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A Teaching Note on Strict Liability in Tort

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Abstract
Before the *Greenman* decision in 1963, a plaintiff in a products liability case had to rely on the theories of negligence, breach of warranty, or misrepresentation or fraud for recovery. These theories were not specific to products cases and presented plaintiffs with certain formidable "obstacles." Because of the many issues raised in applying these theories, courts began to search for a more rational theory for determining liability which would move away from judging the conduct of an actor and instead would focus on the product itself. In Part 6 of the Series on Teaching Notes, the authors focus on the theory of strict liability in tort as the now *preferred* method of compensating parties for injuries caused by a defective product.

Keywords: Strict Liability in Tort, Product Defects, Franchising, Used Products, Leasing, Service Transactions, Misuse, Bystanders, Assumption of Risk

1. Introduction

The area of law termed *products liability* is a mixture or a hybrid of both contract law, involving either *express or implied promises, found in the law of warranties,* and tort law, based upon specific *conduct,* oftentimes reflected in a *negligence standard,* or actions based on *fraud* or *misrepresentation*. In general terms, products liability refers to the potential liability of manufacturers, wholesalers or other middlemen, or retailers/sellers, as well as other parties, to consumers, purchasers, users, and even bystanders when a product is found to be defective. No matter what the underlying theory of liability, the predicate of a suit in products liability is a *defective product*. As the Supreme Court of New Jersey stated in *Feldman v. Lederle Laboratories* (1984): "The emphasis of the strict liability doctrine is upon the safety of the product, rather than the reasonableness of the manufacturer's conduct. It is a product-oriented approach to responsibility." This defect can arise from three common sources:

1. A manufacturing or production defect—that occurs from a random and atypical breakdown in the manufacturing process (Owen, 2002).
2. A design defect—that is characteristic of a whole product line (Owen, 2008), for example, the Ford Pinto (Strother, 2018).

3. A marketing defect—involving inadequate warnings concerning risks or dangers, or inadequate instructions or labels relating to how to properly or safely use a product, with many cases in the area of a marketing defect (Ausness, 2002) involving food, drugs, venetian blinds, or more recently, children's toys, cribs (Hunter & Montuori, 2012), or car seats.

Under the common law, there were three theories under which a plaintiff could bring suit for personal injury, property damages, or economic damages caused by a defective product (Hunter, Amoroso, & Shannon, 2012b):

1. Negligence**,** an action brought in tort, focuses on the defendant's conduct or omission to act and whether that conduct or omission was *reasonable* in light of defendant's duty of due care (see generally Hunter, Shannon, Amoroso, 2023a). Negligence requires proof that a product was designed or manufactured in an *unreasonable manner*, or that the warnings or directions were inadequate under the circumstances.

   Professor Owen (2007, p. 1671) states:

   > "To prevail on a claim of negligence, a plaintiff is required to prove: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty by the defendant; (3) an injury to proximately caused by the breach. Also essential to negligence, evident from an early date, was the necessity of a causal connection between the defendant's breach of duty and the plaintiff's damage that was natural, probable, proximate, and not too remote."

   However, there were significant drawbacks relating to a negligence action which included the *doctrine of* privity, which made it difficult, if not impossible, to reach a negligent manufacturer with whom an injured plaintiff had not personally dealt (Bedi, 2022). At the same time, the doctrine of privity absolved the retailer from liability because the retailer had normally only "passed on the product"—hence the origin of the common law doctrine of "*caveat emptor*," translated as "let the buyer beware." In addition courts recognized the *defense of contributory negligence*, which at common law was an absolute bar to recovery by the plaintiff (Simmons, 1995) and which resolved the issue of liability on the basis of the sometimes tortured *standard of a "reasonable man,"* more specifically, reaching a consensus on what would be the standard of conduct required of a "reasonable manufacturer" or "reasonable designer" or of a "reasonable plaintiff" or "reasonable defendant" under the circumstances of each case (Poe, 2021).

2. Misrepresentation and fraud actions focus on proof of a *false representation of a material fact* (found in words, actions, concealment, or in some cases silence, where the common law found a "duty to speak"), upon which a plaintiff *reasonably relied* in entering into a contract. At common law, evidence of falsehood was required in order to prove misrepresentation, and proof of *scienter* ("the intent to deceive"), arising from either "knowledge of falsity or "reckless disregard of the truth," was a part of the "*prima facie*" proof required in cases of fraud. Often times, assertions of "safety" or of a "safe product" formed the basis of many allegations of fraud.

   A practical drawback to a suit based on misrepresentation or fraud was the common belief or negative expectation that all sellers would engage in a certain amount of "sales puffing" or exaggeration regarding their products (see generally Jessop, 2020), and the common notion that no matter how careful a manufacturer might be, no one could absolutely guaranty the safety of any product, thus potentially negating the requirement of reasonable reliance on the part of a plaintiff because under these circumstances, "the consumer has no expectations as to how safe it is" (see *Knitz v. Minster Mach. Co.*, 1982).

3. Warranty actions were essentially based on contract promises, either express or implied (Hunter, Shannon, & Amoroso, 2023b). Warranties, however, were subject to *disclaimers* on the part of sellers and could also be severely *limited* in their scope by severe notice requirements (that is, the injured party had to give the party causing the injury *notice* that damage/injury had occurred *within a rather limited period of time*). Warranty actions also required that the plaintiff had to prove *reliance* on specific words or promises made by a seller.

Warranties under the *Uniform Commercial Code* (UCC) were only applicable in cases involving the sale of goods, and not in the myriad of other types of transactions that resulted in goods or other property reaching the hands of a consumer—most notably *leases or bailments* (Shannon & Hunter, 2021). Under the common law, privity of contract between a manufacturer and the consumer/buyer (termed vertical privity) was often problematic, although the requirement of vertical privity was severely limited in M*acPherson v. Buick Motors* (1916). Under the common law, a manufacturer's liability was limited to the *actual purchaser* of a product and not to any other parties. This aspect of privity was greatly modified with the decision in *Henningsen v. Bloomfield Motors* (1960), which saw the expansion of liability (horizontal privity) under the warranty of merchantability to persons other than the consumer/buyer found in UCC § 2-318, which significantly expanded the range of potential plaintiffs in a warranty action.

The drawbacks inherent in the three common law forms of action led to the creation of the modern and now preferred theory of liability in products cases—the *development of strict (or absolute) liability in tort*. Strict liability focuses exclusively on the existence of a *product defect* and not on the conduct of the defendant (negligence), or on specific words or promises (warranty/misrepresentation/ fraud). Strict liability permits an injured party (broadly defined) to sue a manufacturer directly, even in the absence of privity; will permit no disclaimers of the manufacturer's duty; and is less stringent than the strict requirements of notice under warranty actions, which was often as short as three months.

2. Types of Product Defects

No matter what might be the theory of recover, a suit in products liability requires proof of a product defect.

2.1. Production or Manufacturing Defects

A production or manufacturing defect exists "*if the product differs from a manufacturer's intended result or if the product differs from apparently identical products from the same manufacturer*."

There are various formulations concerning a production or manufacturing defect:

a. A product which comes off the assembly line in a substandard condition in comparison with other identical units ("*the deviation from the norm test*") (see Traynor, 1965; *Lee v. Volkswagen of America, Inc.*, 1984).
b. Imperfections that occur in a typically *small percentage of products* of a given design as a result of a failure in the manufacturing process. If there are a large number of individual defects, this will be seen as a design defect and not an isolated manufacturing or production defect.
c. Products that do not conform to their intended design (Hunter, Amoroso, & Shannon, 2012a, p. 37).
d. Products that do not conform to the great majority of manufactured products within the design.
e. Products that are misconstructed.
f. Defects which result from a mishap in the manufacturing process or from improper workmanship, or because defective materials were used (applied to component parts, assembled, but not made, by the final manufacturer).
g. Products which do not conform to the manufacturers own specifications.

2.2. "Foreign-Natural" vs. "Reasonable Expectations"

In a large majority of manufacturing defect cases, courts will employ a simple test to determine if a product is defective: the “reasonable expectations of the buyer/consumer.” There is a major “wrinkle” or exception to this test found in cases filed under a theory of breach of warranty.

In *Hunt v. Ferguson-Paulus Enterprises* (1966) (see Janes, 1976), the plaintiff purchased a cherry pie from the defendant through a vending machine owned and maintained by the defendant. On biting into the pie, one of plaintiff's teeth was broken when it encountered a cherry pit.

The *Hunt* court noted that some courts have:

> “drawn a distinction between injury caused by spoiled, impure, or contaminated food or food containing a foreign substance, and injury caused by a substance natural to the product sold. In the latter class of cases, these courts hold there is no liability on the part of the dispenser of the food.”

In the leading case of *Mix v. Ingersoll Candy Co.* (1936), the court held that a patron of a restaurant who ordered and paid for chicken pie, which contained a sharp sliver or fragment of chicken bone, and who was injured as a result of swallowing the bone, had no cause of action against the restaurateur either for breach of warranty or negligence. Referring to cases in which recovery had been allowed the court said:

> "All of the cases are instances in which the food was found not to be reasonably fit for human consumption, either by reason of the presence of a foreign substance, or an impure and noxious condition of the food itself, such as for example, glass, stones, wires or nails in the food served, or tainted, decayed, diseased, or infected meats or vegetables."

The "foreign-natural" test of *Mix* which denied a remedy to a plaintiff has been applied in the following cases: *Silva v. F.W. Woolworth Co.* (1938) (turkey bone in "special plate" of roast turkey); *Musso v. Picadilly Cafeterias, Inc.* (1965) (cherry pit in a cherry pie); *Courter v. Dilbert Bros., Inc.* (1965) (prune pit in prune butter); *Adams v. Great Atlantic & Pacific Tea Co.* (1960) (crystallized grain of corn in cornflakes); and *Webster v. Blue Ship Tea Room, Inc.* (1964) (fish bone in a fish chowder).

However other courts have rejected the foreign-natural test in favor of what is known as the "reasonable expectation" test, among them the Supreme Court of Wisconsin, which, in *Betehia v. Cape Cod Corp.* (1960) held that a plaintiff who was injured by a chicken bone in a chicken sandwich served to him in a restaurant, could recover for his injury either for breach of an implied warranty or for negligence. "There is a distinction," the *Betehia* court in finding for the plaintiff, stated, "between what a consumer expects to find in a fish stick and in a baked or fried fish, or in a chicken sandwich made from sliced white meat and in roast chicken.”

The *Betehia* court (pp. 331-332) noted that the test should be what is *reasonably expected* by the consumer in the food as served, not what might be natural to the ingredients of that food prior to preparation.

> “What is to be reasonably expected by the consumer is a jury question in most cases; at least, we cannot say as a matter of law that a patron of a restaurant must expect a bone in a chicken sandwich either because chicken bones are occasionally found there or are natural to chicken."

2.3. Design Defects

Fischer and Powers (1988, p. 57) wrote:

> “Design and warning defects present more difficult problems than manufacturing defects. For one thing, it is harder to identify when such products are defective. Some external standard is needed because these products cannot be identified as being defective by simply comparing them to the manufacturer’s other products. In addition, the repercussions of declaring that a product is defective because of design or failure to warn are more serious for the manufacturer. The determination condemns all products in the line rather than an isolated few.”

A design defect occurs where the design of the product makes the product unreasonably dangerous or unsafe. Courts will employ industry standards, trade customs or “trade usage,” applicable manufacturing codes, or

consensus industry standards in order to determine the nature of any design defect. Design defect cases, however, will often require the introduction of expert proof, which must be authenticated. The *expert* him/herself must be qualified to give objective/fact testimony or to render a professional opinion.

2.4. Standards for Admitting Expert Testimony

As Hunter, Shannon, and Amoroso (2018b, p. 1) wrote:

> "Our American legal system often relies on the testimony of so-called expert witnesses to guide the jury in its deliberations. These experts may offer their professional opinions as to facts which will be important to a jury in understanding the nature of a claim or of a defense. Expert witnesses are often critical to both the plaintiff and the defendant, most especially in cases involving products liability, drugs and pharmaceuticals, and toxic torts. Thus, their participation in the trial process must be carefully managed and, in some cases, orchestrated."

Expert testimony often relates to the element of legal causation. Causation is a required element in a negligence case) Owen, 2007). Causation may be proved at trial through the testimony of an expert witness. Technical experts can give opinions on scientific matters that are beyond the general knowledge or competency of the jury or beyond the scope of testimony of ordinary or "fact witnesses." Because of an expert's education, training, background, or experience, an expert witness's testimony will often assist the jury to understand complex technical issues, especially relating to design questions.

Many product liability cases in the 1980s and early 1990s were characterized by the "battle of the experts" that were often confusing to the average juror (see, e.g., Gluck, Regan, & Turret, 2020). It appeared to many that expert testimony was often based on what some came to call "junk science" (Meyer, 2020) or novel scientific theories that were based on data or inferences that were not subject to scientific proof.

In an effort to reform the area of expert testimony, the United States Supreme Court in 1993 established principles for the admission of such expert testimony in *Daubert v. Merrell Dow Pharmaceuticals* (1993). The Supreme Court stated that trial judges must act as a "judicial gatekeeper" and refuse to admit testimony based on "junk science," holding that scientific evidence had to be both *relevant* and *reliable* (Young & Goodman-Delahunty, 2021). The Supreme Court listed four *standards* for admitting scientific evidence:

- Has the theory been scientifically tested?
- Has the theory been subjected to *peer review* and *publication*?
- What is the known or potential *rate of error* and are there controlling standards for the testing process?
- Does the scientific community "*generally accept*" the theory?

2.5. Determining a Design Defect

Design defect cases recognize the fact that there is a risk involved in the production of many products and then the question becomes: *Did the manufacturer take reasonable steps to correct or at least minimize the risk?*

Borel v. Fibreboard Paper Products Corp. (1973) stands for the proposition that "A dangerously defective product would be one which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character" In some cases, courts will inquire whether or not the hazard, danger, or risk could have been obviated at a slight cost. (For example, selling or manufacturing a lawnmower without a dead man's switch which could have been added or supplied for less than $5.00 (*Burch v. Sears Roebuck,* 1983)). The opposite consideration may be present as well.

In determining the existence of a design defect (Vetri, 2009), courts must necessarily balance various factors against the safety interests of the consumer. Many courts hold that the proper standard to be applied is as follows:

> *"A product is defective because of its design and unreasonably dangerous if the reasonable seller, having been made aware of the danger involved, would not sell the product."*

The State of New Jersey provides a statement of the majority view relating to determining a design defect. New Jersey courts require that the *plaintiff* must prove there is a "practical and technically feasible" alternative design that will not impair the core function of the product or unreasonably increase its cost.

2.6. "State of the Art" Evidence

In general, in order to determine if a design defect is present, a product will be judged when it is either manufactured or sold (see *Maxted v. Pacific Car and Foundry Co.,* 1974). So-called *"state of the art"* testimony will be utilized to determine the technology available at this point (CMP Law Group, 2018).

In *Turner v. General Motors* (1979, p. 746) stated:

> "… whether a product was defectively designed must be judged against the technological context existing at the time of its manufacture. Thus, when the plaintiff alleges that a product was defectively designed because it lacked a specific feature, attention may become focused on the feasibility of that feature the capacity to provide the feature without greatly increasing the product's cost or impairing usefulness. This feasibility is a relative, not an absolute, concept; the more scientifically and economically feasible the alternative was, the more likely that a jury may find that the product was defectively designed. A plaintiff may advance the argument that a safer alternative was feasible with evidence that it was in actual use or was available at the time of manufacture. Feasibility may also be shown with evidence of the scientific and economic capacity to develop the safer alternative. Thus, evidence of the actual use of, or capacity to use, safer alternatives is relevant insofar as it depicts the available scientific knowledge and the practicalities of applying that knowledge to a product's design."

2.6.1. *Boatland:* A Case Study

In *Boatland of Houston v. Bailey* (1980) the court discussed issues relating to the *feasibility of an alternate design.* The dispute between the parties concerned whether the feasibility of an alternative design for Bailey's boat was the *"state of the art"* when the boat was sold (see Buckler, 1998; Ausness, 2012). In a case alleging negligence, the *reasonableness* of the defendant's conduct in placing a product on the market is in issue. Feasibility may be shown by proving that *a safer alternative was available at the time of manufacture, or that there was evidence of the scientific and economic capacity to develop safer alternatives*. Thus, evidence of industry customs offered for the purpose of showing the "state of the art" at the time of manufacture may be offered by either party for the purpose of comparing the defendant's conduct with industry customs.

Boatland involved an alleged defect in the design of a 16-foot bass boat. The plaintiffs were the widow and adult children of Samuel Bailey, who was killed in a boating accident in May of 1973. The plaintiffs sued under a *wrongful death* statute, alleging that Bailey's death occurred because the boat he was operating was defectively designed.

> "The boat had struck a partially submerged tree stump, and Bailey was thrown into the water. With its motor still running, the boat turned sharply and circled back toward the stump. Bailey was killed by the propeller, but it is unclear whether he was struck when first thrown out or after the boat circled back toward him."

At trial, the plaintiffs put forth several reasons why the boat was defectively designed, including inadequate seating and control area arrangement, unsafe stick steering and throttle design, and the failure of the motor to automatically turn off when Bailey was thrown from the boat. They based liability under the theories of negligence and strict liability in tort.

The plaintiffs produced evidence of the scientific and economic feasibility of a design that would have caused the boat's motor to automatically shut off when Bailey fell out. As a result, the plaintiffs argued, "the boat's design

should have incorporated an automatic cut-off system or the boat should have been equipped with a safety device known as a "kill switch."" Extensive testimony was elicited from a number of parties on the question of feasibility: the president of Boatland in deposition testimony stated that there were several types of "kill switches" available, and that they were now being installed by Boatland when it assembled and sold bass boats;' a passenger in the boat with Bailey at the time of the accident stated he had not heard of automatic kill switches before the accident, but afterwards he purchased one for his own boat; the inventor of a kill switch designed for open-top carriers stated that began developing his "Quick Kill" in November of 1972 and had applied for a patent in January of 1973, and the invention required no breakthroughs in the state of the art of manufacturing or production.

A witness also stated that his "kill switch" *invention was simple*: a lanyard connects the operator's body to a device that fits over the ignition key so that if the operator moves, the lanyard is pulled, the device rotates, and the ignition switch turns off. If the kill switch were installed and the operator was thrown out of the boat, the killing of the motor would prevent the boat from circling back.

A NASA employee who worked with human factors engineering, testified that he had tested a bass boat similar to Bailey's. He concluded that the boat was deficient for several reasons and that these deficiencies played a part in Bailey's death. When the boat struck a submerged object and its operator became incapacitated, the seating and control arrangement caused the boat to go into a hard turn. If the operator were thrown out, the boat was capable of coming back and hitting him. The witness also stated that a kill switch would have cut off the engine and the motor would not have been operative when it hit Bailey.

Boatland elicited evidence to rebut the Baileys' evidence of the feasibility of equipping boats with kill switches or similar devices in March of 1973, when the boat was assembled and sold. Boatland introduced evidence to show that the kill switches were *not available* when Bailey's boat was sold. The matter was submitted to the jury. After considering the feasibility and effectiveness of an alternative design and other factors such as the utility and risk, the jury found that the boat was not defective.

In reinstating the jury verdict, the Supreme Court of Texas noted:

> "Evidence of this nature is important in determining whether a safer design was feasible. The limitations imposed by the state of the art at the time of manufacture may affect the feasibility of a safer design. Evidence of the state of the art in design defect cases has been discussed and held admissible in other jurisdictions. In this case, the evidence advanced by both parties was relevant to the feasibility of designing bass boats to shut off automatically if the operator fell out, or more specifically, the feasibility of equipping bass boats with safety switches."

The dissenting opinion of Judge Campbell (pp. 750-753) in rejecting the notion that "state of the art" should be equated with industry custom raised several important points.

> "State of the art" does not mean "the state of industry practice." "State of the art" means "state of industry knowledge." At the time of the manufacture of the boat in question, the device and concept of a circuit breaker, as is at issue in this case, was simple, mechanical, cheap, practical, possible, economically feasible and a concept seventy years old, which required no engineering or technical breakthrough. The concept was known by the industry. This fact removes it from "state of the art."

In criticizing the dismissal of the complaint against Boatland, Judge Campbell wrote.

> "The focus is on the product, not the reasoning behind the manufacturer's option of design or the care exercised in making such decisions. Commercial availability or defectiveness as to Boatland is not the test. Defectiveness as to the product is the test. If commercial unavailability is not a defense or limitation on feasibility to the manufacturer, it cannot be a defense to the seller."
>
> "What is this Court faced with in this case? Nothing more than a defendant seller attempting to avoid liability by offering proof that Bailey's boat complied with industry practice (which it did at that time) but not because of any limitations on manufacturing feasibility at that time. This is an industry practice case. The evidence does not involve "technological feasibility.""

2.7. Utility

In addition, courts will look at issues relating to the *utility* of a product. In *Phillips v. Kimwood Mach. Co.* (1974), the Supreme Court of Oregon stated:

> "In design cases the utility of the article may be so great, and the change of design necessary to alleviate the danger in question may so impair such utility, that it is reasonable to market the product as it is, even though the possibility of injury exists and was realized at the time of the sale. Again, the cost of the change may be so great that the article would be priced out of the market and no one would buy it even though it was of high utility. Such product is not dangerously defective despite its having inflicted injury."

In *Turner v. General Motors Corp.* (1979), the Supreme Court of Texas discussed the strict liability standard of "defectiveness" as applied in design defect cases relating to utility and noted that:

> "whether a product was defectively designed requires a balancing by the jury of its utility against the likelihood of and gravity of injury from its use. The jury may consider many factors before deciding whether a product's usefulness or desirability is outweighed by its risks. Their finding on defectiveness may be influenced by evidence of a safer design that would have prevented the injury. Because defectiveness of the product in question is determined in relation to safer alternatives, the fact that its risks could be diminished easily or cheaply may greatly influence the outcome of the case."

3. Failure to Warn

In general, in order for a warning to be adequate, it must make the product safe for both its intended and foreseeable uses, including any potential foreseeable misuse (*Barker v. Lull Engineering Company*, 1978), especially by a minor child or children (*Spruill v. Boyle-Midway, Inc.*, 1962; *Knowles v. Harnischfeger Corp*., 1983; Kirby, 2012).

There are three criteria that are used by courts in determining the adequacy of warnings (Hunter, Lozada, & Shannon, 2019):

1. A warning must be displayed in such a way as to reasonably "*catch the attention*" of the person expected to use the product (Tiersma, 2002). This element deals with such factual questions as size, position, and even the color of the warnings (Lewandowska & Olejnik-Krugly, 2022).
2. A warning must fairly apprise a reasonable user of the nature and extent of the danger and *not minimize* any danger (*Gardner v. Q.H.S.*, 1971).
3. A warning must instruct the user how to use the product in such a manner as to avoid the danger—essentially how to *safely use* the product (see Bowbeer, Lumish, & Cohen, 2000).

The question of sufficiency of the warning is normally one for the jury (*McClanahan v. California Spray-Chemical Corp*, 1953). The *Spruill* court, quoting *Sadler v. Lynch* (1951, p. 666), emphatically stated: "*An insufficient warning is in legal effect no warning.*"

4. The Historical Development of the Theory of Strict Liability in Tort

In *Daly v. General Motors Corporation* (1978), the court referred "certain highlights" in the historical development of strict liability in tort:

> *"Tort law had evolved from a "legal obligation initially imposed without 'fault,' to recovery which, generally, was based on blameworthiness in a moral sense." Later, for reasons of social policy and because of the unusual nature of defendants' acts, "liability without fault continued to be prescribed in a certain restricted area, for example, upon keepers of wild animals, or those who handled explosives or other dangerous substances, or who engaged in ultrahazardous activities." Simultaneously, and more particularly, those who were injured in the use of personal property were permitted recovery on a contract theory if they were the purchasers of the chattel or were in privity. Subsequently, liability was imposed in negligence upon the*

> *manufacturer of personalty in favor of the general consumer. Evolving social policies designed to protect the ultimate consumer soon prompted the extension of legal responsibility beyond negligence to express or implied warranty. Thus, in the area of food and drink a form of strict liability predicated upon warranty found wide acceptance. Warranty actions, however, contained their own inherent limitations requiring a precedent notice to the vendor of a breach of the warranty, and absolving him from loss if he had issued an adequate disclaimer."*
> *"General dissatisfaction continued with the conceptual limitations which traditional tort and contract doctrines placed upon the consumers and users of manufactured products, this at a time when mass production of an almost infinite variety of goods and products was responding to a myriad of ever-changing societal demands stimulated by wide-spread commercial advertising. From an historic combination of economic and sociological forces was born the doctrine of strict liability in tort."*

Two cases would be pivotal in this development. The first case was *Escola v. Coca Cola Bottling* (1944) (a *res ipsa loquitur* case), in which Justice Traynor argued in his concurring opinion that traditional theories for determining liability were inadequate and that the court should adopt a *new and special theory for product cases*. "In my opinion, it should now be recognized that a manufacturer incurs an absolute liability when an article he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings." Judge Traynor pointed out that a form of strict liability was already imposed on products sellers under the law of warranty ("merchantability"). The privity requirement (Green, 2023), however, rendered the remedy inadequate because most buyers could not, at that *pre-Henningsen* time, sue the manufacturer of the product directly because they were not in privity of contract with the manufacturer.

The second case was *Greenman v. Yuba Power* Products (1963), where Justice Traynor wrote:

> *"A manufacturer is strictly liable in tort when an article he places on the market, knowing that it to be used without inspection for defects, proves to have a defect that causes injury to a human being."*

> *"Although…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 between them, the recognition that the liability is not assumed by agreement but imposed by law…and the refusal to permit the manufacturer to define the scope of his own responsibility for defective products…make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort."*

> *"The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."*

> *"To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use."*

Justice Traynor makes several salient points in his opinion:

- "The notice requirement of Section 1769, however, is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt."
- "As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary. The injured consumer is seldom 'steeped in the business practice which justifies the rule,' We conclude, therefore, that even if plaintiff did not give timely notice of breach of warranty to the manufacturer, his cause of action based on the representations contained in the brochure was not barred."

- "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. Recognized first in the case of unwholesome food products, such liability has now been extended to a variety of other products that create as great or greater hazards if defective."
- "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 the liability is not assumed by agreement but imposed by law * * * and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products * * * 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 that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed."
- "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."
- "It should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do."
- "To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use."

Today, courts continue to work out the details of strict liability, by addressing such issues as defenses (misuse, extension of contributory negligence, comparative negligence, assumption of risk, etc.) causation, scope of duty, and the applicability and extension of strict tort liability to particular products, sellers, and circumstances (see Hunter, Shannon, & Amoroso, 2018a).

In 1965, the American Law Institute embraced the *Greenman* principle in Section 402A of the Restatement (Second) of Torts. It states:

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

The *Greenman* decision, coupled with Section 402A (originally thought to apply only to food and drink cases), has provided the intellectual basis for the transition from warranty to strict liability in tort and *represented the beginning of modern products liability law.*

As a general rule, the basic elements of strict products liability cases may be stated as follows:

1. The defendant is in the business of producing or selling the product;

2. The product was expected to and did reach the purchaser without substantial change in the condition in which it was sold;
3. The product was defective [in design, manufacture, or warnings] when it left the defendant's control;
4. The harm resulted when the product was being used in a reasonably foreseeable manner;
5. The person harmed was foreseeable [later expanded to include a bystander]; and
6. The defect was the cause in fact and proximate cause [legal cause] of physical harm to the plaintiff's person or property.

Courts, commentators, scholars and even *professors* have advanced a variety of "policy justifications" for the imposition of strict tort liability. The following are the most prevalent and are summarized briefly (see Hunter, Shannon, & Amoroso, 2018c, pp. 160-162):

1. Loss Spreading: It is fair to shift losses from an individual to all consumers of a product by imposing strict liability on manufacturers, thus, forcing manufacturers to insure against losses in order to spread such losses among all purchasers through appropriate pricing policies.
2. Deterrence/Incentive: Imposing strict liability on manufacturers provides them with an incentive to market safer products. Strict liability induces manufacturers to go beyond traditional negligence standards of a "reasonable manufacturer," especially if the cost of the added safety measures is less than the potential cost of liability for the failure to undertake measures as indicated by a cost/benefit or risk/utility analysis—most especially if the cost of any change or modification is minimal.
3. Encouraging Useful Conduct: Strict liability, based upon risk/utility while recognizing that there is some risk in all areas of human activity, will continue to encourage manufacturers to produce useful products. A plaintiff will not be compensated simply because he or she has been injured; rather, a plaintiff is still required to prove that a defect exists, thus holding out to the manufacturer that proper conduct will not result in the imposition of liability.
4. Proof Problems: Modern complexities in manufacturing make it very difficult to establish negligence, since the manufacturer is at a relative advantage in terms of access to expertise, information, and resources. Strict liability eliminates a plaintiff's need to prove negligence and may eliminate proof of identity of a defendant through the imposition of *enterprise liability* (see *FTC v. Tax Club, Inc.*, 2014; Hunter, Shannon & Amoroso, 2017).
5. Protection of Consumer Expectations: Since modern advertising and marketing techniques induce consumers to rely on manufacturers to provide them with safe, high quality products, consumers should come to expect protection from latent defects in products through the imposition of strict liability.
6. Cost Internalization: Forcing manufacturers to compensate victims of defective products through the purchase of appropriate products liability insurance (Pearl, 2001) or by making an enlightened decision to essentially "self-insure" will lead to a more efficient allocation of resources and pricing of products to include all of their true costs, including costs associated with damages caused by defective products. If financial reserves are already available from which injured parties can be compensated, manufacturers will be more apt to admit liability rather than "stonewall" the plaintiff in handling complaints of product defects.

5. Scope of Liability

There have been significant developments in cases that have considered the imposition of strict liability other than in sales transactions (see generally Hunter, Amoroso, & Shannon, 2012a; 2012b). Two questions must be asked: First, can product liability law be applied in these circumstances? Second, would the imposition of strict liability be appropriate in these circumstances? The court in *Martin v. Ryder Truck Rental, Inc.* (1976) makes an important

point relating to the development of liability and notes "*the common law must grow to fulfill the requirements of justice as dictated by changing times and conditions."*

5.1. Leasing

A sale is defined as the "passing of title between a buyer and a seller." Section 402A of the Restatement, setting forth the requirements for the imposition of strict liability, would certainly apply to a sale ("one who sells a product... .") Likewise, an action based on warranty (either express or implied—especially one involving the warranty of merchantability) would apply in the case of a sale. However, the question remains: *Can areas be expanded or is a sale strictly required for liability to be applied?*

In *Martin v. Ryder Truck Rental, Inc*. (1976), the Supreme Court of Delaware heard an appeal of the order of the trial court that had granted summary judgment in favor of a defendant in a lawsuit based on strict liability in a leasing or bailment case (Shannon & Hunter, 2021). On appeal, the court reversed the judgment of the lower court, holding that in a bailment-lease of a motor vehicle, entered into "in the regular course of a truck rental business," was subject to the application of the doctrine of strict tort liability if the truck proved to have a defect that proximately caused injury or property damage to the plaintiff.

Today, courts regularly apply strict liability to a both *sale* and to *lease* (bailments) transactions (see Shannon & Hunter, 2021), holding that there is little difference in supplying products to the public in either a sale or lease transaction. However, as indicated by *Martin*, it is clear that courts will apply strict liability to a lease, but only if the lessor is "in the business" of leasing products of this kind, and where the product itself has been "introduced into the stream of commerce" through a lease entered into "in the regular course of the rental business."

Subsequent to *Martin*, liability has been expanded to a variety of other transactions (Paterson & Sicco, 2022), depending on the specific facts developed—in such cases as *product demonstration cases, supplying free samples, artificial intelligence* (Muftic, 2021) *or even in the case of a gift* where the product was defective.

5.2. Franchising

Franchising is a method of offering products and services identified with a particular trade name or trademark, which in turn may be associated with a patent, a trade secret, a particular product design, or management expertise. The franchise agreement establishes the legal and business relationship between the parties and regulates the "quality of the product" (Gomez, Gonzales, & Suarez, 2010; Glaser, Jirasek, & Windsperger, 2020), the sales territory, advertising, and other details of the relationship (see Lozada, Hunter, & Kritz, 2005; Hunter & Lozada, 2013a; 2023b).

5.2.1. *Kosters*: A Case Study

In *Kosters v. Seven-Up Company* (1979), the Sixth Circuit Court of Appeals heard an appeal in a case relating to the imposition of liability in the context of franchising in which the trial court considered whether an injured plaintiff was entitled to recover damages against the franchisor for a product that was found to be defective, which the franchisor had caused to be entered into the "stream of commerce" (see generally Morgan, 1987).

The Seven-Up Company appealed from a $150,000 jury verdict awarded for injuries caused by an exploding 7-Up bottle. The plaintiff had removed a cardboard carton containing six bottles of 7-Up from a grocery shelf, putting the carton under her arm, and headed for the check-out counter of the grocery store. The plaintiff was blinded in one eye when a bottle slipped out of the carton, fell on the floor and exploded, causing a piece of glass to strike her eye as she looked down. [The 7-Up carton was a so-called "over-the-crown" or "neck-thru" carton designed to be held from the top and made without a strip on the sides of the carton which would prevent a bottle from slipping out if held underneath.]

The carton was designed and manufactured by Olinkraft, Inc. Olinkraft sold the cartons to the Brooks Bottling Company, a *franchisee* of the defendant, Seven-Up Company. Seven-Up retained the right to approve the design of various supplies used by the bottler, including the cartons, in the course of carrying out its "quality control" obligations (see *Salazar v. McDonald's Corp.*, 2019; Glaser, Jirasek, & Windsperger, 2020; Siebert, 2021). The franchise agreement entered into between Seven-Up and the Brooks Bottling Company requires that "cases, bottles, and crowns used for 7-Up will be of a type . . . and design approved by the 7-Up Company," and "any advertising . . . material . . . must be approved by the 7-Up Company before its use by the bottler."

After securing Seven-Up's approval of the design of the packaging under the franchise agreement, Brooks packaged the bottles in cartons selected and purchased by Brooks from various carton manufacturers, including Olinkraft. Brooks then sold the 7-Up products to retail stores in various Michigan counties, including Meijers Thrifty Acres Store in Holland, Michigan, where the plaintiff picked up the carton and carried it under her arm toward the checkout counter. Plaintiff settled her claims against the bottler, the carton manufacturer, and the grocer for $30,000.

Seven-Up, however, denied liability, insisting its approval of the cartons was limited only to the "graphics" found on the cartons for the purpose of assuring that its trademark was properly displayed.

The trial judge submitted the case to the jury on five related theories of product liability, including a negligence theory, three theories relating to strict liability, and one contract theory. The Court of Appeals stated that it could not readily ascertain which of these theories the jury had accepted because it had returned a general verdict of liability. On appeal, Seven-Up argued that all of the theories were improper except the claim of negligence, arguing that the strict liability standard was inappropriate.

Seven-Up Company conceded that a franchisor, like a manufacturer or supplier, may be liable to the consumer for its negligence, without regard to privity, under the doctrine of *MacPherson v. Buick Motor Co.* (1916). Seven-Up contended, however, that it does *not* carry the liabilities of a supplier when it did not supply the product and that other theories of strict tort liability do not apply.

The question before the Court of Appeals was whether Michigan's principles of "strict accountability" extended to a franchisor who retains the *right of control* over the product (the carton) and specifically *consents to its distribution* in the form sold, but does not actually manufacture, sell, handle, supply, ship, or require the use of the product.

The Court of Appeals found that the Seven-Up Company introduced the bottles of its carbonated soft drink into the "stream of commerce." The Company also "assumed and exercised a degree of control" over the "type, style, size and design" of the carton in which its product was to be marketed. The carton had, in fact, been submitted to Seven-Up for inspection.

> "With knowledge of its design, Seven-Up consented to the entry in commerce of the carton from which the bottle fell, causing the injury. The franchisor's sponsorship, management and control of the system for distributing 7-Up, plus its specific consent to the use of the carton, in our view, places the franchisor in the position of a supplier of the product for purposes of tort liability."

The Court of Appeals laid down a rule that may be applied broadly in the context of franchising: "When a franchisor consents to the distribution of a defective product bearing its name, the obligation of the franchisor to compensate the injured consumer for breach of implied warranty, we think, arises from several factors in combination:

> (1) the risk created by approving for distribution an unsafe product likely to cause injury,
> (2) the franchisor's ability and opportunity to eliminate the unsafe character of the product and prevent the loss,
> (3) the consumer's lack of knowledge of the danger, and
> (4) the consumer's reliance on the trade name which gives the intended impression that the franchisor is responsible for and stands behind the product. Liability is based on the franchisor's

> control and the public's assumption, induced by the franchisor's conduct, that it does in fact control and vouch for the product."

While the *Kosters* case was decided in the context a breach of the implied warranty, it is now recognized that most courts now *practically equate the implied warranty of merchantability with the application of strict liability in tort* (see Geistfeld, 2006, p. 252). Rapson (1965, p. 700) made the direct connection between the warranty of merchantability and strict liability in tort, stating that:

> "It appears, then, that the criterion for establishing that an article is 'defective' for purposes of strict liability in tort is synonymous with the fitness criterion of merchantability set forth in [UCC] Section 2-314 (2)(c)." Shanker (1979, p. 556) added: "Almost every commentator who has seriously studied the problem has concluded that there is no difference; that strict tort liability requires the seller to deliver the same quality of goods as that required under the merchantability warranty."

5.3. Used Products

As a general rule, courts have conceded that a seller "who is free from fault in the usual sense" may be held strictly liable for a defective product (see *Wights v. Staff Jennings,*1965). As a result, over time, courts would extend liability to non-manufacturer sellers and distributors of *new* goods "in part, on the assumption that these groups would place pressure on the manufacturer to produce safe products. Courts also believed that retailers and distributors might be more accessible to suit than manufacturers" (Dept. of Commerce, 1976).

Tillman v. Vance Equipment Company (1978) addressed the question whether strict liability should be applied in cases of "used goods." The plaintiff alleged that the defendant seller was liable because of a defectively designed crane and for failing to provide adequate warnings of the danger. The trial court found for the defendant because the crane was a "used piece of equipment" and was sold "as is," holding that "a seller of used goods is not strictly liable in tort for a defect in a used crane when that defect was created by the manufacturer."

Justice Traynor, the author of the seminal opinion in *Greenman v. Yuba Power Products, Inc.* (1963) offered a rationale for the imposition of strict liability to non-manufacturers in *Vandermark v. Ford Motor Company* (1964) by noting:

> "Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. In some cases, the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases, the retailer himself may play a substantial part in insuring the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety."

However, in cases involving used goods, would the court adopt the same rationale? The *Tillman* court stated:

> "While dealers in used goods are, as a class, capable like other businesses of providing for the compensation of injured parties and the allocation of the cost of injuries caused by the products they sell, we are not convinced that [other considerations] weigh sufficiently in this class of cases to justify imposing strict liability on sellers of used goods generally."

The *Tillman* court concluded that:

> "Holding every dealer in used goods responsible regardless of fault for injuries caused by defects in his goods would not only affect the prices of used goods; it would work a significant change in the very nature of used goods markets. Those markets, generally speaking, operate on the apparent understanding that the seller, even though he is in the business of selling such goods, makes no particular representation about their quality simply by offering them for sale. If a buyer wants some assurance of quality, he typically either bargains for it in the specific transaction or seeks out a dealer who routinely offers it (by, for example, providing a guarantee, limiting his stock of goods to those of a particular quality, advertising that his used goods are specially selected, or in some other fashion). The flexibility of this kind of market appears to serve legitimate interests of buyers as well as sellers."

In sum, *Tillman* stands for the proposition "that the sale of a used product, without more, may not be found to generate the kind of expectations of safety that the courts have held are justifiably created by the introduction of a new product into the stream of commerce."

In terms of meeting the "risk-reduction aspect of strict products liability," the position of the used-goods dealer is normally entirely outside the original chain of distribution of the product. As a consequence, the court concluded that:

> "any risk reduction which would be accomplished by imposing strict liability on the dealer in used goods would not be significant enough to justify our taking that step. The dealer in used goods generally has no direct relationship with either manufacturers or distributors. Thus, there is no ready channel of communication by which the dealer and the manufacturer can exchange information about possible dangerous defects in particular product lines or about actual and potential liability claims."

As a corollary, UCC Section 2-314 warranty actions may be applicable to the sale of used goods but "only to the extent reasonable." However, warranties can be disclaimed, and in most cases used goods will be sold "as is" or "with all faults"—essentially negating all warranties (Hunter, 2016; see also Hunter, Shannon, & Amoroso, 2019), especially the warranty of merchantability.

5.4. Property Cases

In Kriegler v. Eichler Homes, Inc. (1969), the plaintiff filed an action for physical injury sustained as the result of the failure of a radiant heating system in a home constructed by Eichler Homes, Inc. and Joseph L. Eichler. The court framed the issue as follows: Was the defendant liable to the plaintiff on the theory of strict liability"?

The *Kriegler* court noted that to this point, strict liability had been applied "only to manufacturers, retailers and suppliers of personal property and rejected as to sales of real estate" (citing *Connolley v. Bull*, 1968), stating that "the doctrine applies to any case of injury resulting from the risk-creating conduct of a seller in any stage of the production and distribution of *goods*."

In extending liability under these circumstances, the court would make an important point: "We think, in terms of today's society, there are no meaningful distinctions between Eichler's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same." Echoing the view that the law of products liability must reflect the "realities" of modern manufacturing, production, and advertising, the *Kriegler* court added:

> "Law, as an instrument of justice, has infinite capacity for growth to meet changing needs and mores. Nowhere is this better illustrated than in the recent developments in the field of products liability. The law should be based on current concepts of what is right and just, and the judiciary should be alert to the never-ending need for keeping legal principles abreast of the times. Ancient distinctions that make no sense in today's society and that tend to discredit the law should be readily rejected as they were step by step in Greenman and Vandermark."

The *Kriegler* court noted with approval the opinion of the Supreme Court of New Jersey in *Schipper v. Levitt & Sons* (1965). In *Schipper*, the purchaser of a mass-produced or manufactured home sued the builder-vendor for injuries sustained by the child of a lessee when the child was injured by excessively hot water drawn from a faucet in a hot water system that had been installed without a mixing valve which the court stated was a latent defect. The Supreme Court held that the builder-vendor was liable to the purchaser on the basis of strict liability, stating:

> "When a vendee buys a development house from an advertised model, as in a Levitt or in a comparable project, he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional adviser of his own, he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible. If there is improper construction such as a defective heating system or a defective ceiling, stairway and the like, the

> well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation."

Perhaps the most important reason for imposing strict liability in cases involving what are known as *development or mass-manufactured* homes was based on public policy considerations:

> "Buyers of mass produced development homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale."

5.5. Service Transactions

Courts have been reluctant to extend the definition of a "product" beyond the actual article manufactured, distributed, sold, or supplied, and not to the *process or service* under which it is supplied.

Courts recognize the existence of two types of service transactions: pure services and hybrid transactions that involve *both* products and services. Courts will not apply strict liability *at all to pure services*, relying instead a negligence standard. Thus, a pure service transaction *where strict liability would not be applied* may best be described as follows: *The negligent installation of a non-defective product.* In the case of professionals who render services, where the issue is one of negligence, the standard of "reasonable care" will be that of a "professional under such circumstances." In practical terms, this standard of "due or reasonable care" will be higher or greater than that of the ordinary, reasonable man because of the training required of a physician, lawyer, or some other professional and the reliance of the public on that expertise (Bieber, 2022).

However, in a "mixed or hybrid" transaction, the majority rule is that the *product itself must be defective*. Some courts, however, have held that *if a service component is involved at all,* even as it relates to a defective product, strict liability is not appropriate and a *negligence standard should be applied.*

6. Theories of Damages in a Products Liability Case

What damages might an injured plaintiff expect to recover in a products liability case? (Hunter, Shannon, Amoroso, & Lozada, 2017).

In general, damages must be *foreseeable* and must not be "remote"; that is, they must "flow naturally and directly from the breach" and must be of the type and character that an ordinary and reasonable person would anticipate in the "reasonable anticipation that the harm or injury is a likely result of the product defect." A plaintiff is entitled to recover all foreseeable damages in a cause of action in tort under either a negligence or strict liability theory. In the case of a warranty action, where a plaintiff is seeking consequential damages for *lost profits*, courts require that the damages be "within the clear contemplation of the parties at the time the contract was created" (see, e.g., *Hadley v. Baxendale,* 1854).

There are two main types of damages awarded in product liability cases: damages awarded for economic losses (*economic damages*) and damages awarded for non-economic losses (HG.org, 2023). Economic damages are designed to compensate a plaintiff for financial losses caused by a defective product (Hunter, Shannon, Amoroso, & Lozada, 2017).

Damages for economic loss are ascertainable in products liability cases through proof or of an "offer of proof." Depending on the jurisdiction, economic damages are sometimes referred to as *compensatory damages* or as *general damages* and stem from an "immediate, direct, and proximate result" from the wrong. Economic damages include medical bills and expenses; loss of wages, the cost of any disability involving continuing medical expenses, and property loss for replacing or repairing property.

On the other hand, non-economic loss damages may be awarded to the plaintiff to compensate the plaintiff for non-financial losses. Non-economic loss damages include compensation for emotional suffering (Hunter & Amoroso, 2011), physical suffering, and other losses that are often difficult to quantify. Non-economic damages may also include damages for loss of consortium (also called "loss of society") which may be awarded in a situation where the injuries a plaintiff suffered has had a negative impact on a marriage or on the relationship between a wife or husband (Pirelli & DeMarco, 2022).

In the case of consequential damages for injury to the person in the case of *consumer goods* (goods purchased for "personal, family or household use"), UCC Section 2-719 states explicitly that an attempt to limit or exclude such damages would be unconscionable (thus probably not enforced by a court). However, in the case of *producer goods*, where the loss is commercial, such a limitation or exclusion is not unconscionable because the damage may be compensable either through an alternative theory or cause of action, may be compensable through business insurance, or in the case of an injury to an employee or worker, through the workers' compensation system. No such exclusion is possible in a case brought under the theory of strict liability, which is one of the advantages of filing a lawsuit under the strict liability regime.

6.1. Punitive Damages

Punitive or exemplary damages are damages awarded to a plaintiff *over and above* economic and non-economic damages, where a wrong done to the plaintiff was aggravated by circumstances of violence, oppression, or malice. For example, punitive damages may be awarded as a result of fraud, through proof of "wanton or wicked conduct" on the part of the defendant, to punish a defendant for "evil behavior," or, in certain cases, to make an example of the defendant (see Hunter, Shannon, Amoroso, & Lozada, 2017).

In general, punitive damages are not available in warranty actions, but may be available in other tort actions, where the conduct is termed "outrageous," "reprehensible and intentional," or showing "flagrant indifference to public safety." This would include cases brought under the theory of strict liability.

6.2. Case Study: Acosta v. Honda Motor Company, Ltd. (1983)

In *Acosta*, the defendants claimed that punitive damages were not appropriate because, no matter what the evidence, punitive damages were "fundamentally inconsistent with a regime of strict products liability in general, and with Section 402A in particular."
Although this question was one of *first impression* in the Virgin Islands, the court noted that "many courts, both state and federal, have already considered the issue, and the overwhelming majority have concluded:

> "That there is no theoretical problem in a jury finding that a defendant is liable because of the defectiveness of a product and then judging the conduct of the defendant in order to determine whether punitive damages should be awarded on the basis of 'outrageous conduct' in light of the injuries sustained by the plaintiff. Punitive damage awards provide a useful function in punishing the wrongdoer and deterring product suppliers from making economic decisions not to remedy the defects of the product."

The court added, "As long as a plaintiff can carry his burden of proof under Section 402A, there is no inconsistency in his also being permitted to offer proof regarding the nature of the manufacturer's conduct" that would warrant the imposition of punitive damages.

The Restatement (Second) of Torts, Section 908(2) includes a specific provision regarding punitive damages:

> "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant."

> "Nowhere in that section or the comments did the drafters suggest that these principles should not apply to strict products liability, and we concur with the considered opinion of the Court of Appeals for the Fifth Circuit that "punishment and deterrence, the basis for punitive damages . . ., are no less appropriate with respect to a product manufacturer who knowingly ignores safety deficiencies in its product that may endanger human life" than in other cases in which "the defendant's conduct shows wantonness or recklessness or reckless indifference to the rights of others."

6.1.3 Standard of Proof for Awarding Punitive Damages

In *Roginsky v. Richardson-Merrell, Inc.* (1967, p. 852), Judge Friendly's observed that "the consequences of imposing punitive damages … are so serious" that "particularly careful scrutiny" is warranted. "If one accepts the proposition that the consequences of punitive damages can be 'momentous and serious,' then justice requires increasing the burden of persuasion of the plaintiff in a punitive damages action." As a result, a plaintiff seeking punitive damages, at least in an action in which liability is predicated on Section 402A, must prove the requisite "outrageous" conduct by clear and convincing proof" (*Wangen v. Ford Motor Co.*, 1980).

The court added that for:

> "Conduct to be considered reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence" (see also Rapp, 2008).

In *Fischer v. Johns-Manville Corporation* (1986), the Supreme Court of New Jersey detailed the circumstances under which punitive damages would be appropriate in failure-to-warn, strict products liability actions, when a manufacturer is:

(1) aware of or culpably indifferent to an unnecessary risk of injury, and
(2) refuses to take steps to reduce that danger to an acceptable level. This standard can be met by a showing of "a deliberate act or omission with knowledge of a high degree of probability of harm and reckless indifference to consequences" (see also *Berg v. Reaction Motors*, 1962).

The *Fischer* court added that punitive damages should bear some "reasonable relationship to actual injury," but the New Jersey Supreme Court declined to require a set numerical ratio between punitive and compensatory damages. Punitive damages

> "Would be justified than when substantial compensatory damages are awarded. The profitability of the marketing misconduct, where it can be determined, is relevant. Other factors to be considered include the amount of the plaintiff's litigation expenses, the financial condition of the enterprise and the probable effect thereon of a particular judgment, and the total punishment the enterprise will probably receive from other sources."

7. Defenses Available in a Strict Liability Case

There are two defenses that are generally available in strict liability cases: assumption of risk (Takhshid, 2021) and misuse (Adler & Popper, 2019).

7.1. Assumption of Risk

There are two versions of assumption of risk: express or contractual assumption of risk and implied assumption of risk. The essence of the defense of assumption of risk in a products liability case can be found in the following statement: "One who voluntarily chooses to use a chattel with a complete realization, regardless of how it was acquired, of the risks to which he thus exposes himself voluntarily assumes such risks" (Hursh & Bailey, 1974).

Implied assumption of risk rests on the plaintiff's consent to relieve the defendant of the obligation of conduct toward him and to take his "chances" of harm from a particular risk. There are three general aspects of implied assumption of risk:

1. The nature and extent of risk must be fully appreciated and known;
2. The risk must be voluntarily encountered;
3. The risk is "normal and natural" and not one that could not reasonably be expected.

In *Heil v. Grant* (1976), the plaintiffs sued the defendant under a theory of strict liability for defective design of a hoist mechanism and for a failure to warn of the hazard. The defendants offered evidence of the defenses of *assumption of risk* and *misuse* by the defendant.

The *Heil* court noted that "an injured person's knowledge of a dangerous condition or defect is measured subjectively, i.e., by that person's *actual, conscious knowledge*. The fact that the injured person should have known of the danger will not support the assumption of risk defense." Whether an injured person actually knew of the danger is within the province of the jury (*Hillman-Kelley v. Pittman*, 1972). The court added:

> "The danger encountered must be both known and appreciated to raise the assumption of risk defense…. If by reason of age, or lack of information, experience, intelligence or judgment, Decedent did not understand the risk involved, he will not be taken to have assumed that risk (Restatement (Second) of Torts, Section 496D, comment c).

There is also a legal principle known as "contractual" or "express assumption of risk" where there is an agreement between the parties that one party will bear the risk of injury, even it is caused by the other party's negligence, or where limitations are placed on liability to specific dollar amounts. These contracts, limitations, or disclaimers will be enforced so long as they are both reasonable and not unconscionable and do not contravene "public policy."

In warranty actions, assumption of risk deals with the requirement of reliance and is associated with the rule that a buyer cannot sue for breach of warranty for a defect if the defect would have become known through a reasonable inspection. Thus, "One who voluntarily chooses to use a chattel with a complete realization of the risks to which he thus exposes himself voluntarily assumes such risks… ."

In strict liability cases, assumption of risk involves a plaintiff who voluntarily encounters a risk that he or she subjectively knows and appreciates. In *Heil*, the court noted that knowledge of some "general hazard" involved in operating a product will not support the assumption of risk defense. There must be "actual" or "charged" knowledge of a specific hazard by using a subjective test.

7.2. Misuse

Misuse is a well-recognized defense in a strict liability case." In *Perfection Paint & Color v. Konduris* (1970), the court noted that the defense of misuse is available when the product is used "in a manner not reasonably foreseeable for a reasonably foreseeable purpose." The court noted that "the defense of contributory negligence of the plaintiff in failing to discover a defect in a product or in failing to guard against the existence of a defect is not misuse of the product and is, therefore, not a defense to strict liability in tort" (Section 402A). The court further stated that:

> "A consumer who incurs or assumes the risk of injury by virtue of his continuing use of a product after having discovered a defect or who uses a product in contravention of a legally sufficient warning, misuses the product and, in the context of the defenses of incurred risk, is subject to the defense of misuse."

From the perspective of a manufacturer, the court categorized misuse as "… use of the product in a manner not reasonably foreseeable for a reasonably foreseeable purpose," or "in a situation in which a product is used for a purpose which is unforeseeable with that for which it was manufactured, or when used for a foreseeable purpose,

is subjected to an unforeseeable or overly harsh use" (*Greeno v. Clark Equipment Company*, 1965; see also Hunter & Solano, 2015).

However, as the court in *Dosier v. Wilcox & Crittendon Co.* (1975) stated: "In applying our rule our courts have held that it should be narrowly applied and even an 'unusual use' which the manufacturer is required to anticipate should not relieve the manufacturer of liability in the absence of warnings against such use."

In addition, misuse may be found when a product is used in "contravention of warnings and instructions" provided for the proper or correct use of the product. However, it may be foreseeable that a product would be misused (based upon the facts, market surveys, incident reports, etc.), and such "misuse" may not be considered as or qualify as "misuse" in a legal sense (Copenhaver, 2023). The defendant may have to take specific steps or precautions to guard against such "foreseeable misuse," especially where the plaintiff was unable to comprehend the inherent danger in any misuse of the product (e.g., by a child). Copenhaver (2023) writes: "Companies should therefore evaluate the potential uses to which their products may be put and decide whether and when they need to take action with respect to any such 'misuse.'"

As an element of the defense against misuse, the defendant may introduce evidence that the product was not in a defective condition when it left the seller's hands. Generally, if a product is not defective at the time of its delivery, the defense of misuse will lie and will be an absolute defense. However, "such a safe condition at the time of delivery by the seller will include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner" (Comment g to Section 402A).

Comment h to Section 402A provides some interesting examples of misuse.

> "If the injury results from abnormal handling, as where a beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger, and a product sold without such warning is in a defective condition."

7.3. Is Comparative Negligence Applicable to Strict Liability in Tort Cases?

The practice of apportionment of damages based upon a theory of comparative negligence was created in order to mitigate against the harshness of the common law rule which held that contributory negligence on the part of a plaintiff was an *absolute bar* to recovery of damages. Comparative negligence standards are adopted under a statute enacted by a state legislature.

Under a comparative fault standard, damages are apportioned according to the proportion of fault attributed to each party. This apportionment is accomplished through a procedure known as a *special verdict* (Adelstein, 2023), under which a jury answers specific questions as to the *amount of damages* and the *percentage of fault* attributed to each party. Most courts will not employ a comparative negligence standard in a case where the negligence of the plaintiff was equal to or greater than the negligence of the defendant (equal to or more than 50%). Ironically, courts today have expanded this concept beyond negligence and apply comparative negligence standards to both misuse and assumption of risk, apportioning damages. The comparative negligence standard has also been applied to strict liability.

In *Daly v. General Motors Corporation* (1978), the court considered whether the principle of comparative negligence applies to actions founded on strict products liability (see Hubbard & Sobocinski, 2018). The plaintiff's theory of recovery was strict liability for damages allegedly caused by an improperly designed door. Interestingly, the court reiterated an important point:

> "From its inception, however, strict liability has never been, and is not now, absolute liability. As has been repeatedly expressed, under strict liability the manufacturer does not thereby become the insurer of the safety of the product's user. On the contrary, the plaintiff's injury must have been caused by a

> "defect" in the product. Thus the manufacturer is not deemed responsible when injury results from an unforeseeable use of its product."

Secondly, the *Daly* court noted that:

> "Though most forms of contributory negligence do not constitute a defense to a strict products liability action, plaintiff's negligence is a complete defense when it comprises assumption of risk. As will thus be seen, the concept of strict products liability was created and shaped judicially. In its evolution, the doctrinal encumbrances of contract and warranty, and the traditional elements of negligence, were stripped from the remedy, and a new tort emerged which extended liability for defective product design and manufacture beyond negligence but short of absolute liability."

In *Li v. Yellow Cab Co.* (1975, pp. 824-825), the court stated "the defense of assumption of risk, insofar as it is no more than a variant of contributory negligence, was merged into the assessment of liability in proportion to fault. Importantly, the court continued: "The application of comparative principles to strict liability treat[s] alike the defenses to both negligence and strict products liability actions. *In each instance the defense, if established, will reduce but not bar plaintiff's claim."*

The *Li* court also commented on "A third objection to the merger of strict liability and comparative fault focuses on the claim that, as a practical matter, triers of fact, particularly jurors, cannot assess, measure, or compare plaintiff's negligence with defendant's strict liability." In response, the court stated, "We are unpersuaded by the argument and are convinced that jurors are able to undertake a fair apportionment of liability."

The court concluded "that a system of comparative fault should be and it is hereby extended to actions founded on strict products liability… ," suggesting that the term '*equitable apportionment of loss*' is more accurately descriptive of the process, nonetheless, the term '*comparative fault'* has gained such wide acceptance by courts and in the literature that we adopt its use herein" (see also McNichols, 1994).

8. Potential Plaintiffs in a Suit Based on Strict Liability

Traditionally, courts have focused almost exclusively on the purchaser or buyer in determining issues relating to who may bring suit for damages (Hunter and Amoroso, 2012a; Geistfeld, 2006, p. 198). This focus on the purchaser or buyer is based on the Restatement (Second) relating to strict liability in tort, in which a party who offers a product for sale impliedly warrants or promises that the product can safely perform its intended and perhaps foreseeable functions. Because there is a correlation between strict liability and warranty, the comments of Professor Geistfeld (2006, p. 252) may also be relevant: "The implied warranty accordingly protects the consumer's reasonable expectation that the seller has provided a non-defective product, and the frustration of this safety expectation justifies holding the seller strictly liable for the defect."

Specifically referencing the law of warranties under Section 2-318 of the UCC, the language is instructive:

> **Alternative A**
> A seller's warranty whether express or implied extends to *any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty*. A seller may not exclude or limit the operation of this section.
> **Alternative B**
> A seller's warranty whether express or implied extends to any *natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty*. A seller may not exclude or limit the operation of this section.
> **Alternative C**
> A seller's warranty whether express or implied extends to *any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty*. A seller may

> not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends.

It is also true that under a negligence standard, it might be possible to include a party other than the purchaser or buyer as a potential plaintiff—but only as long as the third party is "foreseeable" (see *Palsgraf v. Long Island R.R.*, 1928), either determined by a judge as a matter of law or as a question of fact by a jury.

Should such a "foreseeable party" include a bystander?

8.1. Is a Bystander Protected as a Potential Plaintiff? (Hunter, Shannon, & Amoroso, 2016)

Who is a bystander? A bystander is someone who is not directly involved in the purchase or use of the product. Bystanders are affected by the product because they are often *near* the person who purchased or used it and are injured in person by the defective product. In *Sills v. Massey-Ferguson* (1969), the U.S. District Court for the Northern District of Indiana held that bystanders may recover under strict liability. In fact, Owen, Madden, & Davis (2000, p. 269) noted that after the adoption of the Restatement, decisions in many jurisdictions have now "almost unanimously allowed foreseeable bystanders, including rescuers to recover for their injuries caused by defective products." Smith (2013, pp. 634-635) noted that the *Sills* court had offered many reasons for extending recovery to a bystander which may be extrapolated to cases decided in other states:

> "First, Indiana does not require privity in recovery for breach of implied warranty, so there was no policy reason to require privity for tort recovery. Second, the court stated that '[t]he public policy which protects the user and consumer should also protect the innocent bystander.' The court cited a Michigan Supreme Court case holding that 'it would be unjust and totally unrealistic to distinguish between the user and a bystander by saying that one could recover but the other could not.' Finally, the court looked to the standard for establishing a manufacturer's duty: whether it was foreseeable that the plaintiff would be affected by the product's defect. The court reasoned that this standard did not preclude bystander recovery because harm to a bystander could be foreseeable. However, the court specifically refrained from deciding whether the fact that a bystander would be harmed must have been foreseeable, a requirement that would bring the proof required in strict liability actions closer to what is required in negligence suits."

On policy grounds, the court noted in *Giberson v. Ford Motor Co.* (1974, p. 12), "the same precautions required to protect the buyer or user would generally do the same for the bystander" reasoning that "… there is no essential difference between the injured user or consumer and the injured bystander." (Giberson, 1974, p. 11). *Giberson* had not been decided in a policy vacuum. In addition to the *Sills* decision in 1969, the California Supreme Court had decided one of the first cases involving neither the buyer nor user of a product—in this case a plaintiff driving an oncoming vehicle involved in a crash when a drive shaft in a defective automobile buckled, causing its driver to lose control of the car on a highway. Clearly, the driver/owner/buyer would be protected under a theory of strict liability. But what about the plaintiff who was driving the "other car," who was neither a purchaser nor a user of that car, and who might thus be legally classified as a bystander?

In *Elmore v. American Motors Corp.* (1969), decided five years before the Missouri court's decision in *Giberson*, the California Supreme Court ruled that the bystander plaintiff could recover against the manufacture under a theory of strict products liability: "An automobile with a defectively connected drive shaft constitutes a substantial hazard on the highway not only to the driver and passenger of the car but also to pedestrians and other drivers. The public policy which protects the driver and passenger of the car should also protect the bystander" (*Elmore*, 1969, p. 89). Professor Geistfeld (2006) offers an expansive policy argument for the extension of strict products liability to bystanders:

> "From a practical standpoint, there is a major distinction between a consumer and a bystander: unlike a consumer or buyer of a product, the bystander is not in a position to make a product choice. It is clear that American consumers have benefitted greatly from the imposition of a general duty on the part of a manufacturer to warn, which will assure that the ordinary consumer will be provided with the material information required to make an informed decision about purchasing a product. Therefore, the fact that consumers have choices may even encompass limitation of liability provisions in certain cases where there is an availability of the relevant safety options, coupled with knowledge of the attendant risks in using a product."

However, noted Professor Geistfeld, these choices "should not necessarily limit the liability of product sellers with respect to third-party harms." (Geistfeld, 2006, p. 253). Geistfeld cites an interesting example. In *Passwaters v. General Motors* (1972), the buyer purchased an "ornamental hubcap" for an automobile which contained "protruding spinning blades" that severely injured a rider of a motorcycle. The flippers or blades only "serve[d] the purpose of aesthetic design." Because the buyer-consumer understood the nature of the product and the dangers inherent in such use, it could be argued that the hubcap did not frustrate the buyer-consumer's expectations of safety. However, did it create an unreasonable risk of harm for the plaintiff motorcycle rider – classified as a bystander – who had been severely injured by the hubcap? Indeed, the plaintiff's expert witness (a Ph.D. in agricultural engineering and theoretical applied mechanics) had testified that the "protruding blades moving at high speeds in an unshielded area constituted an unsafe design to persons who might come within their vicinity" (*Passwaters*, 1972, p. 1272).

9. Concluding Commentary

Greenman v. Yuba Power Products, decided by the California Supreme Court in 1963, marks the beginning of the recognition of the theory of strict liability in tort as the preferred vehicle for seeking damages when a product proves to be defective. Because the common law theories of negligence, breach of warranty, or misrepresentation or fraud for recovery—not specific to products cases—presented plaintiffs with certain formidable "obstacles," strict liability is now the basis of the great majority of product cases. Yet, application of these standards through case decisions will continue to evolve, particularly in response to changes in the development, manufacturing and use of products, new theories of causes of actions and defenses are being considered, and defendants are more aware than ever of their responsibilities to buyers and others to provide safe, affordable products without defects.

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