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PERSONAL INJURIES FROM DEFECTIVE PRODUCTS - SOME "DOTS AND DASHES"

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Justice Cardozo described the progress of the law as "neither a straight line nor a curve. It is a series of dots and dashes."[1] The development of the law of liability for personal injuries caused by defective products certainly lends credence to this statement.[2] Courts and commentators differ not only as to the elements of recovery, but also as to the more basic question of the theory of recovery. To date, three principal theories have evolved: negligence, misrepresentation, and strict liability. The "dots and dashes" of a manufacturer's liability for personal injuries resulting from defective products can best be shown by considering these three theories.

I. NEGLIGENCE

Negligence in a products liability case is comprised of the same basic elements as negligence in any tort litigation: duty, breach of duty, proximate cause, and damages. Generally speaking, a manufacturer has a duty to use due care in the design,[3] construction,[4] assembly,[5] and inspection[6] of his products in order to insure that his merchandise will not create an unreasonable risk of harm to the consuming public. The standard of care is that care which a reasonable man would exercise under the same or similar circumstances.

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[1] *B. Cardozo,* THE PARADOXES OF LEGAL SCIENCE 27 (1928).

[2] *Cf.* Cowan, *Some Policy Bases of Product Liability,* 17 STAN. L. REV. 1007 (1965).

[3] *See* Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966), *cert. denied,* 385 U.S. 836 (1966). *See generally* Nader, *Automobile Design: Evidence Catching Up With the Law,* 42 DENVER L.C.J. 32 (1965).

[4] *See* Goullon v. Ford Motor Co., 44 F.2d 310 (6th Cir. 1930); J. I. Case Co. v. Sandfur, 245 Ind. 213, 197 N.E.2d 519 (1964); Philo, *Automobile Products Liability Litigation,* 4 DUQUESNE L. REV. 181, 188 (1965).

[5] *See* Clark v. Zuzioh Truck Lines, 344 S.W.2d 304 (Mo. Ct. App. 1961).

[6] *See* Trowbridge v. Abrasive Co., 190 F.2d 825 (3d Cir. 1951); Markel v. Spencer, 5 App. Div. 2d 400, 171 N.Y.S.2d 770 (1958), *aff'd,* 5 N.Y.2d 958, 157 N.E.2d 713, 184 N.Y.S.2d 835 (1959); Annot., 6 A.L.R.3d 12, 77 (1966).

It is with regard to proof of breach of duty that the established principles of tort liability for negligence break down in products liability cases. The injured consumer rarely, if ever, has any direct evidence of what 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.[7] There are three well recognized prerequisites to the invocation of the doctrine:

1. the accident which allegedly caused the plaintiff's injuries ordinarily would not have occurred unless someone had been negligent;

2. the mishap was caused by an instrumentality entirely within the defendant's control;

3. the accident was not due, wholly or in part, to some voluntary action of the plaintiff.[8]

The first condition is generally satisfied without difficulty. It is the requirement of exclusive control that poses the major problem. If this were strictly applied, res ipsa loquitur would not be applicable in the vast majority of products liability cases, for in most cases, at the time of the mishap, the product is entirely within the plaintiff's control.[9] Some courts have taken the position 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.[10] Most cases, however, have held that the plaintiff need prove only that the negligent act occurred while the product was within the manufacturer's control; this is needed to introduce the second element — that the product has not been damaged since it left the manufacturer's control. The control of the product at the time of the mishap is immaterial.[11] The leading case taking this position is *Escola v. Coca-Cola Bottling Co.*[12] There

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[7] 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).

[8] *See* W. PROSSER, TORTS § 39 (3d ed. 1964).

[9] This has prompted Dean Keeton to formulate three different requisites to the invocation 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 of a kind that would not ordinarily be present unless the manufacturer had been negligent.

Keeton, *Products Liability — Problems Pertaining to Proof of Negligence*, 19 Sw. L.J. 26, 36 (1965).

[10] *See* Knapp v. Bob Sullivan Chevrolet Co., 234 Ark. 395, 353 S.W.2d 5 (1962); Brookshire v. Florida Bendix Co., 153 So. 2d 55 (Fla. Dist. Ct. App. 1963).

[11] *See, e.g.*, Bustamante v. Carborundum Co., 375 F.2d 688 (7th Cir. 1967); Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944); *cf.* Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).

[12] 24 Cal. 2d 453, 150 P.2d 436 (1944).

plaintiff,[13] a waitress, was injured when a bottle exploded in her hand.[14] She alleged that defendant manufacturer was negligent in bottling the drink. 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 where it took place some time after 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 the accident, *provided* plaintiff first proves that the condition of the instrumentality had not been changed after it left the defendant's possession.[15]

In *Crystal Coca-Cola Bottling Co. v. Cathey*,[16] the Arizona Supreme Court applied *Escola* type res ipsa to an action against a beverage bottler for personal injuries sustained as a result of drinking a soft drink containing a dead fly. There, of course, the instrumentality causing the injury, the beverage, was not in the exclusive control of the defendant at the time of the injury. In rejecting the defendant's contention that to establish res ipsa a plaintiff had to prove that the instrumentality causing the damage was under the defendant's exclusive control, the court said:

> Though this may correctly state the law in the standard classic case to which the doctrine of res ipsa loquitur applies, the requisite of exclusive control receives a special interpretation when applied to cases involving injury from food and beverages containing deleterious foreign substances.[17]

It can be argued from the above excerpt that the Arizona Supreme Court has left open the question of the degree of exclusive control required in a *non*-food or drink products liability case. Injury due to some other sort of defective product may or may not be "the standard classic case to which the doctrine of res ipsa loquitur applies." Thus far, *Cathey* has been followed in only one Arizona case, *Coca-Cola Bottling Co. v. Fitzgerald*,[18] an action for personal injuries resulting from drinking a fungus-contaminated soft drink. Although another jurisdiction has expressly limited relaxation of the exclusive control requirement to beverage cases,[19] there is no sound reason for doing so.

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[13] Don't ask Gladys Escola if things go better coke, after coke, after coke.

[14] For an almost unbelievably thorough analysis of exploding bottle cases see Bishop, *Trouble in a Bottle*, 16 BAYLOR L. REV. 337 (1964).

[15] 24 Cal. 2d at 458, 150 P.2d at 438.

[16] 83 Ariz. 163, 317 P.2d 1094 (1957).

[17] *Id.* at 169, 317 P.2d at 1098.

[18] 3 Ariz. App. 303, 413 P.2d 869 (1966).

[19] Patrol Value Co. v. Farrell, 316 S.W.2d 92, 96 (Tex. Civ. App. 1958).

The concern should not be whether the product involved was a soft drink or a pogo stick, but whether the plaintiff proves that the condition of the instrumentality had not been changed after it left the defendant's possession.

II. MISREPRESENTATION

Originally, actions for misrepresentation[20] assumed two forms: deceit and negligence.[21] Under either theory, it was necessary to prove a false representation, reliance on the false representation, and resulting damages.[22] To recover under deceit, it was also necessary that the plaintiff prove the defendant's knowledge that the representation was false; in negligent misrepresentation, the additional factor was, of course, negligence.[23] Courts were hesitant to impose liability for personal injuries resulting from misrepresentations. In *Derry v. Peek*,[24] an English court said that the misrepresentation must be intentional in order for the buyer to recover for personal injuries. After *Derry*, American courts split: some requiring intentional misrepresentation,[25] others requiring only negligent misrepresentation.[26] It is now fairly well settled that negligent misrepresentation is actionable.[27] The problem area today is liability for innocent misrepresentation.[28]

Since proving either scienter or negligence is often extremely difficult in misrepresentation cases, Professor Williston advocated liability for personal injuries resulting from innocent misrepresentation.[29] The first case to impose tort liability for an innocent misrepresentation was

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[20] Technically speaking, a misrepresentation does not require a defective product. It is possible for a product to be other than represented without being defective. For example, an overzealous tire manufacturer might represent that his tires can be driven safely at high speeds over slick surfaces. That they cannot, does not mean that they are defective. Such cases, however, are so rare that misrepresentation is generally regarded as a remedy for injuries occasioned by use of a defective product. In *Jacobson v. Ford Motor Co.*, 427 P.2d 621, 624 (Kan. 1967), the court said:

> Regardless of the ground of liability asserted, before a plaintiff can recover damages from a manufacturer, he must show that the product was defective or harmful. This is essential. If the plaintiff cannot do so he has no cause of action on any theory.

See also 1 R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 1.3 (1961).

[21] *See* W. PROSSER, TORTS 697 (3d ed. 1964).

[22] *Id.*

[23] *Id.*

[24] 14 App. Cas. 337 (1889).

[25] *See, e.g.*, Nash v. Minnesota Title & Trust Co., 163 Mass. 574, 40 N.E. 1039 (1895); Rosenberg v. Cyrowski, 227 Mich. 508, 198 N.W. 905 (1924).

[26] *See, e.g.*, Prestwood v. Carlton, 162 Ala. 327, 50 So. 254 (1909); Cunningham v. C. R. Pease House Furnishing Co., 74 N.H. 435, 69 A. 120 (1908).

[27] *See* Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231, 235 (1966).

[28] For an extended discussion of the three theories, *see* Carpenter, *Responsibility for Intentional, Negligent and Innocent Misrepresentation*, 24 ILL. L. REV. 749 (1930); Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1966).

[29] *See* Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415, 427-40 (1911).

Baxter v. Ford Motor Co.[30] In *Baxter*, the plaintiff purchased a new Ford from a retail dealer. The dealer, in his sales talk, used literature 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 said:

> [It] was the duty of appellant [Ford] to know that the representations made to purchasers were true. Otherwise it should not have made them. If a person states as true material facts susceptible of knowledge to one who relies and acts thereon to his injury, if the representations are false, it is immaterial that he did not know they were false, or that he believed them to be true.[31]

In the past thirty-five years *Baxter* has gained considerable support. Liability for innocent misrepresentations has been imposed in twenty states.[32] The legal commentators have been virtually unanimous in their approval of *Baxter*,[33] and the *Restatement (Second) 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 a contractual relation with the seller."[34]

One of the most eloquent arguments supporting this trend was made in *Rogers v. Toni Home Permanent Co.*[35] where 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 very 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.[36]

Toni concerned only advertisements and labels, but the form that the misrepresentation takes is immaterial.[37] Manufacturers have been held

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[30] 168 Wash. 456, 12 P.2d 409 (1932), *aff'd. per curiam*, 168 Wash. 465, 15 P.2d 1118 (1932) (rehearing en banc), *aff'd*, 179 Wash. 123, 35 P.2d 1090 (1934) (on appeal from second trial). For a lengthy discussion of *Baxter*, *see* Leidy, *Another New Tort?*, 38 MICH. L. REV. 964 (1940).

[31] 179 Wash. at 128, 35 P.2d at 1092 (opinion on the second appeal).

[32] The cases are collected in W. PROSSER, TORTS § 97 at 684-85 (3d ed. 1964).

[33] For a review of the commentators' remarks on the *Baxter* case, see GILLAM, PRODUCT LIABILITY IN THE AUTOMOBILE INDUSTRY 89 (1960).

[34] RESTATEMENT (SECOND) OF TORTS § 402B (1965).

[35] 167 Ohio St. 244, 147 N.E.2d 612 (1958).

[36] *Id.* at 248, 147 N.E.2d at 615-16.

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

liable for misrepresentations in brochures,[38] manuals,[39] and service policies.[40]

The above quotation from *Toni* also indicates that privity is not required. This is the position of the great majority of the cases and commentators.[41] *Dimoff v. Ernie Mayer, Inc.*[42] is the only recent case taking a contrary position. There the injury complained of was economic in nature; plaintiff's complaint was that his operating costs were higher than represented because of a defective fuel line. The court held that privity would be waived only in cases in which the defect causing the injury was dangerous.[43] One final factor should be noted from the above excerpt from *Toni* — the consumer must rely on the misrepresentation. Whether a person has relied upon a misrepresentation is a question of fact, and reliance is a very difficult fact to prove.[44] In most cases, the injured consumer can do little more than simply testify that he relied on the misrepresentation.

Closely related to the reliance requirement is the rule that there can be no recovery for misrepresentation absent a showing of casual relationship between the misleading statement and the injury.[45] Causation in a misrepresentation case 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 the use of the product; (3) the representation affected the consumer's operation or use of the product at the time of the accident. It is not necessary to show a "but for" relationship; it is sufficient that the representation had a material influence upon the consumer's conduct.[46]

There are three other prerequisites to recovery under a misrepresentation theory: the plaintiff must prove that the representation was in fact a representation and not merely "puffing" or the expression of

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[38] *See* Hansen v. Firestone Tire & Rubber Co., 276 F.2d 254 (6th Cir. 1960).

[39] *See* Mannsz v. Macwhyte Co., 155 F.2d 445 (3d Cir. 1946).

[40] *See* Studebaker Corp. v. Nail, 82 Ga. App. 779, 62 S.E.2d 198 (1950).

[41] *See, e.g.*, B. F. Goodrich v. Hammond, 269 F.2d 501 (10th Cir. 1959); Bahlman v. Hudson Motor Car Co., 290 Mich. 683, 288 N.W. 309 (1939); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399 (1962); Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966); RESTATEMENT (SECOND) OF TORTS § 402B (1965); Skeel, *Product Warranty Liability*, 6 CLEV.-MAR. L. REV. 94 (1957).

[42] 55 Wash. 2d 385, 347 P.2d 1056 (1960).

[43] RESTATEMENT (SECOND) OF TORTS § 402B applies only to personal injuries. In an officially unpublished, yet widely publicized section, § 552D, Council Draft No. 17, p. 76, the *Restatement* extends strict liability for misrepresentations to economic losses. *See* Ford Motor Co. v. Lonon, 398 S.W.2d 240, 246-47 (Tenn. 1966); Wade, *Recent Developments in the Law of Strict Liability for Products*, 33 INS. COUNCIL J. 552, 556 (1966). This seems in line with the current trend. *See* Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965). *Contra* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

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

[45] *See generally* Annot., 75 A.L.R.2d 112, 144 (1961).

[46] *See* W. PROSSER, TORTS § 103 at 730 (3d ed. 1964).

opinion, that the representation was material, and that his reliance on it was justifiable.[47]

III. STRICT LIABILITY

A. Warranty

The action for breach of warranty was originally one on the case, sounding in tort and closely allied to deceit.[48] Shortly after 1750 an express warranty began to be recognized as a term of the contract of sale, and attorneys adopted the practice of declaring on the contract.[49] *Stuart v. Wilkins*[50] sanctioned this practice by holding that assumpsit would lie for breach of an *express* warranty. In the course of the argument of *Stuart,* there seems to have been discussion as to whether the same was true of implied warranty; Lord Mansfield was of the opinion that *implied* warranties were exclusively a matter of tort.[51] Forty years later, however, *Stuart* was extended to implied warranties of merchantable quality.[52]

Warranty has never entirely lost the tort character it had in the beginning. For example, courts have held that the tort aspects of warranty call for application of the tort statute of limitations[53] and the tort law of damages.[54] Today, however, all warranty recovery is generally recognized as contractual in nature.[55] Thus, when a court considers a claim for breach of warranty, it must consider the bars to recovery imposed by the law of sales.

The most notable such bar is privity.[56] Since *Winterbottom v. Wright,*[57] the general rule has been that a manufacturer is not liable for personal injuries incurred by a consumer with whom he was not in privity. Major exceptions to this rule developed. In *MacPherson v. Buick Motor Co.,*[58] the privity requirement was abolished for negligence actions. This is the law today in every American jurisdiction.[59] The attack on

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

[48] *See* Ames, *History of Assumpsit,* 2 HARV. L. REV. 1, 8 (1888).

[49] *Id.*

[50] 1 Dougl. 19, 99 Eng. Rep. 15 (K.B. 1778).

[51] *See* Prosser, *The Implied Warranty of Merchantable Quality,* 27 MINN. L. REV. 117, 120 (1943).

[52] Gardiner v. Gray, 4 Camp. 144, 171 Eng. Rep. 46 (1815).

[53] *See* Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (1954); Jones v. Boggs & Buhl, Inc., 355 Pa. 242, 49 A.2d 379 (1946).

[54] *See* Despatch Oven Co. v. Rauenhorst, 229 Minn. 436, 40 N.W.2d 73 (1949); Berg v. Rapid Motor Vehicle Co., 78 N.J.L. 724, 75 A. 933 (1910).

[55] *See* Gillam, *Products Liability in a Nutshell,* 37 ORE. L. REV. 119, 147 (1958).

[56] For an excellent discussion of the privity concept see Comment, *The Contractual Aspects of Consumer Protection: Recent Developments in the Law of Sales Warranties,* 64 MICH. L. REV. 1430, 1442 & n.2 (1966).

[57] 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

[58] 217 N.Y. 382, 111 N.E. 1050 (1916).

[59] *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099, 1100 (1960). Mississippi was the last state to take this position. *See* State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966) *cert. denied,* 386 U.S. 912 (1967).

the requirement of privity in an action for breach of warranty is more recent.

The requirement was first abolished in food cases.[60] In *Jacob E. Decker & Sons, Inc. v. Capps*,[61] the Texas Supreme Court wrote:

> We think the manufacturer is liable in such a case under an implied warranty imposed by operation of law as a matter of public policy . . . . Liability in such case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life.[62]

Fifteen years later the Arizona Supreme Court adopted this very language in holding a food manufacturer liable, under a negligence theory, for personal injuries incurred by a consumer, despite the lack of privity.[63]

As to non-food products, courts invented a wide variety of complex legal theories to get around the privity requirement.[64] Commentators began to advocate the extension of the no privity rule to non-food cases.[65] As Professor James stated, "[T]he food area is not necessarily the most dangerous field. Greater peril lurks in a defective automobile wheel than in a pebble in a can of beans."[66] Finally, the New Jersey Supreme Court abolished the privity requirement in a non-food case, *Henningsen v. Bloomfield Motors, Inc.*[67]

In *Henningsen* the plaintiff was driving a new automobile, purchased ten days previously. It suddenly veered off the road colliding with roadside objects, demolishing the automobile, and causing personal injuries. Plaintiff sued the manufacturer and the dealer on a theory of implied warranty of suitability for use. The court held that when a manufacturer places a new automobile into the stream of commerce and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use accompanies the automobile into the hands of the purchaser, members of the family, and others using it with his consent, regardless of the presence or absence of privity of contract.

After *Henningsen*, the courts of other jurisdictions followed suit in what Dean Prosser describes as "the most spectacular overturn of an established rule in the entire history of torts."[68] Today a majority of

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[60] *See* Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).
[61] 139 Tex. 609, 164 S.W.2d 828 (1942).
[62] *Id.* at 612, 164 S.W.2d at 829.
[63] Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 167, 317 P.2d 1094, 1096 (1957).
[64] One legal writer chronicled twenty-nine such triumphs of judicial reasoning. *See* Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 147 (1958).
[65] *See, e.g.*, James, *Products Liability*, 34 TEX. L. REV. 192, 196 (1955); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1100 (1960); 1965 U. ILL. L.F. 144.
[66] James, *Products Liability*, 34 TEX. L. REV. 192, 196 & n.18 (1955).
[67] 32 N.J. 358, 161 A.2d 69 (1960).
[68] *See* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 794 (1966).

the states do not require privity in an action for breach of warranty, regardless of the type of product.[69] Further evidence of the acceptance of *Henningsen* is the position taken by the American Law Institute in the *Restatement (Second)* of Torts.[70]

It is difficult to ascertain the Arizona view of the need for privity in non-food warranty cases. There is no reported case even discussing the matter. In *Crystal Coca-Cola Bottling Co. v. Cathey*, the Supreme Court limited its holding to food, beverages, and drugs.[71] The inclusion of drugs is perhaps significant since drugs were not involved in the case. Perhaps this indicates the extent to which the Arizona court is willing to do away with privity. Dean Prosser says that Arizona has abolished the privity requirement in all cases;[72] however, the cases on which he bases his conclusion were all actions against the immediate vendor and so did not even involve questions of privity.[73]

While privity has been the center of the courts' and commentators' attention, it is not the only problem precipitated by the warranty concept. Any liability founded upon a warranty is subject to disclaimer,[74] and almost every manufactured product accompanied by an express warranty is accompanied by a disclaimer of all implied warranties. Recently, however, the enforcement of disclaimers against consumers has come under attack. Several legal writers have urged that some disclaimers should be unenforceable as violative of public policy.[75] Strong arguments can be made in support of this position. The average consumer is helpless when confronted with a typical warranty disclaimer. He will not even notice it — written in small print or placed on the back of the container. He is no better off if he does notice the disclaimer, for he has neither the knowledge to determine its legal effect nor the sophistication to use it as a factor in determining which goods to buy. Moreover, the seller is usually without authority to vary the

[69] *Id.* at 794-96; B.B.P. Ass'n, Inc. v. Cessna Aircraft Co., 420 P.2d 134 (Idaho 1966); State Stove Mfg. 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).

[70] RESTATEMENT (SECOND) OF TORTS § 402A (1965). For an excellent analysis of this section, see Note, *Products Liability and Section 402A of the Restatement of Torts*, 55 GEO. L.J. 286 (1966).

[71] 83 Ariz. 163, 167, 317 P.2d 1094, 1096 (1957).

[72] Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 794 (1966).

[73] Nalbandian v. Byron Jackson Pumps, Inc., 97 Ariz. 280, 399 P.2d 681 (1965); Colvin v. Superior Equip. Co., 96 Ariz. 113, 392 P.2d 778 (1964); Crystal Coca-Cola Bottling Co. v. Cathey, 83 Ariz. 163, 317 P.2d 1094 (1957); Eisenbeiss v. Payne, 42 Ariz. 262, 25 P.2d 162 (1933).

[74] *See* Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117, 157-61 (1943).

[75] *See, e.g.*, R. Keeton, *Assumption of the Risk in Products Liability Cases*, 22 LA. L. REV. 122, 135 (1961); Note, *Disclaimers of Warranty in Consumer Sales*, 77 HARV. L. REV. 318 (1963).

terms of the disclaimer. A number of courts have utilized these and similar arguments to strike down warranty disclaimers.[76]

There are other obstacles to recovery posed by the law of sales. For example, there must be a sale.[77] Further, 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 ought to know, of the breach.[78]

B. Strict Liability in Tort

Because of the difficulties imposed by the law of sales, a number of leading commentators in the area of products liability have urged the courts to discard the word "warranty," with all its contractual implications, and speak solely of strict liability in tort.[79] Courts have frequently confused strict liability in tort with implied warranty and used the latter term when the phrase "strict liability in tort" far better described the theory under which they allowed recovery. Implied warranty and strict liability in tort can be distinguished easily in theory: the former is transactional; the latter is behavioral.[80] The practical distinction is far more important: privity, disclaimers, and other niceties of the law of sales are not material to 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.*[81] In *Greenman*, the plaintiff was injured when a piece of wood he was turning on a lathe, which his wife had purchased from a retail store, came loose and struck him on the head. He brought an action, grounded in negligence and breach of warranty, against the manufacturer and the seller of the machine.[82] The jury found for the plaintiff, and the manufacturer appealed on the ground that the plaintiff's failure to give notice of the breach of war-

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[76] *See, e.g.*, State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). Several commentators have voiced their approval of this aspect of the *Henningsen* decision. *See, e.g.*, A. CORBIN, CONTRACTS § 128 (2d ed. 1963); Philo, *Automobile Products Liability Litigation*, 4 DUQUESNE L. REV. 181, 187 (1965).

[77] *See* Whitehurst v. American Nat'l Red Cross, 1 Ariz. App. 326, 402 P.2d 584 (1965); Community Blood Bank, Inc. v. Russell, 196 So. 2d 115, 209 (Fla. Dist. Ct. App. 1967); *cf.* Chesire v. Southampton Hosp. Ass'n, 53 Misc. 2d 355, 278 N.Y.S.2d 531 (Sup. Ct. 1967).

[78] *See* L. VOLD, SALES 434 (1931). Notice and disclaimers are discussed further in the sub-section of this article entitled Uniform Commercial Code.

[79] *See, e.g.*, Keeton, *Products Liability — Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855 (1963); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

[80] *See* McCurdy, *Warranty Privity in Sales of Goods*, 1 HOUSTON L. REV. 201 (1964). *See also* Boshkoff, *Some Thoughts About Physical Harm, Disclaimers and Warranties*, 4 B.C. IND. & COM. L. REV. 285 (1963).

[81] 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

[82] In virtually all subsequent cases which have adopted strict liability in tort, the plaintiff has pleaded breach of warranty and made no mention of strict liability in tort.

ranty barred recovery. The California Supreme Court, in a unanimous opinion by Justice Traynor,[83] 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 . . . .[84]

Numerous commentators have called strict liability in tort for defective products the law of the future.[85] It is perhaps more accurate to call it the law of the present. In the five years since *Greenman*, a number of cases have adopted strict liability in tort,[86] as has the American Law Institute.[87]

The Arizona Supreme Court has discussed strict liability in tort in only two cases. In *Colvin v. Superior Equipment Co.*,[88] the defendant counterclaimed for breach of an implied warranty. He contended that a power shovel purchased from plaintiff had a defectively welded replacement part. There was evidence that defendant had examined the shovel prior to the purchase, so the court was faced with the problem of whether the statute, precluding implied warranty where the buyer had examined the merchandise, applied.[89] In resolving this question the court quoted an excerpt from *Greenman* to the effect that an examination of the goods does not vitiate implied warranty liability where the defect "lurks beneath the surface."[90] The court's editing of the excerpt

[83] Products liability must be added to the growing list of fields of law in which Justice 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); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

[84] 59 Cal. 2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

[85] *See* Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 S. CAL. L. REV. 30 (1965); Noel, *Manufacturers of Products — The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957).

[86] *See* RESTATEMENT (SECOND) OF TORTS, Appendix § 402A (1966). To this last add B.B.P. Ass'n, Inc. v. Cessna Aircraft Co., 420 P.2d 134 (Idaho 1966); State Stove Mfg. 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); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967). It should be noted that the position of the *Restatement* draftsmen is that cases which eliminate the requirement of privity in actions for breach of an implied warranty are actually strict liability in torts cases in which the *ratio decidendi* has not been thoroughly explained.

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

[88] 96 Ariz. 113, 392 P.2d 778 (1964).

[89] ARIZ. REV. STAT. ANN. § 44-215 (1956).

[90] 96 Ariz. at 119, 392 P.2d at 782.

from *Greenman* is perhaps significant; instead of ending the quotation where the discussion of hidden defects stops, the court included a statement of the basic theory of strict liability in tort. At least one of the justices of the Arizona Supreme Court is of the opinion that the court adopted strict liability in tort in the *Colvin* case. Justice Lockwood has so written in her concurring opinion in *Nalbandian v. Byron Jackson Pumps, Inc.*[91] Dean Prosser and a student writer of the Arizona Law Review have taken similar positions.[92]

Recently both divisions of the Arizona Court of Appeals delivered decisions proclaiming strict liability in tort to be the law in Arizona. In *O. S. Stapley Co. v. Miller*[93] the steering mechanism on a motor boat malfunctioned, causing the boat to swerve sharply and throw the plaintiff off the front deck. The court said:

> We therefore *hold* that [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 an injury to a human being"[94] (emphasis added).

Division Two used similar language in remanding a case involving an allegedly defective pogo stick.[95] However, Judge Molloy, in dissent, indicated his reluctance to adopt strict liability in tort for manufacturers at this time.[96]

Despite extensive treatment of the subject in numerous opinions,[97] books,[98] and law review articles,[99] many attorneys still do not understand the basic nature of strict liability in tort. Under strict liability in tort a manufacturer is not an insurer. *Strict liabilty is not absolute liability!* In order to prevail under strict liability in tort, as it has been developed in the case law, a plaintiff must prove: (1) the product was defective; (2) the defect existed at the time the product was sold by the defendant; (3) the presence of the defect made the use of the product unreasonably dangerous to the typical user; (4) the defective

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[91] 97 Ariz. 280, 287, 399 P.2d 681, 686 (1965).

[92] *See* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 794 (1966); Comment, *Arizona: A Move Toward Strict Products Liability*, 7 ARIZ. L. REV. 263 (1963). The student author is not quite so positive as Justice Lockwood or Dean Prosser; he says that Arizona has either adopted strict liability in tort or is leaning that way.

[93] 430 P.2d 701 (Ariz. Ct. App. 1967).

[94] *Id.* at 706.

[95] Bailey v. Montgomery Ward & Co., 431 P.2d 108 (Ariz. Ct. App. 1967).

[96] *Id.* at 115.

[97] *See, e.g.*, Putman v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964); Ford Motor Co. v. Lonon, 398 S.W.2d 240 (Tenn. 1966).

[98] *See, e.g.*, L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY (1964); GILLIAM, PRODUCTS LIABILITY IN THE AUTOMOBILE INDUSTRY (1960).

[99] *See, e.g.*, Cruse, *Products Liability — Past, Present, and Future*, 8 So. TEX. L.J. 151 (1966); Steffen, *Enterprise Liability: Some Exploratory Comments*, 17 HASTINGS L.J. 165 (1965).

condition caused the accident; and (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";[100] Traynor defines it as one that fails to meet the average quality of like products;[101] the *Restatement (Second) of Torts* defines it as "a condition not contemplated by the ultimate consumer, which will be dangerous to him."[102]

There are four primary methods of proving the existence of a defect: (1) direct evidence — introduction of the product;[103] (2) testimony of an expert who has examined the product after the accident and identifies the specific defect;[104] (3) testimony negating all other possible causes;[105] (4) testimony by the user as to the malfunction.[106] While numerous law review articles set out general guidelines as to the weight to be given each type of evidence,[107] these generalizations are of limited

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[100] Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 57, 207 A.2d 305, 313 (1965).

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

[102] RESTATEMENT (SECOND) OF TORTS § 402A comment *g* (1965).

[103] *See* Benavides v. Stop & Shop, Inc., 346 Mass. 154, 190 N.E.2d 894, 897 (1963).

[104] *See, e.g.*, Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Gherna v. Ford Motor Co., 246 Adv. Cal. App. 721, 55 Cal. Rptr. 94 (1966).

[105] *See* Dealers Transport Co. v. Battery Distrib. Co., 402 S.W.2d 441 (Ky. Ct. App. 1965).

[106] *See* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); *but cf.* Jack Roach-Bissonnet, Inc. v. Puskar, 417 S.W.2d 262 (Tex. 1967). In *Henningsen* the only evidence of a specific 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." 161 A.2d at 75. Nevertheless, the New Jersey Supreme Court held that this, together with the lack of evidence of fault on the plaintiff's part, the fact that the car had been driven only 468 miles, and the testimony of a repairman-appraiser that "something down there had to drop off or break loose" to cause the car to act as it did, was sufficient to raise an inference that the car was defective.

Dean Keeton is very critical of *Henningsen* for this reason. *See* Keeton, *Products Liability — Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1340 (1966). To illustrate the confusion in this area of the law, another legal writer has stated that in *Henningsen* "the plaintiff clearly proved by expert opinion that a defect existed in the automobile." Philo, *Automobile Products Liability Litigation*, 4 DUQUESNE L. REV. 181, 187 (1966).

Perhaps Mr. Philo was basing his opinion on evidence not mentioned by the New Jersey Supreme Court. In *Henningsen* the plaintiff's expert admitted that the defect could have been caused by improper servicing by the retailer; *see* Milling, *Henningsen and the Pre-Delivery Inspection and Conditioning Schedule*, 16 RUTGERS L. REV. 559, 562 (1962). 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, 37 Cal. Rptr. 896 (1964).

[107] *See, e.g.*, Freedman, *"Defect" in the Product: The Necessary Basis for Products 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 a Defect*, 41 TEX. L. REV. 855 (1963).

value. First, the courts do not always adhere to the rules set out in the articles.[108] For example, the writers are unanimous in saying that the mere use of a product accompanied by an injury does not, in and of itself, establish the existence of a defect.[109] Yet in *Crusan v. Aluminum Co. of America*,[110] the plaintiff merely testified that a pie pan manufactured by defendant company collapsed causing the hot contents to flow over her. Without discussing any evidence of a defect the court found that the pie plate was defective, and added, by way of dictum, that even if it was not defective strict liability on the basis of public policy should be imposed.[111] Second, in each case the determination of the existence of a defect is so dependent on the particular facts before the court that generalizations are of limited value.[112]

It is difficult to envision a case in which the plaintiff has direct evidence that the defect existed when the manufacturer relinquished control of the product. Generally there is only circumstantial evidence. In some cases, such as where a foreign object is found in a sealed container, the circumstantial evidence is convincing.[113] In most cases the plaintiff must rely primarily on inferences. For example, in *Bailey v. Montgomery Ward*,[114] the plaintiff was injured when the spring on a pogo stick "got loose" and the cap hit him in the eye. The pogo stick had been purchased in a sealed package and had never been used until a few minutes prior to the accident. There was no direct evidence that the defect existed when the pogo stick left the manufacturer's control. The court simply held that the circumstances were sufficient to raise an inference that the defect existed then. The important factor in the *Bailey* case was the relatively short interval between first use of the product and the accident. The longer such a period, the weaker will be the inference that the defect existed when the manufacturer relinquished control, and the stronger the inference of owner abuse.[115]

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[108] For a highly entertaining and woefully accurate appraisal of the influence of most law review articles, *see* Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 43 (1936).

[109] *See, e.g.*, Freedman, *"Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty*, 33 TENN. L. REV. 323 (1966); Keeton, *Products Liability — Allocation of the Risk*, 64 MICH. L. REV. 1329 (1966).

[110] 250 F. Supp. 863 (E.D. Tex. 1965).

[111] *Id.* at 864.

[112] *Compare* Williams v. Ford Motor Co., 411 S.W.2d 443 (Mo. Ct. App. 1966) *with* Jack Roach-Bissonet, Inc. v. Puskar, 417 S.W.2d 262 (Tex. 1967). These two cases are remarkably similar, except for the result.

[113] *See* Kroger Co. v. Bowman, 411 S.W.2d 339 (Ky. Ct. App. 1967); Shoshone Coca-Cola Bottling Co. v. Dolinski, 420 P.2d 855 (Nev. 1966). Even here some courts require the plaintiff to prove the absence of any tampering. *See* Williams v. Paducah Coca-Cola Bottling Co., 343 Ill. App. 1, 98 N.E.2d 164 (1951).

[114] 431 P.2d 108 (Ariz. Ct. App. 1967).

[115] *But see* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). The plaintiff bought a new car from an authorized dealer; the car had been shuttled from dealer to dealer for over six months. After the plaintiff had driven the car for some fifteen hundred miles, it went out of control. In spite of this time lapse, the court held that the defect existed at the time the manufacturer relinquished control.

In the vast majority of products liability cases if the plaintiff can prove that the product was defective and he was injured by it, he will have little problem showing that the defect made the product unreasonably dangerous.[116] Difficulties arise most frequently when the product in question is unavoidably unsafe, as is 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.[117] The manufacturer's liability for products containing an ingredient, to which some people are allergic, at one time posed a problem.[118] Now it seems settled that the manufacturer's duty is limited to giving adequate warning and instructions when it knows, or reasonably should know of the susceptibility of a substantial number of persons to the drug.[119]

A recent article in *Consumers Report*[120] clearly illustrates the need for requiring a plaintiff seeking recovery under strict liability in tort to prove not only the existence of a defect, but also a causal relationship between the defect and the injury alleged. The article states that one hundred per cent of a random sample of new 1965 automobiles were defective in some respect. Unless proof of causation were required, the owner of any car in this group could recover for any injury incurred while driving the car. Comparatively little has been said about causation in strict liability in tort by either the courts or the commentators. Perhaps this is either because they have been occupied with the more basic question of whether to adopt strict liability in tort, or because the causation considerations are much the same as in any other tort action.

With regard to causation it is necessary to consider the availability of defenses based on the conduct of the plaintiff. While the reported cases indicate a serious conflict in this area,[121] disagreement is solely a

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[116] The *Restatement* 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." RESTATEMENT (SECOND) OF TORTS § 402A comment *i* (1965). Dean Wade suggests that the test of whether a product is unreasonably dangerous is one of "balancing the utility of the risk against the magnitude of the risk." *See* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965). For a critical analysis of the requirement of "unreasonably dangerous" *see* Note, *Products Liability and Section 402A of Torts*, 55 GEO. L.J. 286 (1966).

[117] RESTATEMENT (SECOND) OF TORTS § 402A comment *k* (1965).

[118] *See* Noel, *Manufacturers of Products — The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 969-71 (1957).

[119] *See* Kaempfe v. Lehn & Fink Prods. Corp., 21 App. Div. 2d 197, 249 N.Y.S.2d 840 (1964), *motion to dismiss appeal denied*, 16 N.Y.2d 1044, 213 N.E.2d 451, 266 N.Y.S.2d 118 (1965); Freedman, *Allergy and Products Liability Today*, 24 OHIO ST. L.J. 479 (1963); RESTATEMENT (SECOND) OF TORTS § 402A comment *j* (1965); Note, 10 ARIZ. L. REV. (1967) (this issue). *See generally* Whitmore, *Allergies and Other Reactions Due to Drugs and Cosmetics*, 19 SW. L.J. 76 (1965).

[120] Consumer Reports, April, 1965 at 4.

[121] *See Annot.*, 4 A.L.R.3d 501 (1965). The two Arizona Court of Appeals decisions afford an excellent illustration of the confusion that results from the difference in terminology. In *O. S. Stapley Co. v. Miller*, 430 P.2d 701, 703 (Ariz. Ct. App. 1967), the court held that contributory negligence is a defense to an action based

matter of language. The legal writers categorize contributory fault on the part of the user or injured party as follows: (1) the plaintiff should have discovered the defect in the product, but failed to do so; (2) the plaintiff was aware of the product's defect or dangerous condition but continued to use it; (3) the product was used in a manner different from that intended or recommended by the manufacturer — in other words, a misuse of the product.[122] Type (1) is not a defense; types (2) and (3) are.[123]

There is only one known case which might violate the above classification scheme, *Maiorino v. Weco Products Co.*[124] There the plaintiff cut his wrist while attempting to open a glass container in which a new toothbrush was packaged. He was denied recovery because of a jury finding of contributory negligence. In affirming the judgment for the defendants, the New Jersey Supreme Court said:

> [W]e are of the view that where a plaintiff acts or fails to act as a reasonably prudent man in connection with the use of a warranted product or one which comes into his hands under circumstances imposing strict liability on the maker or vendor or lessor, and such conduct proximately contributes to his injury he cannot recover . . . . [T]he well known principle of contributory negligence in its broad sense is sufficiently comprehensive to encompass all the various notions expressed in cited cases . . . . A manufacturer is entitled to expect normal use of his product.[125]

While the first two sentences are extremely broad, the last sentence indicates that *Maiorino* goes no farther than holding that contributory fault, amounting to misuse, is a defense. Several legal commentators have so interpreted *Maiorino*.[126] Unfortunately, the recitation of facts

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on strict liability in tort. The court was concerned with a plaintiff who was riding on the deck of a motor boat, instead of sitting in one of the seats. The court reversed the trial court's directed verdict in favor of plaintiff and remanded for a jury determination of the plaintiff's contribution to her own injury. *See* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 824 (1966). In *Bailey v. Montgomery Ward & Co.*, 431 P.2d 108 (Ariz. Ct. App. 1967), the dissent takes the position that contributory negligence is not a defense to an action grounded on strict liability in tort, citing the *Restatement* as authority for this proposition. The *Restatement*, however, clearly provides that misuse is a defense in a strict liability case. *See Restatement (Second) of Torts* § 402A comment *h* (1965). Thus, while the language of the two cases indicates a conflict, in fact there is none.

[122] *See* W. PROSSER, TORTS 656 (3d ed. 1964); Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 S. CAL. L. REV. 30 (1965); Noel, *Products Liability of Retailers and Manufacturers in Tennessee*, 32 TENN. L. REV. 207, 260 (1965); Wade, *Strict Liability of Manufacturers*, 19 SW. L.J. 5, 22 (1965).

[123] Wade, *Strict Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

[124] 45 N.J. 570, 214 A.2d 18 (1965).

[125] 214 A.2d at 20.

[126] *See* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 3-221 (1966); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 839 & n.254 (1966); Comment, *Products Liability — The Expansion of Fraud, Negligence, and Strict Tort Liability*, 64 MICH. L. REV. 1350, 1385 (1966).

in the appellate court opinion is so inadequate that it is impossible to determine if they are correct.

The risk allocation that results from "categorized contributory fault" is the proper one.[127] A manufacturer should not be relieved of liability because the plaintiff is negligent in failing to discover a defect. A large portion of mass-produced items are manufactured in as inferior a manner as the traffic will bear yet are advertised by conscious misrepresentations as being far superior to their quality. This "high quality lying" about "low quality" products lulls the consuming public into a false sense of security. The failure to inspect or look for defects in a product is merely a manifestation of this reliance.

Misuse or use after discovery of a defect should be a defense. To hold otherwise would be to impose virtually absolute liability; it would make every manufacturer an insurer. We should first try a limited re-allocation of risks, leaving such a radical change in the social order to the democratic process of legislation.[128]

The recent and almost universal enactment of the Uniform Commercial Code,[129] with its sections dealing with warranties,[130] has prompted several commentators to urge a return to the law of sales in the area of products liability.[131] Arizona recently adopted the Code by legislative action;[132] still more recently, both divisions of the Arizona Court of Appeals adopted the *Restatement* view of strict liability in tort.[133] These developments invite a consideration and comparison of

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[127] Allocation of the risk, and not the nature of strict liability, should be the controlling consideration. *See* Keeton, *Recent Decisions and Developments in the Law of Products Liability*, 32 INS. COUNSEL J. 620, 631 (1965); *cf.* Calabresi, *Some Thoughts About Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1960); R. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959); Weaver, *Allocation of Risks in Products Liability Cases: The Need for a Revised Third Party Beneficiary Theory in UCC Warranty Actions*, 52 VA. L. REV. 1028, 1037-47 (1966).

[128] *Cf.* German, *Products Liability — Strict Liability?*, 33 INS. COUNSEL J. 259, 268 (1966); James, *General Products — Should Manufacturers Be Liable Without Negligence*, 24 TENN. L. REV. 923, 924 (1957); Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. Det. L.J. 343 (1965).

[129] Louisiana is the only state that has not adopted the Code.

[130] The UNIFORM COMMERCIAL CODE recognizes three basic warranties of quality: § 2-313 (ARIZ. REV. STAT. ANN. § 44-2330 (Supp. 1967)) (express warranty); § 2-314 (ARIZ. REV. STAT. ANN. § 44-2331 (Supp. 1967)) (implied warranty of merchantability); and § 2-315 (ARIZ. REV. STAT. ANN. § 44-2332 (Supp. 1967)) (implied warranty of fitness). The implied warranty of merchantability applies to all sales (unless disclaimed) and is the warranty under which products liability cases are most likely to arise. Therefore, only it will be treated in depth here.

[131] *See, e.g.*, Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974 (1966); Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes, and Communication Barriers*, 17 W. RES. L. REV. 5 (1965). *Contra*, Littlefield, *Some Thoughts on Products Liability Law: A Reply to Professor Shanker*, 18 W. RES. L. REV. 10 (1966); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

[132] ARIZ. REV. STAT. ANN. §§ 44-2201 to 3202 (Supp. 1967).

[133] Bailey v. Montgomery Ward & Co., 431 P.2d 108 (Ariz. Ct. App. 1967); O. S. Stapley Co. v. Miller, 430 P.2d 701 (Ariz. Ct. App. 1967).

these two approaches, which can best be accomplished by analyzing their application to a hypothetical fact situation.

> *P* purchases a new automobile, manufactured by *M*, and sold to *P* by *R*, an authorized dealer. That same day *P's* son, *S*, uses the new automobile to take his girlfriend, *G*, for a ride. While driving, they are involved in an automobile-pedestrian accident in which *S*, *G*, and *B*, a bystander, sustain personal injuries and the automobile is damaged. Subsequent examination of the automobile reveals that the steering mechanism was faulty.

1. *Possible Actions Available to the Injured Parties*

There are four potential plaintiffs — *P*, *S*, *G*, and *B* — and two prospective defendants — *R* and *M*.

Plaintiffs. Under the Code, only *P* and *S* expressly are granted a cause of action for breach of warranty.[134] *P's* claim for damages to the automobile exists by virtue of section 2-314, which establishes a seller's liability, under an implied warranty, for damages due to the non-merchantable quality of goods sold.[135] *S's* cause of action is authorized by section 2-318, which extends the seller's liability under section 2-314[136] to members of the vendee's family or household, and to guests in the vendee's home.[137] Since *G*, a guest in the vendee's automobile,[138] and *B*, a bystander, do not fall within any of the categories of protected persons specified in section 2-318, they have no claim explicitly authorized by the Code.

On the face, the *Restatement* limits recovery to persons who are classified as *ultimate* users or consumers.[139] *S* was clearly an ultimate user of the automobile and has a cause of action. *G*, as a passenger in the automobile, is also protected under the *Restatement;* the comments to section 402A define "user" to include "those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles . . . ."[140] *P*, while the owner of the vehicle, was not the *ultimate*

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[134] This does not necessarily mean that only *P* and *S* have a cause of action. In areas where the Code is silent, prior law governs. UNIFORM COMMERCIAL CODE § 1-104 (ARIZ. REV. STAT. ANN. § 44-2204 (Supp. 1967)).

[135] UNIFORM COMMERCIAL CODE § 2-314 (ARIZ. REV. STAT. ANN. § 44-2331 (Supp. 1967)). "Merchantable" goods are those which are fit for the ordinary purposes for which such goods are used.

[136] UNIFORM COMMERCIAL CODE § 2-318, Comment 2. (ARIZ. REV. STAT. ANN. § 44-2335 (Supp. 1967)).

[137] UNIFORM COMMERCIAL CODE § 2-318 (ARIZ. REV. STAT. ANN. § 44-2335 (Supp. 1967)).

[138] A guest in the buyer's automobile is not a guest in his "home" and is therefore not within the protection of section 2-318 (ARIZ. REV. STAT. ANN. § 44-2335 (Supp. 1967)). *See* Thompson v. Reedman, 199 F. Supp. 120 (E.D. Pa. 1961). *But cf.* Wood v. Hub Motor Co., 110 Ga. App. 101, 137 S.E.2d 674 (1964).

[139] Although the decisions are usually otherwise, in a few instances strict liability in tort has been applied to sanction recovery by one other than an ultimate user or consumer. *See* Piercefield v. Remington Arms, Inc., 375 Mich. 85, 133 N.W.2d 129 (1965); Forgione v. State, Prod. Liab. Rep. 715194 (N.Y. Ct. Cl. 1963).

[140] RESTATEMENT (SECOND) OF TORTS § 402A comment *l* (1965).

user. Thus, it would seem that the *Restatement* affords him no protection.[141]

B does not fall within the protection expressly afforded by the *Restatement* since he cannot be regarded as a user or consumer. The caveat to section 402A states that no opinion is expressed as to whether such a party is entitled to recovery under the rules stated in that section.[142] It is interesting to note that *B's* predicament, as an innocent bystander injured by a defective product used by another, has been virtually ignored.[143] As Dean Prosser stated in 1961:

> The innocent bystander, the person who is standing around when the bottle of Coca-Cola blows up and who gets his eye put out, hasn't turned up in more than two or three cases, and thus far he has been denied recovery. There may not be any theoretical reason why he shouldn't get in on this strict liability, but whatever demand there is for this thing — and there obviously is a very powerful demand underlying these court opinions — whatever demand there is is a consumers' demand, and nobody has yet built up any excitement about the innocent bystander.[144]

Since this statement, two cases have permitted recovery by a bystander for injuries received from a defective product: *Mitchel v. Miller*[145] and *Piercefield v. Remington Arms Co.*[146] In *Piercefield,* the bystander was injured when the barrel of a shotgun fired by his brother exploded because of a defective shell. The court permitted recovery on a warranty theory, but without fully stating its reasons; it merely said that the result in *Henningsen* would have been the same had the plaintiff there been a pedestrian. The *Mitchell* court, in allowing recovery on a strict liability theory, was more explicit:

> A defective automobile . . . constitutes a real hazard upon the highway. . . . The likelihood of injury from its use exists not merely for the passengers therein but for the pedestrians upon

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[141] Logic seems to support *P's* right to recover. *P* is the owner of the automobile and the only person injured by the property damage to it. "Ultimate user or consumer" should be interpreted to include any person with the *right* to use or consume where property damage to the product itself is concerned. Situations are imaginable in which such property damage would be suffered even though no one was actually using or consuming the product at the time the loss occurred. Moreover, in Arizona the "family purpose" doctrine would designate *P* as a user of the automobile if it is being driven by a member of his family. Mortensen v. Knight, 81 Ariz. 325, 305 P.2d 463 (1956) (applying the "family purpose" doctrine to automobile owned as community property); Benton v. Regeser, 20 Ariz. 273, 179 P. 966 (1919) (applying agency principles).

[142] *See* RESTATEMENT (SECOND) OF TORTS § 402A comment *o* (1965).

[143] There is an excellent student work in the area. *See* Note, *Strict Liability and the Bystander,* 64 COLUM. L. REV. 916 (1964).

[144] 38 ALI PROCEEDINGS 55-56 (1961).

[145] 26 Conn. Supp. 142, 214 A.2d 694 (Super Ct. 1965) (based on strict liability in tort).

[146] 375 Mich. 85, 133 N.W.2d 129 (1965) (based on implied warranty theory). Let the reader be forewarned. *Piercefield* is one of those Michigan cases in which the dissent appears first in the regional reporter.

> the highway. The public policy which protects the user and consumer should also protect the innocent bystander.[147]

Undoubtedly these cases mark the beginning of a trend allowing bystanders to recover damages caused by defective products. However, neither the Code nor the *Restatement* specifically provide for, or preclude, recovery by such persons.

Defendants. The use of the word "seller" in section 2-318 of the Code indicates that the section is intended to effect a partial abolition of the requirement only of horizontal, and not vertical, privity in a warranty action. As applied to our hypothetical fact problem, this merely allows *S*, as well as *P*, to bring an action against *R*, the seller. The Code is expressly neutral as to vertical privity, and leaves to "the developing case law" the problem of whether either *P* or *S* or both can bring an action against *M*.[148]

The *Restatement*, on the other hand, applies to anyone engaged in the business of selling, including manufacturers and wholesalers, as well as retailers.[149] Therefore, parallel causes of action would lie against both *R* and *M*.

2. *Elements of the Cause of Action*

To recover under the Code, a plaintiff must prove that the product's lack of merchantability was the proximate cause of the injury or loss.[150] In our fact situation, *P* or *S* would have to show that the automobile was unfit for the ordinary purposes for which it is used[151] and that its being unfit proximately caused the accident. Comparing these requirements with the prerequisites for recovery under the *Restatement*, the following distinctions appear: (1) the *Restatement* requires proof of an unreasonably dangerous defect;[152] the Code requires merely that the goods be unfit for the ordinary purposes for which they are used; (2) the *Restatement* requires "cause";[153] the Code requires "proximate cause"; (3) the *Restatement* requires that the defect exist when the defendant relinquished control;[154] the Code is silent as to the time when the goods must be unmerchantable.[155]

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[147] 214 A.2d at 698-99. *See also* Note, *Strict Liability and the Bystander*, 64 COLUM. L. REV. 916, 935 (1964).

[148] UNIFORM COMMERCIAL CODE § 2-318, Comment 3 (ARIZ. REV. STAT. ANN. § 44-2335 (Supp. 1967)).

[149] RESTATEMENT (SECOND) OF TORTS § 402A comment F (1965).

[150] UNIFORM COMMERCIAL CODE § 2-314, Comment 13 (ARIZ. REV. STAT. ANN. § 44-2331 (Supp. 1967)).

[151] UNIFORM COMMERCIAL CODE § 2-314(2)(c) (ARIZ. REV. STAT. ANN. § 44-2331 B(3) (Supp. 1967)).

[152] RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

[153] *Id.*

[154] RESTATEMENT (SECOND) TORTS § 402A(1)(b) (1965).

[155] Some courts have imposed a requirement, similar to that under the *Restatement*, that the goods be unmerchantable at the time of the sale. *See* McMeekin v. Gimbel Bros., Inc., 223 F. Supp. 896 (W.D. Pa. 1963); *cf.* Mangoni v. Detroit

These differences are of little practical importance.[156] In our hypothetical situation, as in most cases, there is no difference between an unreasonably dangerous defect and an unmerchantable product; the same is true as to "cause" and "proximate cause". "Unreasonably dangerous" and "proximate cause" serve the same function. They afford the trial court a degree of flexibility. In a situation where the product is of considerable social utility and the risk is limited and unavoidable, a court can employ either "unreasonably dangerous" or "proximate cause" to avoid liability.

3. *Disclaimer and Notice*

The Code provides that the implied warranty of merchantability may be disclaimed if the seller complies with rudimentary requirements relating to both the content and form of the disclaimer. The content requirement is that "the language must mention merchantability."[157] The requirement as to form is that such a disclaimer, when *written*, be "conspicuous."[158] If the seller refers to the goods as being sold "as is" or "with all faults" or uses "other language which . . . calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty," then all implied warranties are excluded.[159] A disclaimer which is patently unfair in its terms, resulting from a great disparity in the bargaining positions of seller and buyer, might be struck down under the general unconscionability section.[160] Although a contractual limitation of damages for a commercial loss is valid, such a

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Coca-Cola Bottling Co., 363 Mich. 235, 241, 109 N.W.2d 918, 922 (1961).

[156] *But see* Boskoff, *Some Thoughts About Harm, Disclaimers, and Warranties*, 4 B.C. IND. & COM. L. REV. 285 (1963).

In theory there is a distinct difference in the terms. "Unreasonably dangerous" and "unmerchantable" are not equatable terms, and neither are "cause" and "proximate cause". The use of the different terms in the *Restatement* and the Code stems from the different theoretical bases of the two bodies of law. The *Restatement* has as its underlying theory strict liability, while the Code bases liability upon fault.

It is obvious that an "unreasonably dangerous" product would be "unmerchantable" and equally obvious that a product may be "unmerchantable" without being "unreasonably dangerous." Under the strict liability theory of the *Restatement*, theoretically, the injured party must prove the existence of an "unreasonably dangerous" defect, but once this is done, need only prove that the defect *caused* the harm. Under the Code the injured party need only prove that the product was unfit for the purpose for which it was normally used, but having done this, also must prove that the unmerchantable quality of the product *proximately* caused the harm. On the one hand the theoretically more difficult burden of proof is centered on the nature of the product, while on the other it is centered on the casual circumstances; indicating that each theory of recovery has its offsetting favorable and unfavorable elements of proof.

[157] UNIFORM COMMERCIAL CODE § 2-316(2) (ARIZ. REV. STAT. ANN. § 44-2333 B (Supp. 1967)).

[158] *Id.*

[159] UNIFORM COMMERCIAL CODE § 2-316(3)(a) (ARIZ. REV. STAT. ANN. § 44-2333 C(1) (Supp. 1967)).

[160] UNIFORM COMMERCIAL CODE § 2-302 (ARIZ. REV. STAT. ANN. § 44-2319 (Supp. 1967)). One legal writer has taken the position that if plaintiff can show that free choice was precluded because of a uniformity in the type of warranty offered by all manufacturers, the otherwise valid disclaimer should be stricken down under § 2-302.

limitation of damages for personal injury is regarded as prima facie unconscionable.[161] Therefore, though a seller may avoid personal injury liability to the buyer by disclaiming any and all warranties, he may not avoid such liability merely by limiting the amount recoverable by the buyer for personal injuries sustained.[162]

Section 2-607(3)(a)[163] provides that where "a tender has been accepted . . . 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."[164] On its face, this section does not require that notice be given by parties who are not buyers but who are entitled to recover under section 2-318; but the comments state that notice must be given such parties where "an injury has occurred."[165]

Since the seller's responsibility under the *Restatement* is based on strict liability in tort, contractual disclaimers or notice requirements have no effect on an injured party's right to recover.[166]

4. *Defenses*

Defenses to an action under strict liability in tort have been discussed above. While the theoretical standards seem clear, the courts still have great difficulty in applying them. Defenses to a warranty action under the Uniform Commercial Code are even more unsettled; it is not clear whether they arise from contract or tort principles or some combination of the two.[167]

See Comment, *Unconscionable Contracts Under the Uniform Commercial Code*, 109 U. PA. L. REV. 401, 420 (1961); *contra*, 1 W. D. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE 84 (1964); Boshkoff, *Some Thoughts About Physical Harm, Disclaimers, and Warranties*, 4 B.C. IND. & COM. L. REV. 285, 305-06 (1963). *Henningsen* seems to support this observation. *See* 161 A.2d at 84-96. It should be noted, however, that the comment to § 2-302 states: "The principle is one of prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."

[161] UNIFORM COMMERCIAL CODE § 2-719(3) (ARIZ. REV. STAT. ANN. § 44-2398 C (Supp. 1967)).

[162] *See also* UNIFORM COMMERCIAL CODE § 2-318 (ARIZ. REV. STAT. ANN. § 44-2335 (Supp. 1967)) declaring that the "seller may not exclude or limit the operation of this section." Although the seller may disclaim *all* warranties, thereby precenting recovery by the parties protected under section 2-318, if a section 2-314 warranty exists, he may not specifically exclude liability to persons, other than the buyer, to whom the warranty is extended by section 2-318.

[163] ARIZ. REV. STAT. ANN. § 44-2370 C(1) (Supp. 1967).

[164] Comment 4 to Uniform Commercial Code § 2-607 explains what constitutes a reasonable time.

The time notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended, for the rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good faith consumer of his remedy.

[165] UNIFORM COMMERCIAL CODE § 2-607, Comment 5 (ARIZ. REV. STAT. ANN. § 44-2370 (Supp. 1967)).

[166] RESTATEMENT (SECOND) OF TORTS § 402A comment *m* (1965).

[167] *See* UNIFORM COMMERCIAL CODE § 2-314, Comment 13, § 2-316, Comment 8, § 2-715, Comment 5 (ARIZ. REV. STAT. ANN. §§ 44-2331, 44-2333, and 44-2394 (Supp. 1967)).

Although a consideration of the relative defenses to the two actions would be valuable, it does not seem possible, at this time, to reach any definite conclusions.[168]

5. *Limitation of Actions*

In Arizona, an action based on strict liability in tort under the *Restatement* would be governed by the general two-year statute of limitations applicable to actions for personal injuries.[169] The Code contains a general statute of limitations of four years for "an action for breach of any contract of sale."[170] The Code statute runs from the time the breach of the contract occurs.[171] "[A] breach of warranty occurs when tender of delivery is made" except that where a warranty explicitly extends to future performance of goods and a breach will not be discovered until the future performance, the cause of action accrues when the breach is or should be discovered.[172] It appears that the Code's four-year statute would apply to a warranty action even though it is brought to recover for personal injuries.[173]

IV. CONCLUSION

While the law of liability for personal injuries incurred through use of a defective product is still a series of "dots and dashes," it is possible to ascertain a definite trend for the future: increased acceptance and utilization of strict liability. The negligence and misrepresentation theories will remain; however, practical problems of proof render them inapplicable in numerous cases. Thus, some form of strict liability is necessary. Strict liability in tort as provided for in the *Restatement (Second) of Torts* is preferable to warranty. While the Code effects substantial improvements in common law warranty, it is basically a commercial statute. It is not intended to be a vehicle for recovery of personal injury damages. The warranties created by the Code are intended in the first instance to protect expected contract benefits. The merchantability warranty is of primary significance in situations where

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[168] *See generally* Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct*, UTAH. L. REV. (To be published May, 1968).

[169] ARIZ. REV. STAT. ANN. § 12-452 (1956).

[170] UNIFORM COMMERCIAL CODE § 2-725(1) (ARIZ. REV. STAT. ANN. § 44-2404 A (Supp. 1967)).

[171] *Id.*

[172] UNIFORM COMMERCIAL CODE § 2-725(2) (ARIZ. REV. STAT. ANN. § 44-2404 B (Supp. 1967)).

[173] The sole reported case on point is *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964), which held the Code's four-year statute applicable. The court relied heavily on the expressed purpose of the Code to create uniformity in the areas it touches. However, it also noted that the result would effect no substantive change in Pennsylvania law because that state long had recognized the destinction between claims for personal injuries based on warranty and those based on negligence. *Cf.* Annot., 37 A.L.R.2d 703 (1954).

merchants and consumers simply are not provided with goods of the quality they contracted to receive. The fact that the warranty may also be a basis for recovering tort damages is ancillary to its essential purpose. The Code does not provide a solution for all the problems in personal injury or property damage cases because it was not intended to.