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Strict Liability in Tort: A Modest Proposal

DAVID G. EPSTEIN

I. INTRODUCTION

Centuries ago, the noted Irish satirist, Jonathan Swift, made a "modest proposal" that the inhabitants of the Emerald Isle remedy a severe food shortage they were experiencing by eating their young.¹ To some, a proposal of the adoption of strict liability in tort—regardless of how limited—is no more a modest proposal than Mr. Swift's.² It is submitted that this opposition to strict liability in tort is at least in part due to a misunderstanding of the present state of the law as to a manufacturer's liability to injured consumers. In most jurisdictions, the adoption of strict liability in tort for personal injuries is indeed a modest proposal. An examination of present day products liability law makes this clear.

Today, there are four primary theories under which an injured consumer can proceed: (1) misrepresentation, (2) negligence, (3) implied warranty, and (4) strict liability in tort.

II. MISREPRESENTATION

Misrepresentation is a traditional basis for tort liability.³ Liability in damages for misrepresentation generally took two forms: deceit and negligence. While there are some five generally recog-

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¹ SWIFT, A MODEST PROPOSAL (1729).

² See *Webb v. Zern*, 422 Pa. 424, 428, 220 A.2d 853, 855 (1966) (dissenting opinion); Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965).

³ See W. PROSSER, TORTS §§ 100-05 (3d ed. 1964); Comment, *Products Liability—"Proceeding Apace"*, 33 TENN. L. REV. 341, 342 (1968).

nized elements of a cause of action in deceit,⁴ the one element that is most important, and that distinguishes deceit from negligent misrepresentation, is scienter: the defendant must know that his representation is false. In negligent misrepresentation the important factor is, of course, negligence.⁵ Accordingly, liability is determined by the principles of negligence. Because proving either scienter or negligence is often extremely difficult in misrepresentation cases, the courts, at the prodding of a prominent commentator,⁶ created a third category—strict responsibility.⁷

Strict liability for misrepresentation has long existed in equitable remedies such as rescission. Courts, however, were and to some extent still are hesitant to impose tort liability for innocent misrepresentations. In *Derry v. Peek*,⁸ an English court said that the misrepresentation must be intentional in order for the buyer to recover damages for deceit. After *Derry*, American courts split: some requiring intentional misrepresentation; some requiring only negligent misrepresentation.⁹ Now the law is settled as to negligent misrepresentation,¹⁰ and the problem area is innocent misrepresentation.

The first case to impose tort liability for an innocent misrepresentation was *Baxter v. Ford Motor Company*.¹¹ In *Baxter*, the plaintiff purchased a new Ford from a retail dealer; the dealer had

⁴ The generally recognized elements of a cause of action in deceit are (1) false representation made by the defendant; (2) knowledge by the defendant that the representation is false; (3) intention on the part of the defendant that the plaintiff should act or refrain from acting in reliance on the representation; (4) justifiable reliance on the representation by the plaintiff; (5) damages to the plaintiff resulting from this reliance. W. PROSSER, TORTS § 100 at 700 (3rd. ed. 1964).

⁵ See Bohlen, *Should Negligent Misrepresentation Be Treated as Negligence or Fraud?* 18 VA. L. REV. 703 (1932). *Contra* Green, *Innocent Misrepresentation*, 19 VA. L. REV. 242 (1933).

⁶ See Williston, *Liability for Honest Misrepresentations*, 24 HARV. L. REV. 415, 427-40 (1911).

⁷ For an extended discussion of the three theories, see Carpenter, *Responsibility for Intentional, Negligent, and Innocent Representation and Third Persons*, 24 ILL. L. REV. 749 (1930).

⁸ 14 App. Cas. 337 (1889).

⁹ See Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty*, 42 HARV. L. REV. 733 (1929).

¹⁰ See 1 R. HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* § 4:6 (1961); Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 235 (1966).

¹¹ 168 Wash. 456, 12 P.2d 409 (1932), *aff'd per curiam*, 168 Wash. 465, 15 P.2d 1118 (1932), *aff'd*, 179 Wash. 123, 35 P.2d 1090 (1934). For a lengthy discussion of *Baxter*, see Leidy, *Another New Tort*, 38 MICH. L. REV. 964 (1940).

used literature in his sales talk supplied by Ford which stated that the windshield of the car was shatterproof. The plaintiff was severely injured when a small pebble thrown up by a passing car shattered the windshield. The court held Ford liable, saying:

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 that they were false, or that he believed them to be true.¹²

In the past thirty-five years, *Baxter* has gained considerable support.¹³ Liability for innocent misrepresentations has been imposed in twenty states; the legal commentators have been virtually unanimous in their approval of *Baxter*;¹⁴ and the *Restatement of Torts* has taken the position that the seller is liable "for physical harm to a consumer of a chattel caused by justifiable reliance upon a misrepresentation, even though (a) it is not made fraudulently or negligently, and (b) the consumer has not bought the chattel from or entered into an contractual relation with the seller."¹⁵ One of the most eloquent arguments supporting this trend was made in *Rogers v. Toni Home Permanent Company*.¹⁶ There the court said:

The consuming public ordinarily relies exclusively on the representation of the manufacturer in his advertisements Surely under modern merchandising practices the manufacturer owes a real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.¹⁷

There are three primary requirements in a cause of action for innocent misrepresentation: (1) a misrepresentation, (2) justifiable reliance on the misrepresentation, and (3) injuries resulting from

¹² 179 Wash. at 128, 35 P.2d at 1092.

¹³ The cases are collected in W. PROSSER, *TORTS* 684-85 (3d ed. 1964).

¹⁴ For a review of the legal writing on the *Baxter* case, see GILLIAM, *PRODUCT LIABILITY IN THE AUTOMOBILE INDUSTRY* 89 (1960).

¹⁵ *RESTATEMENT (SECOND) OF TORTS* § 402B (1985).

¹⁶ 167 Ohio St. 244, 147 N.E.2d 612 (1958).

¹⁷ *Id.* at 248, 147 N.E.2d at 615.

the reliance. To prove that the defendant made a misrepresentation, the plaintiff must show (1) an untrue statement, and (2) that the untrue statement was a representation and not merely "puffing" or the expression of an opinion.¹⁸ Further, the misrepresentation must be material.¹⁹ The form that the misrepresentation takes is irrelevant.²⁰ Manufacturers have been held liable for misrepresentations contained in circulars,²¹ bills of lading,²² and manuals.²³ Reliance is much more difficult to prove.²⁴ It can be shown in three ways: (1) the consumer relied on the representation in making the purchase, (2) the consumer relied on the representation in continuing to use the product, and (3) the representation affected the consumer's operation or use of the product at the time of the accident. In most cases, there is little more that the injured consumer can do than testify that he relied on the representation in one or more of the above ways. Even if he is able to convince the jury as to reliance, he still must prove that the reliance was justifiable.²⁵

The above paragraph reveals the limitations of the misrepresentation remedy. While liability for innocent misrepresentations represents a significant liberalization of the law of misrepresentation, it is far from an adequate remedy. It is available in only a fraction of the products liability cases, and, even where available, there are serious proof problems. Thus it cannot be said that the availability of this theory of recovery precludes a need for strict liability in tort.

III. NEGLIGENCE

A products liability case based on negligence is much the same as any other negligence action. Negligence in a products liability

¹⁸ See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 836 (1966).

¹⁹ *Id.* at 837.

²⁰ See RESTATEMENT (SECOND) OF TORTS § 402B, comment h (1965); Prosser, *Misrepresentations and Third Persons*, 19 VAND. L. REV. 231, 245 (1966).

²¹ See *Brown v. Globe Lab.*, 165 Neb. 138, 84 N.W. 2d 151 (1952); cf. Spies, *Surgical Materials That Fail: A Medicolegal Study in Liability*, 14 ARK. L. REV. 1, 22 (1959).

²² See *Laclede Steel Co. v. Silas Mason Co.*, 67 F. Supp. 751 (W.D. La. 1946).

²³ See *Mannsz v. Macwhyte*, 155 F. 2d 445 (3d Cir. 1946).

²⁴ See *Freezer, Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles*, 37 MICH. L. REV. 1, 14 n. 28 (1938).

²⁵ See *Harper & McNeely, A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 941 (1938).

case has the same five basic elements as negligence in any tort litigation: (1) duty, (2) breach of duty, (3) cause in fact, (4) proximate cause, and (5) damages.

As to duty, the law is the same in both situations. Generally speaking, a manufacturer has a duty to use due care in the design,²⁶ construction,²⁷ assembly²⁸ and inspection²⁹ of his products in order to insure that his merchandise will not create an unreasonable risk of harm to the consuming public. Since the basis of the liability is negligence, the standard of care is that care that a reasonable man would exercise under the circumstances.

It is with regard to proof of breach of duty—negligence—that the established principles of tort liability for negligence break down in products liability cases. In the ordinary negligence case, eye-witnesses to the negligent act are common. This is not true of a products liability case. The injured consumer rarely, if ever, has any direct evidence of what has occurred. Most of this information is known only to the defendant manufacturer. Thus the plaintiff in a negligence action against the manufacturer generally resorts to circumstantial evidence and employs the doctrine of *res ipsa loquitur*.³⁰ There are three well recognized conditions precedent to the invocation of *res ipsa loquitur*:

1. the accident which allegedly caused the plaintiff's injuries was one which would not have ordinarily occurred unless someone had been negligent;
2. the mishap was caused by an instrumentality that was entirely within the defendant's control;
3. the accident was not due to some voluntary action or contribution of the plaintiff.³¹

Whether these three conditions have been shown in a particular case is a question for the jury to answer, unless, of course, the

²⁶ See Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

²⁷ See, e.g., *McKee v. Brunswick Corp.*, 354 F.2d 577 (7th Cir. 1965); *Elliott v. General Motors Corp.*, 296 F.2d 125 (7th Cir. 1961), cert. denied, 369 U.S. 860 (1962).

²⁸ See I L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 10.02 (1966).

²⁹ See, e.g., *Gonzales v. Virginia-Carolina Chem. Co.*, 239 F. Supp. 567 (E.D.S.C. 1965); *Ford Motor Co. v. Arguelio*, 382 P.2d 886 (Wyo. 1963).

³⁰ For an extensive analysis of the application of *res ipsa loquitur* in products liability litigation see Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 SW. L.J. 26, 35-42 (1965).

³¹ See W. PROSSER, *TORTS* § 39 (3d ed. 1964).

trial judge concludes as a matter of law that a jury cannot reasonably find from the evidence presented that the conditions existed.

The trial judge will reach exactly this conclusion in the vast majority of products liability cases if the second requirement—exclusive control by the defendant at the time of the mishap—is imposed, since in the vast majority of products liability cases, at the time of the mishap, the product is entirely within the plaintiff's control.³² Some courts have strictly applied the exclusive control requirement: they have held that a plaintiff can demonstrate the requisite degree of control only by proving that the defendant was in control of the product at the time of the accident.³³ A number of food and beverage cases, however, have held that the product need only be within the manufacturer's control at the time of the negligent act;³⁴ the control of the product at the time of the mishap is immaterial. The leading such case is *Escola v. Coca Cola Bottling Company*.³⁵ There plaintiff, a waitress, was injured when a bottle broke in her hand. She alleged that defendant manufacturer was negligent in bottling the drink.³⁶ Since she had no direct evidence of the negligence, she relied on *res ipsa loquitur*. In sustaining her claim, the California Supreme Court said:

Many authorities state that the happening of the accident does not speak for itself when it took place some time after the defendant had relinquished control Under the more logical view, however, the doctrine [*res ipsa loquitur*] may be applied upon the theory that defendant had control at the time of the alleged negligent act, although not at the time of

³² This has prompted Dean Keeton to formulate three different requisities to the imposition of *res ipsa loquitur* in products liability cases:

1. the injury resulted from an accident attributable to a defect in the product;
2. the defect was probably present when the manufacturer relinquished control;

3. the defect was a kind that would not ordinarily be present unless the manufacturer had been negligent. See Keeton, *Products Liability—Problems Pertaining to Proof of Negligence*, 19 Sw. L.J. 26, 36 (1965).

³³ See, e.g., *Vandercook & Son, Inc. v. Thorpe*, 322 F.2d 638 (5th Cir. 1963); *Sheing v. Remington Arms Co.*, 48 Del. 591, 108 A.2d 364 (1954).

³⁴ See, e.g., *Zentz v. Coca Cola Bottling Co.*, 39 Cal.2d 436, 247 P.2d 344 (1952); *Keller v. Coca Cola Bottling Co.*, 214 Ore. 654, 330 P.2d 346 (1958). See generally 1 L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 12.03 (3) (1966); Hensel, *Food, Beverages and Their Containers*, 1964 ILL. L. F. 705, 708-10.

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

³⁶ See generally *Bishop Trouble in a Bottle*, 16 BAYLOR L. REV. 337 (1964); Spangenberg, *Exploding Bottles*, 24 OHIO ST. L.J. 516 (1963).

the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.³⁷

There is no sound reason for limiting this reasoning to food and beverage cases. Although one court has done exactly this,³⁸ several others have held that *res ipsa* is applicable regardless of defendant's lack of control of the instrumentality of harm at the time of the mishap, even in cases where the injury was caused by a product other than food or beverage.³⁹

While there is a theoretical debate as to the procedural effect of the invocation of *res ipsa loquitur*,⁴⁰ its practical effect is clear. Where the plaintiff has made out a *res ipsa loquitur* case, he avoids a directed verdict; the case goes to the jury. Plaintiffs rarely lose *res ipsa loquitur* cases at the jury's hands.⁴¹ Therefore even in an action based on negligence the plaintiff can recover from the manufacturer merely by showing that the product was defective when it left the manufacturer's control.⁴² The liberal interpretation of the exclusive control requirement expands a manufacturer's liability to strict liability in tort under the guise of negligence.

IV. IMPLIED WARRANTY

A cause of action for breach of an implied warranty was first recognized in 1815 in the case of *Gardiner v. Gray*.⁴³ There the parties had contracted for the sale of a quantity of silk without any express agreement or representation as to the quality of the silk. Inspecting the silk on arrival, the buyer found it to be unmerchantable and sued for breach of contract. In allowing damages, Lord Ellenborough said:

I am of the opinion, however, that under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular war-

³⁷ 24 Cal. 2d at 458, 150 P.2d at 438.

³⁸ *Patrol Valve Co. v. Farrell*, 316 S.W.2d 92, 96 (Tex. Civ. App. 1958).

³⁹ See, e.g., *Bustamente v. Carborundum Co.*, 375 F.2d 688 (7th Cir. 1967); Comment, *Products Liability—The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350, 1365 (1965).

⁴⁰ See 2 F. HARPER & F. JAMES, TORTS § 19.11 (1956).

⁴¹ *Id.*; Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 8-9 (1965).

⁴² Cf. Witherspoon, *Manufacturer's Negligence in Products Liability Cases*, 5 B.C. IND. & COM. L. REV. 585, 586-87 (1964).

⁴³ 4 Camp. 144, 171 Eng. Rep. 46 (1815).

ranty, this is an implied term in every contract He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them.⁴⁴

From the above excerpt, it would seem that there is no need for strict liability in tort—that implied warranty affords an adequate remedy. While breach of implied warranty is the most popular theory in the area of products liability today,⁴⁵ it is far from sufficient.

The action for breach of warranty was originally tortious in nature.⁴⁶ With the development of the action of *assumpsit*, however, warranty came to be recognized as part of the law of sales.⁴⁷ Thus when a court considers a claim for breach of warranty, it must consider the bars to recovery imposed by the law of sales. This was logical so long as the injuries alleged were commercial in nature, however, the logic of applying the law of sales to a recovery for personal injuries is, at best, questionable.

The most notable bar to recovery imposed by the law of sales is the requirement of privity.⁴⁸ In 1842, *Winterbottom v. Wright*,⁴⁹ established the general rule that a manufacturer is not liable to a consumer with whom he is not in privity. The requirement was first abolished in warranty cases involving products for human consumptions.⁵⁰ Although the legal writers argued that there was no logical reason for treating food and non-food cases differently,⁵¹

⁴⁴ *Id.* at 145, 171 Eng. Rep. at 47.

⁴⁵ See Comment, *The Contractual Aspects of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430 (1966).

⁴⁶ See 1 S. WILLISTON, SALES § 195 (rev. ed. 1948).

⁴⁷ See Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 6 (1965).

⁴⁸ See generally Comment, *The Contractual Aspects of Consumer Protection: Recent Developments in the Law of Sales Warranties*, 64 MICH. L. REV. 1430 (1966).

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

⁵⁰ See *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942). Today as regards food and drugs, the weight of authority is that a buyer can recover from the seller on an implied warranty without showing privity. See Keeton, *Products Liability—Current Developments*, 40 TEXAS L. REV. 193, 205-6 (1961).

⁵¹ See, e.g., *Freezer, Manufacturer's Liability for Injuries Caused By His Products: Defective Automobiles*, 37 MICH. L. REV. 1, 27 (1938); *James, Products Liability*, 34 TEXAS L. REV. 192 (1955). As James points out, "[T]he food area is not the most dangerous field. Greater peril lurks in a defective automobile than in a pebble in a can of beans."

the courts were hesitant to eliminate the requirement in non-food cases.⁵² Finally, the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors, Inc.*,⁵³ abolished the privity requirement in a non-food case.

In *Henningsen*, the plaintiff was injured while driving a new automobile purchased by her husband from a franchised dealer. Plaintiff sued the manufacturer and dealer on the theory of breach of implied warranty of suitability for use. Despite the absence of privity, the court found the manufacturer liable, saying:

Under modern conditions the ordinary layman . . . must rely on the manufacturer who has control of its construction . . . [and] his remedies . . . should not depend "upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon 'the demands of social justice.' " . . .⁵⁴

After *Henningsen*, courts in other states followed suit in what has been described as the most "spectacular overturn of an established rule in the entire history of the law of torts."⁵⁵ Today twenty-nine states do not require privity in an action for breach of an implied warranty, regardless of the type of product.⁵⁶ Most of the others simply have not been presented the opportunity to abolish the privity requirement.

While privity has been the center of the courts and commentators attention, it is not the only problem inherent in the warranty concept. There must be a sale;⁵⁷ also a buyer cannot recover for breach of warranty unless he gives notice of the breach to the seller within a reasonable time after he knows or should have known

⁵² For a step by step account of the development, see Jaeger, *Warranties of Merchantability and Fitness for Use: Recent Developments*, 16 *RUTGERS L. REV.* 493, 494-500 (1962).

⁵³ 32 N.J. 353, 161 A.2d 69 (1960).

⁵⁴ *Id.* at 384, 161 A.2d at 83.

⁵⁵ See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *MINN. L. REV.* 191, 193-94 (1966).

⁵⁶ *Id.* at 794-796; *B.B.P. Ass'n v. Cessna Aircraft Corp.*, 420 P.2d 134 (Idaho 1966); *State Stove Co. v. Hodges*, 189 So.2d 113 (Miss. 1966); *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 420 P.2d 855 (Nev. 1966); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966).

⁵⁷ See, e.g., *Lasky v. Economy Grocery Stores*, 319 Mass. 224, 65 N.E.2d 305 (1946); *Cheshire v. Southampton Hosp. Ass'n*, 278 N.Y.S.2d 531 (1967). But cf. James, *Products Liability*, 34 *TEXAS L. REV.* 192, 199-201 (1955).

of the breach.⁵⁸ Further, liability founded upon warranty—either expressed or implied—is subject to disclaimer,⁵⁹ and almost every manufactured product accompanied by an express warranty is accompanied by a disclaimer. Recently, however, the enforcement of disclaimers against consumers has come under attack. Several legal writers have urged that certain disclaimers should be unenforceable as violative of public policy.⁶⁰ Strong arguments can be made in support of this position. The average consumer is helpless when confronted with the average warranty disclaimer. If the warranty disclaimer is at all average, chances are that the consumer will not even notice it. Disclaimers generally appear in small print on standard forms, or on the back of the container. The consumer is little better off if he does notice the disclaimer. He does not have the ability to determine whether he should accept the goods on the terms set forth. Moreover, the seller is usually without authority to vary the terms of the disclaimer. The New Jersey Supreme Court in *Henningsen*⁶¹ utilized these arguments⁶² to strike down the standard disclaimer used by the Automobile

⁵⁸ The Uniform Commercial Code provides that "the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." Uniform Commercial Code § 2-607(3)(a). See generally Jaeger, *How Strict is the Manufacturer's Liability? Recent Developments*, 48 MARQ. L. REV. 293, 309-12 (1964).

⁵⁹ See, e.g., *Myers v. Land*, 314 Ky. 514, 235 S.W.2d 988 (1950); 1 S. WILLISTON, SALES § 239 (rev. ed. 1948). See generally Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

⁶⁰ See Boshkoff, *Some Thoughts About Physical Harm, Disclaimers, and Warranties*, 4 B.C. IND. & COM. L. REV. 285, 305 (1962); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Products Cases*, 18 STAN. L. REV. 974, 1019 (1965); R. Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 135 (1961); Philo, *Automobile Products Liability Litigation*, 4 DUQUESNE L. REV. 181, 187 (1966); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 833 (1966). See generally Comment, *Products Liability, Breach of Warranty and the Waning of Some Classic Defenses*, 7 S.D.L. REV. 124, 133-40 (1962).

⁶¹ 32 N.J. at 385-406, 161 A.2d at 84-86.

⁶² There is disagreement as to the reason the disclaimer was not given effect. The student writers are of the view that it was because of the disparity in bargaining power. See, e.g., 46 CORNELL L.Q. 607 (1961); 74 HARV. L. REV. 630, 631 (1961). Two eminent professors of commercial law, however, say that the disclaimer was struck down because it did not clearly appraise the consumer of his limited rights. See 1 W. HAWKLAND, *A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE* 81 (1964); Boshkoff, *Some Thoughts About Physical Harm, Disclaimers, and Warranties*, 4 B.C. IND. & COM. L. REV. 285, 305-06 (1963).

Manufacturers Association.⁶³ Several other courts have taken similar action.⁶⁴

As the above paragraphs indicate, the sales law of warranty is changing—becoming more liberal. In a number of jurisdictions, some of the bars to recovery have been removed. Again the liberalization has the practical effect of expanding a manufacturer's liability to strict liability in tort. This time it is under the guise of breach of warranty.

V. STRICT LIABILITY IN TORT

Because of the difficulties imposed by the law of sales, a number of the leading commentators in the area of products liability urged that courts discard the word "warranty" with all its contractual implications and talk of strict liability in tort.⁶⁵ Until 1963, courts confused strict liability in tort and implied warranty. They used the term "implied warranty" when the phrase "strict liability in tort" far better described the theory they were allowing recovery under. Implied warranty and strict liability in tort are conceptually distinguishable: the former is transactional; the latter is behaviorable.⁶⁶ Far more important, however, is the practical difference already mentioned: disclaimers and the other niceties of the law of sales are not involved in an action in strict liability in tort.

The first case to adopt the strict liability in tort approach was *Greenman v. Yuba Power Products, Inc.*⁶⁷ In *Greenman*, the plaintiff was injured when a piece of wood he was turning on a lathe purchased from a retail store came loose and struck him on the head. He brought an action against the manufacturer and the seller of the machine in negligence and breach of warranty.⁶⁸ The jury found for the plaintiff; the manufacturer appealed on the

⁶³ It should be noted that this very same disclaimer has been upheld in several cases since *Henningsen*. See, e.g., *Marshall v. Murray Oldsmobile Co.*, 154 S.E.2d 140 (Va. 1967); *Payne v. Valley Motor Sales, Inc.*, 146 W. Va. 1063, 124 S.E.2d 622 (1962).

⁶⁴ See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN L. REV. 791, 833 (1966).

⁶⁵ See, e.g., Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

⁶⁶ See McCurdy, *Warranty Privity in Sales of Goods*, 1 HOUS. L. REV. 201 (1964). See also Boshkoff, *Some Thoughts About Physical Harm, Disclaimers, & Warranties*, 4 B.C. IND. & COM. L. REV. 285 (1962).

⁶⁷ 59 Cal.2d 57, 377 P.2d 897 (1963).

⁶⁸ In virtually all subsequent cases which adopted strict liability in tort, the plaintiff pleaded breach of warranty and made no mention of strict liability in tort.

ground that the plaintiff was barred from recovery by his failure to give notice of the breach of warranty to the manufacturer. The California Supreme Court in an unanimous opinion by Justice Traynor⁶⁹ rejected this contention, saying:

Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that liability is not assumed by agreement, but is imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility . . . make clear that the liability is not one governed by the law of contract warranties, but by the law of strict liability in tort. Accordingly, rules defining and governing warranties . . . cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products . . .⁷⁰

Greenman was lavishly praised by the note writers.⁷¹ In the four years since the decision, numerous cases have taken a similar position.⁷² Further the *Restatement (Second) of Torts* has adopted strict liability in tort.⁷³ It is not inaccurate to say that strict liability in tort is the law of the present.⁷⁴

Despite extensive treatment of the subject in numerous opinions,⁷⁵ books,⁷⁶ and law review articles,⁷⁷ a considerable number of attorneys still do not understand the basic nature of strict liability

⁶⁹ Products liability must be added to the growing list of fields of law in which Roger Traynor has had a tremendous impact. See *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, concurring); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

⁷⁰ 59 Cal.2d at 63, 377 P.2d at 901.

⁷¹ See, e.g., 15 STAN. L. REV. 381 (1963); 17 Sw. L.J. 669 (1964).

⁷² See Annot., 13 A.L.R.3d 1057, 1071-77 (1967).

⁷³ See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

⁷⁴ In fact, this is exactly what Dean John Wade of Vanderbilt Law School told a group of defense attorneys. See Wade, *Recent Developments in the Law of Strict Liability*, 33 INS. COUNSEL J. 552, 553 (1966).

⁷⁵ See, e.g., *Picker X-ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. Mun. Ct. App. 1962); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

⁷⁶ See, e.g., L. FRUMER & M. FRIEDMAN, *PRODUCTS LIABILITY* (1966); R. HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* (1961).

⁷⁷ See, e.g., Freedman, *Defect in the Product: The Necessary Basis for Product Liability in Tort and in Warranty*, 33 TENN. L. REV. 323 (1966); Keeton, *Products Liability—The Nature and Extent of Strict Liability*, 1964 ILL. L.F. 693.

in tort. Under strict liability in tort, a manufacturer is not an insurer. Strict liability is not absolute liability. Section 402A of the *Restatement (Second) of Torts* establishes the following pre-requisites for recovery under strict liability in tort:

- (1) the product was defective;
- (2) the defect existed when the product left the manufacturer's control;
- (3) the presence of the defect made the product unreasonably dangerous;
- (4) the defect caused the accident;
- (5) as a result of the accident, the plaintiff suffered injuries.

The word "defect" has been defined in various ways: the New Jersey Supreme Court defined a defective product as one "not reasonably fit for the ordinary purposes for which such articles are sold and used";⁷⁸ Traynor defines a defective product as one that fails to meet the average quality of like products;⁷⁹ the *Restatement of Torts* defines it as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him";⁸⁰ Professor Marc Franklin of Stanford Law School says that defective means the same thing as "unmerchantable" in sales warranty law.⁸¹ Professor Kessler is critical of all the above definitions and feels that products liability law can keep up with the changing times only if defect is an "accordion-like, open-ended term."⁸²

The quantum of proof necessary to sustain the plaintiff's burden on defect has also varied. The commentators are unanimous in saying that mere use of a product accompanied by an injury does not in and of itself establish the existence of a defect.⁸³ The courts, however, have not always adhered to this. The only explanation for the finding of liability in *Bronson v. J. L. Hudson and Co.*,⁸⁴

⁷⁸ *Santor v. A & M Karagheusian*, 44 N.J. 52, 67, 207 A.2d 305, 313 (1965).

⁷⁹ Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 367 (1965).

⁸⁰ RESTATEMENT (SECOND) OF TORTS § 402, Comment g (1965).

⁸¹ See Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974, 978 (1966).

⁸² See Kessler, *Products Liability*, 76 YALE L.J. 887, 931 (1967).

⁸³ See, e.g., Freedman, *Defect in the Product: The Necessary Basis for Product Liability in Tort and in Warranty*, 33 TENN. L. REV. 323 (1966); Jackson, *Wrestling with Strict Liability*, 1966 INS. L. J. 133; Keeton, *Products Liability—Liability Without Fault and the Requirement of Defect*, 41 TEXAS L. REV. 855 (1963).

⁸⁴ 376 Mich. 98, 135 N.W.2d 388 (1965).

and *John Brown, Inc. v. Shelton*,⁸⁵ is that the courts took the position that proof of use of a product accompanied by injury is sufficient to hold a manufacturer liable. This has prompted one legal writer to predict that in the future proof of defect will not be a requisite to recovery under strict liability in tort.⁸⁶

Clearly, the existence of a defect may be proved by direct evidence such as introduction of the product. It is equally well settled that the existence of a defect can be shown by circumstantial evidence such as the testimony of an expert who has examined the product after the accident and who identifies the specific defect. In some cases, however, even this testimony is not available. *Henningsen* is a notable example. There the plaintiff was driving a new automobile purchased ten days previously when it suddenly veered sharply off the road, colliding with roadside objects, demolishing the automobile and causing personal injuries to the plaintiff. The only evidence of a defect in the automobile noted in the appellate court opinion was testimony of the plaintiff that she heard a loud noise "from the bottom of the hood which felt as if something had cracked".⁸⁷ Nevertheless, the New Jersey Supreme Court held that the evidence was sufficient to raise an inference that the new car was defective.⁸⁸

Generally, there is even less evidence that the defect existed when the manufacturer relinquished control. Only in a rare case, as for example where a foreign object is found in a sealed container, is there any evidence of this. Thus the plaintiff usually must rely on inferences. The longer the interim between the sale date and the date of the injury, the weaker the inference that the defect existed when the manufacturer relinquished control. Also, the

⁸⁵ 391 P.2d 259 (Okla. 1964).

⁸⁶ See Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965).

⁸⁷ In *Henningsen*, the plaintiff's expert admitted that the defect could have been caused by improper servicing. See Milling, *Henningsen and the Pre-Delivery Inspection and Conditioning Schedule*, 16 RUTGERS L. REV. 559, 562 (1962). The New Jersey Supreme Court made no mention of this in its opinion. Little has been written on the liability of the manufacturer for improper servicing by his retailer. Under the position taken by the Restatement, the manufacturer would not be liable. See RESTATEMENT (SECOND) OF TORTS § 402A, comment g (1965). The California Supreme Court has taken a contrary stand. See *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 391 P.2d 168 (1964).

⁸⁸ Several legal commentators are very critical of *Henningsen* for this reason. See, e.g., Condon, *Products Liability Problems*, 57 NW. U. L. REV. 536, 542-45 (1962); Keeton, *Products Liability—Some Observations About Allocation of the Risk*, 64 MICH. L. REV. 1329, 1340 (1964).

longer the use, the greater the possibility of owner abuse. It must be noted that the courts have been extremely liberal in inferring that the defect existed when the manufacturer relinquished control. In *Vandermark v. Ford Motor Co.*,⁸⁹ for example, the car in question had been shuttled from dealer to dealer for some six months prior to the sale to plaintiff. After the plaintiff had driven the car for some fifteen hundred miles, it went out of control and crashed into a light pole. The court still held that the defect existed when the manufacturer relinquished control.

In the vast majority of product liability cases, if the plaintiff can prove that the product was defective, he will have little problem showing that the defect made the problem unreasonably dangerous.⁹⁰ Difficulties arise most frequently when the product in question is unavoidably unsafe. These products are fairly common in the field of drugs. The restatement position here is clearly correct: such products if properly prepared and accompanied by appropriate directions are neither defective nor unreasonably dangerous.⁹¹ A similar rule governs products containing an ingredient to which some people are allergic: if such products are accompanied by adequate warnings and instructions, they are not unreasonably dangerous.⁹²

A recent article in *Consumers Report*⁹³ graphically illustrates the importance of requiring the proof of a causal relationship between the defect and the accident as a pre-requisite to recovery under strict liability in tort. The article states that 100% of a random sample of new 1965 automobiles tested were defective in some respect. If proof of causation were not required, the owner of any car in this group could under strict liability in tort recover for any injury incurred while driving the car. Little has been said about causation in strict liability cases by either the court or the com-

⁸⁹ 61 Cal.2d 256, 391 P.2d 168 (1964).

⁹⁰ RESTATEMENT (SECOND) OF TORTS § 402A, comment i (1965) defines unreasonably dangerous as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

⁹¹ RESTATEMENT (SECOND) OF TORTS § 402A, comment k (1965); cf. Comment, *The Manufacture, Testing and Distribution of Harmful New Drugs: The Applicability of Strict Liability*, 28 PITT. L. REV. 37 (1966).

⁹² See RESTATEMENT (SECOND) OF TORTS 402A, comment j (1965); Freedman, *Allergy and Products Liability Today*, 24 OHIO ST. L.J. 479 (1963). See generally 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 28-31 (1966); Whitmore, *Allergies and Other Reactions Due to Drugs and Cosmetics*, 19 SW. L.J. 76 (1965).

⁹³ CONSUMERS REPORTS, April 1965, at 175.

mentators. It would seem that most questions as to causation can be resolved by reference to "traditional" strict liability case since proximate cause is used to restrict liability there also.⁹⁴

VI. THE MODEST PROPOSAL

Numerous law review articles have been written advocating the adoption of strict liability in tort;⁹⁵ there are several articles that support the contrary view.⁹⁶ The arguments in favor of imposing strict liability in tort are separable into the following three categories:

1. The necessity of proving negligence is often an impossibly heavy burden on the plaintiff;
2. The imposition of strict liability in tort will provide incentive for manufacturers to make their products safer;
3. The responsibility for the loss due to use of a defective product should be borne by the party best able to carry or distribute it.

Countering these arguments, three general theories have been advanced in opposition to a system of strict liability:

1. The imposition of strict liability in tort will impede the development of new and beneficial products;
2. The adoption of strict liability in tort will result in a flood of fraudulent claims;
3. As a philosophical matter, strict liability is foreign to our way of living.

The first two arguments in favor of strict liability in tort suffer one serious shortcoming—they are incorrect. First, it is little, if any, easier to prove a cause of action in strict liability in tort than in negligence. Proving that the injury complained of was caused by a defective product and that the defect existed when the product

⁹⁴ See Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 23 (1965). See generally W. PROSSER, TORTS 535 (3d ed. 1964); Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001 (1931).

⁹⁵ See, e.g., Prosser, *The Assault Upon the Citadel, (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

⁹⁶ See, e.g., German, *Products Liability—Strict Liability*, 33 INS. COUNSEL J. 259 (1968); Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957).

left the manufacturer's control—the principal elements to recovery in strict liability in tort—are the most serious obstacles to recovery under a negligence theory. Dean Prosser estimates that not even in one case out of one hundred could a person recover against a manufacturer in strict liability in tort but not in negligence.⁹⁷ The second argument can best be answered by the following rhetorical question: why should a manufacturer who is unaffected by the prospect of injury to his business reputation and the threat of broad liability for negligence via *res ipsa loquitur* be affected by the imposition of strict liability in tort?

The arguments against strict liability in tort are equally open to attack. Arguments one and two are actually answered by the discussion of the arguments in favor of strict liability in tort. This does not mean that with the advent of strict liability in tort there will be no fraudulent claims. As one commentator put it: "the rats of Hamlin were as nought in comparison with that horde of mice which has sought refreshment within Coca-Cola bottles."⁹⁸ However, there should be no increase in the number of fraudulent claims. A fraudulent claimant is as likely to invent negligence as he is to invent a defect. Finally, with regard to the third argument, it should be noted that strict liability has long been a part of Anglo-American jurisprudence in the keeping of wild animals, in the case of unnatural substances that escape, and workmen's compensation.⁹⁹

Thus virtually all of the policy arguments relating to strict liability in tort, both favorable and unfavorable, are entitled to be considered at most as makeweights. Only the risk spreading argument that the manufacturer is better equipped to distribute loss has any real substance,¹⁰⁰ and it presents an extremely close

⁹⁷ Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114 (1960). Cf. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 9 (1965).

⁹⁸ Spruill, *Privity of Contract as a Requisite for Recovery on Warranty*, 19 N.C.L. REV. 551, 566 (1941).

⁹⁹ For an extensive discussion of strict liability in areas other than products liability, see 2 F. HARPER & F. JAMES, *TORTS* ch. 14 (1956).

¹⁰⁰ There are three primary situations in which the allocation of risk under strict liability differs from that under negligence:

(1) where the jurisdiction has not liberalized the requirements of *res ipsa*;

(2) where the plaintiff proceeds against a seller other than a manufacturer;

In some instances it is either impractical or impossible to bring an action against the manufacturer, and the plaintiff must look to the retailer, distributor,

question¹⁰¹ that lends itself more to legislative than judicial determination.¹⁰² Thus, in a state with a clean slate as to products liability law, the adoption of strict liability in tort presents a very close and difficult question. In most states, however, the slate is not clean. In varying degrees, in nearly every jurisdiction, courts bastardized traditional theories of liability in products liability cases in order to compensate the injured consumer: in negligence, the requisites of *res ipsa loquitur* have been altered; in warranty, the privity requirement has been virtually abolished. In these "progressive" jurisdictions, the essential requisites to recovery under breach of warranty or negligence in products liability cases virtually mirror the requisites under strict liability in tort; in these states, the advisability of adopting strict liability in tort is much clearer.

or wholesaler for relief. It is here that negligence breaks down. These intermediate sellers usually are not negligent; they owe no duty to inspect or test for defects. See 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 18.03, 20.01 (1966). Strict liability, however, does apply to retailers. See, e.g., *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 391 P.2d 168 (1964); *Simpson v. Power Prods., Inc.*, 24 Conn. Supp. 409, 192 A.2d 555 (1963); RESTATEMENT (SECOND) OF TORTS § 402A, comment *f* (1965). *Contra* *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965). The same is true as to wholesalers and distributors. See, e.g., *Canifax v. Hercules Powder Co.*, 46 Cal. Rptr. 522 (Dist. C. App. 1965); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Texas 1967); RESTATEMENT (SECOND) OF TORTS § 402A, comment *f* (1965).

(3) where the plaintiff has negligently failed to discover the defect.

This is a defense to an action based on negligence but not to one grounded on strict liability in tort. See *Shamrock Fuel & Oil Sales Co., Inc. v. Tunks*, 416 S.W.2d 779 (1967). See generally Annot., 4 A.L.R.3d 501 (1965); Comment, *Contributory Negligence as a Defense to a Warranty Action*, 39 TEMP. L. Q. 361 (1965). This does not mean that contributory negligence is not a defense to an action based on strict liability in tort. The legal writers distinguish between different kinds of contributory fault on the part of the injured party: (1) negligence in failing to discover the defect, (2) use of the product after discovery of the defect, (3) improper use. As to (1), contributory negligence is not a defense; as to (2) and (3), it is. See, e.g., W. PROSSER, TORTS 656 (3d ed. 1964); Wade, *Strict Liability of Manufacturers*, 19 Sw. L.J. 5, 22 (1965).

¹⁰¹ The question of allocation of loss is one of the most difficult and most crucial facing legal theorists today. Making no claim to being a legal theorist, I can merely point out the most recent writings of men who are. See Calabresi, *Some Thoughts On Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Green, *The Thrust of Tort Law* (pts. 1-3), 64 W. VA. L. REV. 1, 115, 241 (1961-1962); James, *An Evaluation of the Fault Concept*, 32 TENN. L. REV. 394 (1965); P. Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329 (1966); R. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Weaver, *Allocation of Risk in Products Liability Cases: The Need for a Revised Third-Party-Beneficiary Theory in UCC Warranty Actions*, 52 VA. L. REV. 1028 (1966).

¹⁰² See German, *Products Liability—Strict Liability?* 33 INS. COUNSEL J. 259 (1966); James, *General Products—Should Manufacturers Be Liable Without Negligence*, 24 TENN. L. REV. 923, 924 (1957).

An obvious advantage of this modest proposal is the clarification of legal principles. Present day product liability litigation certainly lends credence to Justice Holmes' memorable statement: "It is the merit of the common law that it decides the case first and determines the principle afterwards."¹⁰³ Afterwards has now come; the principles should be determined. I do not make this proposal merely to satisfy the legal purists or make the law easier for the lackadaisical law student. There are practical reasons for adopting this proposal. Because of the confused state of law as to a manufacturer's liability to an injured consumer, a litigant is confronted with a multitude of problems. Among them,

1. Under what theory should he proceed?
 2. How important is the election of remedies?
 3. What statute of limitations is applicable?
 4. What choice of law rule is applicable?¹⁰⁴
 5. Will *res ipsa* be altered and the privity requirement ignored where the losses allegedly suffered are economic in nature?¹⁰⁵
- The questions cannot be answered until the courts clear up the law of products liability.

¹⁰³ Holmes, *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

¹⁰⁴ See generally Weintraub, *Choice of Law for Products Liability: The Impact of the Uniform Commercial Code and Recent Developments in Conflicts Analysis*, 44 TEXAS L. REV. 1429 (1966).

¹⁰⁵ Compare *Seely v. White Motor Co.*, 59 Cal.2d 57, 403 P.2d 145, 45 Cal. Rptr. 17 (1965) with *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). See generally Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966).