said that there is strict liability in tort, declared outright, without an illusory contract mask,"[25] several state courts have dropped all talk of warranty

[19] This is the language that was used by the Ohio Supreme Court when they adopted strict liability, Lonzrick v. Republic Steel Corp., 6 Ohio St.2d 227, 234, 218 N.E.2d 185,191 (1966).

[20] *See* Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1126 (1960).

[21] 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[22] 6 Ohio St.2d 227, 218 N.E.2d 185 (1966).

[23] Lonzrick v. Republic Steel Corp., 6 Ohio St.2d 227, 229, 218 N.E.2d 185, 187 (1966).

[24] See the text accompanying note 69 *infra* for the elements of the strict liability cause of action in Ohio.

[25] W. PROSSER, LAW OF TORTS 681 (3rd ed. 1964); *see also* Dippel v. Sciano, 37 Wis.2d

and instead talk about strict liability. The drafters of the Restatement agreed, and in 1965, purporting to restate the law, a new section was added to the Restatement of Torts entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer".[26] The Restatement drops the "implied warranty" rationalization and simply provides that:

> (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. . . .

The term strict liability when used in connection with products liability includes both "implied warranty in tort" and the Restatement §402A. Since both the Restatement and the *Lonzrick* court accomplish the same objective it would seem that much confusion could be eliminated if the Ohio courts would also drop the "implied warranty in tort" rationalization and confine the name of the remedy to strict liability.

II. Proof Of Causation In Fact

Three causes of action have been identified which are available to the victim of a defective product. Although there are overlaps between the three causes of action, each has a standard for the imposition of liability upon the seller, and each has a class of victims which it is designed to protect. A substantial component of the successful products liability cause of action has thus far not been mentioned. This is the proof of causation in fact, a requirement common to all three causes of action identified above. Causation in fact means that the injury sustained by the plaintiff must be traced to the defendant through a series of cause and effect stages. Because of geographical dispersement and multiple channels of product distribution, proof of causation is one of the more difficult problems with a products liability case.

Causation in fact is a common requirement, and is undertaken in the same way for each of the causes of action identified above.[27] Unless a plaintiff proves causation he will not recover for his injuries. Once a plaintiff does prove causation, he may or may not be able to recover depending upon whether or not he can meet the additional individual requirements of one of the causes of action set out previously. Therefore the following discussion of causation is intended to apply to a products liability case without regard to the theory of recovery which is being pursued.

The sequential cause and effect stages of a products liability case are as

443, 155 N.W.2d 55 (1967); Rossignol v. Danbury School of Aeronautics, 154 Conn. 549, 227 A. 2d 418 (1967); Olney v. Beaman Bottling Co., 418 S.W.2d 430 (Tenn. Sup. Ct. 1967).

[26] Restatement (Second) of Torts § 402A (1965). See note 70 *infra* for the text of § 402A.

[27] *See* 1 Frumer & Friedman, Products Liability § 11.01 (1964); Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 Yale L.J. 1099, 1114-15 (1960).

follows. First, it is necessary to show that the injury was caused by the product. Second, it must be proven that the injury resulted because of a defect in the product, and third, the defect has to be traced to the manufacturer or the defendant.[28] The reader should be cautioned that in some cases one or more of these distinct steps are telescoped together, and at times a step is either assumed or uncontested. For the sake of clarity these steps will be treated individually.

That the injury was caused by the product — If a household appliance explodes and inflicts cuts and bruises upon the person of the plaintiff it is relatively easy to show that the immediate cause of the injury was the product, especially if the remains of the product are available. On the other hand when the injury results from a contaminated ham sandwich it may be necessary to determine the specific identity of the offending food. In the case of drugs or cosmetics the initial problem again is to establish that a particular drug or cosmetic caused the injury. Medical records, expert testimony, and the testimony of the plaintiff and any eye witnesses may be required to show which product caused the injury.[29]

That the injury was caused by a defect in the product — A defect is a condition or characteristic of a product which if found to exist will lead to liability on the part of the seller or manufacturer. It is that characteristic of the product which makes it inadequate. Absolute proof that the injury is the result of a defect is not essential. If the plaintiff can establish facts sufficient to allow a jury to infer that there is a defect, and that this defect was a substantial factor in bringing about the injury, he will have sustained his burden of proof.[30] As a matter of common knowledge soda bottles do not explode unless there is a defect so that in such a case the inference of a defect almost automatically follows once injury by the product has been shown. However, in the case of an automobile accident, there are many agencies which could have caused the injury, one of which might be the driver. In these cases where multiple causes are a possibility, it is essential that the plaintiff pinpoint the alleged defect, or that he eliminate causes other than the alleged defect. Again expert testimony will often be necessary to supply the circumstantial evidence which will allow the jury to reach the conclusion.[31] Demonstrative evidence may be utilized to good advantage in products liability cases.[32] Accident reports of law en-

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[28] 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 11.01 (1964).

[29] Winner, *Techniques In Handling A Products Liability Case-Gathering and Presenting Evidence*, 47 NEB. L.R. 316, 325 (1968).

[30] PROSSER, LAW OF TORTS 245 (3rd ed. 1964); Emroch, *Pleading and Proof In A Strict Products Liability Case*, 1966 INS. L.J. 581, 591.

[31] Frumer & Friedman suggest that many trials of products liability cases boil down to a battle of the experts, with the jury being given the job of resolving the conflicting testimony, 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 12.02 (1964).

[32] Types of demonstrative evidence include models, diagrams, photographs, motion pcitures, and tests in court, 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 49.02 (1964).

forcement agencies and maintenance reports of offending machines should also provide helpful evidence.

Tracing the defect to the defendant — Assuming that the plaintiff has successfully attributed his injury to some alleged defect in the product, his next problem will be to show that the defect existed when the product left the defendant. *O'Donnell v. Geneva Metal Wheel Company*[33] demonstrates one method of accomplishing this objective. In *O'Donnell* the plaintiff was inflating a tire when the wheel flew apart injuring him. The plaintiff's theory was that the wheel was defective because the rivets holding it together were defective and cracked, and that this condition had existed when the wheel left the defendant manufacturer. To prove that the rivets were defective when the wheel left the defendant's plant the plaintiff introduced testimony from two expert engineers, who had examined the remains of the wheel, to the effect that the rivets were defective as charged. The defendant on the other hand introduced evidence to show that his quality control would prevent defective wheels from leaving the plant. The court ruled that the question was one for the jury. Here the method employed by the plaintiff to prove his case was the use of affirmative evidence.

A second approach, demonstrated by the facts in *Cusumano v. Pepsi-Cola Bottling Company*,[34] involves the elimination of all agencies which could have caused the defect in the product between the time that the product left the defendant and the time of the injury, thereby establishing the inference that the product was defective when it left the defendant. In *Cusumano* the defendant's deliveryman left several cases of Pepsi-Cola in the plaintiff's storeroom. Several days later the plaintiff picked up a case, the bottom of the case fell out and the plaintiff was injured. To prove that the case was defective when it was left by the defendant's deliveryman, the plaintiff accounted for the persons who had been in and out of the storeroom between the time that the case was left by the deliveryman and the time of the injury. The inference that the case was defective when it left the defendant was permissible after the elimination of other potential causes.[35]

In some types of products liability cases it is not difficult to prove that the alleged defect existed when the product left the hands of the manufacturer. If a plaintiff should contend that a cigarette is defective because it causes cancer, there would be little dispute over the question of whether the product was in the same condition when it was smoked by the plaintiff as it was when it left the defendant's plant. Where the product is alleged to be defective because it is improperly designed, the product itself or a

[33] 183 F.2d 733 (6th Cir. 1950).

[34] 9 Ohio App. 2d 105, 223 N.E.2d 477 (1967).

[35] The court however seemed to merge the issue of *res ipsa loquitur* with proof of the defective condition when the product left the control of the defendant.

new product identical to it, would demonstrate the design when it left the defendant.[36] If the alleged defect is an inadequate warning the plaintiff can enter the label or instructions that came with the product into evidence in order to prove that the defect existed when the product left the hands of the defendant.[37]

In proving that a defect existed when the product left the defendant's plant, the passage of time, although certainly an important factor, will not necessarily defeat the plaintiff's recovery.[38] Under these circumstances it will generally be impossible to eliminate all the causes that could have caused the defect between the time the product left the defendant and the time of the injury. On the positive side the plaintiff may be able to prove that other consumers or users have had similar problems with the product, thus establishing a characteristic of the product from which the inference of a defect may be drawn.[39] The results of tests made by the manufacturer or by independent laboratories may provide evidence to help overcome the difficulties presented by the passage of time.[40]

III. Completing The Cause Of Action

As a consequence of having proven causation in fact, the plaintiff in the products liability case will have isolated some alleged defect of a product, attributable to the defendant, for which the plaintiff proposes to impose liability upon the defendant. Earlier it was indicated that each of the three causes of action, negligence, commercial code warranty, and strict liability imposes its own standard of liability and has its own class of victims which it is designed to protect. Therefore the discussion will now have to center upon each of these causes of action on an individual basis to determine whether the standard of liability has been violated, and to determine whether the plaintiff is within the protected class of victims. The starting point under each cause of action will be upon the assumption that the plaintiff has identified some alleged defect which he is contending should result in the imposition of liability upon the defendant.

A. *Negligence*

A person is negligent when he fails to conform his behavior to a cer-

[36] Greenman v. Yuba Power Products Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963) represents a case where the alleged defect was one of design.

[37] Winner, *Techniques In Handling A Products Liability Case-Gathering and Presenting Evidence*, 47 NEB. L.R. 316, 323 (1968).

[38] Burns v. Pennsylvania Rubber & Supply Co., 117 Ohio App. 12, 19, 189 N.E.2d 645, 651 (1961); Note, *Time Lapse In Products Liability*, 4 WILLAMETTE L.J. 394 (1967).

[39] *Id.*

[40] Discovery procedures may be used to discover complaints and investigative reports involving the same product, tests made by the manufacturer, modifications to the product after the injury, and reports relating to the repair of the product, 3 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 47.01 (1964).

tain standard of conduct imposed by law for the protection of others.[41] In terms of products liability this means that a seller must exercise the care of a reasonable man of ordinary prudence to insure that the goods which he sells do no harm to the plaintiff.[42] More specifically, a manufacturer is expected to:

1. Exercise care in the design of products so that they will be fit for their intended purpose,
2. Exercise care in the construction of products to insure that the materials and workmanship make the product suitable for its intended use,
3. Inspect the goods which he sells for any defects, including defects in material and workmanship,
4. Give warnings of danger and instructions as to proper usage if the goods cannot be made safe.[43]

A retailer or middleman has less responsibility.[44] If the retailer knows of a danger which would not be evident to the consumer he must warn the consumer. Generally however, where the retailer is a mere conduit for the goods he has no duty to inspect, nor does he have any duties in regard to design or construction of the product unless he knows of some danger.[45]

In view of the standard of liability imposed above, it is evident that liability for negligence will be imposed upon the defendant only if the plaintiff proves first that the product was somehow defective, and second that it was defective because of a failure to exercise care on the part of the defendant. Since this discussion began with the assumption that the plaintiff had identified some alleged defect, it is now incumbent upon the plaintiff to prove that the allegation is true. He must show that the product was somehow unfit for its intended use, or legally defective, a topic which will be considered at some length under the discussion of strict liability.[46]

Assuming that the plaintiff has proven that the product was legally defective he must now prove that the seller's exercise of care would have prevented the defective product from leaving the seller's place of business in its defective condition. The seller on the other hand will attempt to show that although the product was defective, care was exercised in the construction stages, the product was inspected, and therefore the defective condition was an unavoidable accident which the conduct of a reasonable man could not have prevented. The seller may well succeed in his de-

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41 W. PROSSER, LAW OF TORTS 146 (3rd ed. 1964).

42 *Id.* at 648.

43 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY §§ 6-8 (1964); W. PROSSER, LAW OF TORTS 648-49 (3rd ed. 1964).

44 *See* Thrash v. U-Drive-It Co., 158 Ohio St. 465, 110 N.E.2d 419 (1953); W. PROSSER, LAW OF TORTS 650 (3rd ed. 1964).

45 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 18.03-04 (1964).

46 See the text accompanying note 86 *infra.*

fense because the standard of liability is only violated by a failure to exercise care.

The doctrine of *res ipsa loquitur* however is available to help the plaintiff put teeth into the standard of liability imposed by negligence law.[47] This doctrine is a rule of evidence which provides that it is unnecessary for the plaintiff to establish specific evidence of negligent acts or conduct, if he can show that in the ordinary course of events the accident would not have occurred if ordinary care had been observed.[48] In order for *res ipsa loquitur* to apply the following conditions must be met:

> 1. The event [product leaving defendant in a defective condition] must be of a kind which ordinarily does not occur in the absence of someone's negligence;
> 2. It [product leaving the defendant in a defective condition] must be caused by an agency or instrumentality within the exclusive control of the defendant;
> 3. It [product leaving the defendant in a defective condition] must not have been due to any voluntary action or contribution on the part of the plaintiff.[49]

The effectiveness of *res ipsa loquitur* in turn often depends upon the attitude of a particular court toward the exclusive control requirement, the second condition listed above.[50] To the extent that a court takes a stringent view and refuses to apply *res ipsa loquitur* unless the product is in the physical possession of the defendant, it will be relatively more difficult for a plaintiff to utilize *res ipsa loquitur* to show the negligence of the defendant.

Unless a defect existed in the product when it left the hands of the defendant, the application of *res ipsa loquitur* is never reached.[51] This is because the function of *res ipsa loquitur* is to assist the plaintiff in proving that a defect existed because of the defendant's negligence. Therefore, when the theory of recovery is switched to warranty or strict liability *res ipsa loquitur* will no longer be available to the plaintiff, and it will not be needed because it will no longer be necessary for the plaintiff to prove negligence.

Finally, although the plaintiff may be able to prove causation in fact and some negligent act on the part of the defendant there are some legal limitations upon the liability of the defendant. These restrictions are sometimes treated as limitations upon the duty of the seller, and some-

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[47] *See* Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1114-15 (1960).

[48] Schafer v. Wells, 171 Ohio St. 506, 172 N.E.2d 708 (1961).

[49] W. PROSSER, LAW OF TORTS 218 (3rd ed. 1964).

[50] For a discussion of *res ipsa loquitur* in Ohio, see Carr, *Res Ipsa Loquitur In Ohio: Does Any "Thing" or "Control" Speak For Itself?*, 29 OHIO ST. L.J. 399 (1968).

[51] Prosser, *The Assault Upon The Citadel (Strict Liability To The Consumer)*, 69 YALE L.J. 1099, 1115 (1960); 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 12.03 [1] (1964).

times as questions of proximate cause, since proximate cause applies to products liability negligence cases as it similarly does to any other tort case. Without deciding whether the following are limitations upon the seller's duty or whether they are problems of proximate cause, it is generally said that the product must be used by the plaintiff for a purpose and in a manner which was reasonably foreseeable by the defendant.[52] Further, the injury must have resulted from some hazard or risk which was foreseeable by the defendant, and injury to the plaintiff or to those in a like situation must have been foreseeable to the defendant.[53]

If the plaintiff discovers the defect or danger in the product or should have discovered it, he is generally not allowed to recover for the negligence of the seller.[54] In the usual case the recovery is denied because of the plaintiff's contributory negligence, or assumption of risk, but it is sometimes said that the plaintiff's own negligence is an intervening cause.[55]

B. Commercial Code Warranty

If a state has adopted strict liability, it is debatable whether consumers will continue to rely upon the commercial code warranty of merchantability as an alternative remedy, even where they can meet the requirequirements of the Code. The courts will be faced with some difficult problems in delineating the scope and limitations of strict liability as it relates to the code warranties and it may be wise for the consumer not to become entangled in the process.[56] As an example, might a merchant buyer utilize the remedy of strict liability to recover from a merchant seller despite a disclaimer of all warranties by the merchant seller? This and other problems remain to be solved.[57]

Section 2-314 of the U.C.C. provides that unless expressly excluded, a seller warrants that goods are of merchantable quality.[58] Since this pro-

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[52] 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 11.02 (1964).

[53] *Id.*; Gedeon v. East Ohio Gas Co., 128 Ohio St. 335, 190 N.E. 924 (1934).

[54] 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 11.02 (1964).

[55] Both assumption of risk and contributory negligence are defenses in a products liability case based upon negligence.

[56] *See* Shanker, *Strict Tort Theory of Products Liability And The Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communications Barriers*, 17 W. RES. L. REV. 1 (1965).

[57] *Id.*

[58] U.C.C. § 2-314, OHIO REV. CODE ANN. § 1302.27 (Page 1962):

> (1) Unless excluded or modified . . . , a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
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> (2) Goods to be merchantable must be at least such as:
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> (a) pass without objection in the trade under the contract description; and
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> . . .
>
> (c) are fit for the ordinary purposes for which such goods are used; and . . . .

vision only applies to a limited class of persons, the task of the potential plaintiff will be to bring himself within the protected class. The defendant must be a "merchant with respect to goods of that kind."[59] Generally a retailer should be included within the category of a merchant, but the courts in some states, including Ohio, have expressed hesitation in enforcing warranties against retailers who were mere conduits for the goods.[60] To complete the requirements as to parties, the plaintiff must show that he is either a buyer, a member of the buyer's family, or a guest in the buyer's home.[61] The plaintiff must be able to prove that he has given notice of the breach of warranty[62] to the seller and that the seller has not disclaimed the warranty of merchantability.[63]

A seller is guilty of a breach of his warranty of merchantability when the goods which he sells are unfit for the ordinary purposes for which such goods are used. If the buyer can prove that the goods were defective when sold by the defendant he will have established a breach by the seller. Since the test for a breach of warranty of merchantability is the same under the U.C.C. as the test for strict liability as it was formulated by the Ohio Supreme Court, the problem of the "legal defect" will be considered in the discussion of the legal defect.[64]

Since the U.C.C. specifies the persons who are covered by the warranty of merchantability, the problem of the unforeseeable plaintiff does not arise. However, § 2-715[65] provides that the seller is liable for consequential damages including "injury to person or property proximately resulting from any breach of warranty," so that there is still a problem with proximate cause. The comments to § 2-715 provide that damages are not proximately caused if the buyer discovered the defect, or if it was unreasonable for the buyer to use the goods without first inspecting for the defect.[66]

C. *Strict Liability In Tort*

In an earlier section it was stated that the theory of "implied warranty in tort" as it was adopted by the Ohio Supreme Court and the theory of §402A of the Restatement of Torts are merely two different routes to the

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[59] *Id.*

[60] McMurray v. Vaughn's Seed Store, 117 Ohio St. 236, 157 N.E. 567 (1927), seems to say that warranty liability will not be imposed upon a retailer unless he had an opportunity to inspect the goods or had knowledge of their condition. *Contra*, are Dow Drug Co. v. Nieman, 57 Ohio App. 190, 13 N.E.2d 130 (1936); Mahoney v. Shaker Square Beverages, Inc., 46 Ohio Op. 250, 102 N.E.2d 281 (1951).

[61] U.C.C. § 2-318, OHIO REV. CODE ANN. § 1302.31 (Page 1962).

[62] U.C.C. § 2-607(3), OHIO REV. CODE ANN. § 1302.65 (Page 1962).

[63] *See* U.C.C. § 2-316, OHIO REV. CODE ANN. § 1302.29 (Page 1962).

[64] See text accompanying note 86 *infra.*

[65] U.C.C. § 2-715, OHIO REV. CODE ANN. § 1302.89 (Page 1962).

[66] U.C.C. § 2-715, Comment 5, OHIO REV. CODE ANN. § 1302.89 Comment 5 (Page 1962).

common end of imposing strict liability upon the manufacturer.[67] To bolster this conclusion, a brief comparison will be made between the requirements of proof as set out by the Restatement and the requirements of proof as set out by the Ohio Supreme Court in *Lonzrick v. Republic Steel Corporation*.[68]

In *Lonzrick*, it was stated that in order for the plaintiff to recover he must prove that:

1. The product was defective;
2. The product was defective at the time it was sold by the manufacturer;
3. The defect in the product caused the product to malfunction while it was being used for its ordinary intended purpose;
4. The defect was the direct and proximate cause of the plaintiff's injury;
5. The plaintiff's presence was in a place which the defendant could reasonably anticipate.[69]

Item two, part of item three, and part of item four relate to the proof of causation in fact which has already been covered. The comparable provision of §402A is "One who sells any product in a defective condition . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer. . . ."[70] The Restatement then goes on to place the burden of proof upon the plaintiff to show that the product was in a defective condition at the time it left the hands of the seller.[71] The foregoing would seem to indicate that strict liability is of no assistance to the plaintiff in proving causation in fact.

Strict liability however does contain some limitations. One type of limitation relates to the class of victims that is protected. The Restatement provides that the seller shall be liable to "users and consumers." Although these terms are liberally defined,[72] the Institute expressly withheld opinion as to whether the section applied to persons other than consumers or users, thus leaving the individual jurisdiction free to add to the coverage.[73]

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[67] See text accompanying note 25 *supra*.

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

[69] 6 Ohio St. 2d at 237, 218 N.E.2d at 192-93.

[70] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

(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 this product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[71] *Id.* comment *g* at 351.

[72] *Id.* comment *l* at 354, includes passengers in automobiles as well as employees of the ultimate buyer as examples of "Users."

[73] *Id.* Caveat at 348.

The *Lonzrick* solution requires that the "plaintiff's presence was in a place which the defendant could reasonably anticipate,"[74] and thereby limits the seller's liability to foreseeable plaintiffs.

Both the *Lonzrick* decision and the Restatement require that the product be used for its ordinary intended use. *Lonzrick* states this requirement expressly,[75] and the Restatement provides that a "product is not in a defective condition when it is safe for normal handling and consumption."[76]

A third type of limitation covers unforeseeable consequences. Under the *Lonzrick* formulation a seller is only liable if the injury was proximately caused by the defect.[77] Presumably this provision incorporates the same foreseeability limitations as were encountered under negligence law. The Restatement does not expressly limit liability to foreseeable consequences. It does however limit the seller's liability to the physical harm caused to the ultimate user or consumer or to his property.[78]

Finally, the Restatement provides that the defendant must be a seller. The comments to § 402A specifically include manufacturers, wholesale and retail dealers, and operators of restaurants within the definition of a seller.[79] The defendant in *Lonzrick* was a manufacturer so the Ohio Supreme Court did not address itself to this point. Arguably this court will follow the Restatement and will impose liability upon retailers and/or wholesalers. Some of the older supreme court decisions and some lower court decisions at least raise the possibility of a contrary result.[80]

If a plaintiff successfully conforms to the requirements set out above, he will still need to show that the product is defective. In strict liability as in warranty, the exercise of care by the defendant is not a defense and evidence to that effect ordinarily should not be admitted.[81] However, the defendant may still prove that the product was not defective within the meaning of strict liability. Under the Restatement formulation, a product must not only be defective, but this defect must be of such a nature as to be "unreasonably dangerous to the user or consumer or to his property." The key words segregating actionable from nonactionable defects are "unreasonably dangerous."[82] A product is in an unreasonably dangerous condition, when it is dangerous to an "extent beyond that which would be contemplated by the ordinary consumer who purchases it, with

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[74] 6 Ohio St. 2d at 237, 218 N.E.2d at 192-93.

[75] *Id.*

[76] RESTATEMENT (SECOND) OF TORTS § 402A, comment *h* at 351 (1965).

[77] 6 Ohio St. 2d at 237, 218 N.E.2d at 192-93.

[78] *See* n. 70 *supra.*

[79] RESTATEMENT (SECOND) OF TORTS § 402A, comment *f* at 350-51 (1965).

[80] Cases cited note 60 *supra.*

[81] 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.01 [1] (1964).

[82] Dickerson, *Products Liability: How Good Does A Product Have To Be?*, 42 IND. L.J. 301, 304 (1967).

the ordinary knowledge common to the community as to [the product's] characteristics."[83]

The *Lonzrick* decision indicates that a product is defective when it is not fit for the ordinary purposes for which such goods are used.[84] If fitness for ordinary purpose is taken from the view of the ordinary consumer, then both the Restatement and *Lonzrick* would seem to determine legal defectiveness by the expectations of the reasonable consumer. This concept of a "legal defect" is also encountered in negligence cases and in cases decided under the commercial code warranty of merchantability. Consistency would seem to require that a given condition of a product be judged a legal defect or not a legal defect independently of the theory of recovery, and this has been suggested to be the proper procedure.[85] If there is a common test for "legal defectiveness", then it would seem to follow that a plaintiff could profitably tap negligence, warranty, and strict liability cases in order to gain insights into the meaning of legal defectiveness.

The cases are concerned with two different kinds of defective products.[86] The first kind involves a "miscarriage of manufacturing"[87] in the sense that the manufacturer would not have sold the product had he known that the condition existed. This type of case is represented by the mouse in the coke bottle, or the can of beans which contains a stone. In these cases consumer expectations have crystalized into some type of objective criteria which have been communicated to the manufacturer. Both the manufacturer and the consumer know what to expect from the product and it is therefore relatively easy to distinguish defective from nondefective products. Everyone knows that soft drink bottles should not contain mice.

However in other cases the characteristics of a product are not clear in the sense that consumers may or may not expect a certain characteristic of the product. This case is represented by the chicken bone in the chicken soup case. To resolve this type of case the courts have developed what is called the "natural-foreign" object test, which generally states that "deleterious matter not intended to be present is not a defect if the normally expected processing of the product by the consumer would either result in its discovery before consumption, or render it harmless prior thereto."[88]

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[83] RESTATEMENT (SECOND) OF TORTS § 402A, comment *i* at 352 (1965).

[84] 6 Ohio St. 2d at 229, 218 N.E. 2d at 187. This test is identical to that employed under the warranty of merchantability.

[85] Dickerson, *Products Liability: How Good Does A Product Have To Be?*, 42 IND. L.J. 301, 304 (1967); Emroch, *Pleading and Proof In A Strict Products Liability Case*, 1966 INS. L.J. 581, 589.

[86] *See* P. Keeton, *Products Liability — Liability Without Fault and The Requirement Of A Defect*, 41 TEXAS L. REV. 855, 859 (1963).

[87] *Id.*

[88] *Id.* at 862.

Applying this test the Ohio Supreme Court held that the presence of an oyster shell in a serving of oysters is not a legal defect.[89]

A second type of alleged defective products creates more difficulty.[90] In this situation the product is sold in the exact condition which the manufacturer intended, so that if a defect is found it will be present in all of the manufacturer's products of that kind. Examples are drugs, cigarettes, or cosmetics. Here either the product cannot be made safe, or the scientific knowledge existing at the time of manufacture has not created a method by which the beneficial factors may be separated from the harmful results. Absent the situation where the product is defective because the manufacturer failed to provide adequate warning or direction, the courts will be faced with some very difficult judgments. The case of cigarettes demonstrates the point. On the one hand there is obvious consumer demand for the product, but on the other hand it is relatively certain that the product is harmful. Further complicating the decision is the fact that neither the manufacturer nor the consumer knew that the product was harmful until long after it was up on the market.

Specific tests for various kinds of alleged defective products will not be developed until these cases are presented to the courts.[91] To the extent that standards of defectiveness have developed under negligence and sales warranty law these standards will most likely be reflected in the tests which emerge. Although strict liability has probably shifted the cost of "miscarriages in manufacturing" to the manufacturer, there are still many areas of products liability in which the consumer will not be relieved of losses incurred.

IV. CONCLUSIONS

Insofar as proving causation is concerned, strict liability is of no assistance to the plaintiff in a products liability case. Under either negli-

[89] Allen v. Grafton, 170 Ohio St. 249, 164 N.E.2d 167 (1960).

[90] *See* P. Keeton, *Products Liability — Liability Without Fault And The Requirement of A Defect*, 41 TEXAS L.R. 855, 859 (1963); RESTATEMENT (SECOND) OF TORTS § 402A, comments *h-k* at 351-54 (1965).

[91] Dickerson, *Products Liability: How Good Does A Product Have To Be?*, 42 IND. L.J. 301, 331 (1967) concludes that a product is legally defective if it meets the following conditions:

1) The product carries a significant physical risk to a definable class of consumer and the risk is ascertainable at least by the time of trial.
2) The risk is one that the typical member of the class does not anticipate and guard against.
3) The risk threatens established consumer expectations with respect to a contemplated use and manner of use of the product and a contemplated minimum level of performance.
4) The seller has reason to know of the contemplated use and, possibly where injurious side effects are involved, has reasonable access to knowledge of the particular risk involved.
5) The seller knowingly participates in creating the contemplated use, or in otherwise generating the relevant consumer expectations, in the way attributed to him by the consumer.

gence, sales warranty, or strict liability the plaintiff must prove that a defect existed, that the defect caused the injury, and that the defect existed when the product left the defendant.

Contrary to negligence, neither strict liability nor the warranty of merchantability require that the plaintiff prove that the defendant was negligent. The importance of this advantage will depend upon the number of cases in which the plaintiff can prove that a defect existed when the product left the hands of the defendant, and yet cannot prove that the defendant was negligent even with the help of *res ipsa loquitur*. Some writers have suggested that there are few cases like this. In cases where the plaintiff cannot sue the manufacturer because of jurisdictional reasons, the plaintiff will want to turn to the retailer or the wholesaler. If this happens, both the warranty of merchantability and strict liability will be more effective than negligence because in many cases the retailer or wholesaler is simply not negligent.

To the extent that the courts required privity of contract under the U.C.C., strict liability provides an obvious advantage in that privity is no longer necessary. The U.C.C. itself eliminated some of the more outrageous results of the requirement of privity by including the members of the buyer's family and his guests within the coverage of the warranty between the buyer and the seller. Strict liability also eliminated two other troublesome provisions of the U.C.C. warranty of merchantability. Under the U.C.C. the seller can disclaim any of the warranties which the code imposes and there is also the requirement that the seller be given notice of his breach of warranty.

Aside from eliminating the nuisance of having to prove negligence of the defendant by invoking the doctrine of *res ipsa loquitur*, it is doubtful whether the advantages of strict liability justify all the furor that it has created. If strict liability does result in the imposition of greater liability upon the manufacturer, much of the increase will have to come from a change in judicial attitudes since the provisions of strict liability still require a showing of legal defectiveness.

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