The Expanding Liability of the Product Supplier: A Primer

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Through the use of the question and answer format in this article, I hope to cover the main areas where product liability is expanding, both as to the imposition of liability and the admissibility of proof. This format is suggested by the type of questions which have been put to me when I have lectured on the subject. I practice as plaintiff's counsel, and my answers are inevitably shaped in that light. Indeed, it is the plaintiff, through product litigation, that is causing the expansion in this area of the law.

The thirty topics which are covered are divided into the following parts: strict liability, negligence, other forms of liability and parties, and proof. A good deal of space is devoted to the proof topics, since much of the expansion of the law in recent years has been little more than an expansion of the type of proof which courts will accept. In turn, that expansion of proof has given juries more leeway in determining the outcome, guided by only the broadest definitions of liability.

A. STRICT LIABILITY

1. What are the elements of a strict liability action?

The most commonly adopted source for the law of strict liability, the formulation of the Restatement (Second) of Torts § 402A, sets out three requirements:

a—the product is in a defective condition;

b—the product is unreasonably dangerous;

c—the defect existed at the time it left the defendant's hands.1

The most crucial requirement is that there be a defect, a concept covered in question 2 below.

As to the “unreasonably dangerous” requirement, technically, just because a product is dangerous does not fit it within the requirements of § 402A, since objects such as guns and dynamite are dangerous but can be said, based upon ordinary consumer understanding, to be “reasonably” so. At the other end of the spectrum, it can be said that some products, even if they have produced personal injury, are not “dangerous,” such as grapefruit or pencils. Creation of such categories at the extreme ends of the

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product spectrum, however, is not often considered by the courts. Generally, a product which has in fact caused injury is deemed to meet this requirement of § 402A. Therefore, several courts have rejected as unnecessary and unwise the requirement of "unreasonably dangerous" and call only for proof of a "defect." The former is found to be only a hurdle in the consumer's path to recovery. In the leading case abandoning the requirement, a metal hasp holding a bread tray was recognized by the court probably not to be "unreasonably dangerous," even when it broke and caused injuries when the tray slid forward.

As to the third requirement—that the defect exist at the time the product left the hands of whomever it is who is being sued—its purpose, obviously, is to prevent the imposition of strict liability upon someone at the early end of distribution where the defect is introduced by someone beyond him in the chain, including the plaintiff. In two situations, however, the requirement should not be used to immunize the manufacturer:

(a) where the person later in the chain, such as a retailer, merely fails to detect and correct the originally existing defect; and
(b) where the product is perfect when made, but bears within it the seeds of its destruction, as where it decomposes later on or where the metal does not stand up under repeated, foreseeable stresses.

2. What is a "defect"?

The following may be said to be within the scope of defect as used in strict liability cases:

I. "Impure" product—not made pursuant to plan
II. "Pure" product:
   (a) design flaw
   (b) labeling flaw
   (c) testing flaw

The architects of strict liability had the impure product situation

4. Covered in question 12, infra.
primarily in mind—the spinach with glass, the tie rod with crystalized metal in it—any situation where the product was not made pursuant to the plans which the manufacturer set out to follow. Very few decided cases deal with this category of defective products, however, mainly because they are clear liability cases. The battleground is in category II—the “pure” product.

A product may be defective even though it is made pursuant to plan and even though the harm producing potential is inherent in the way it is made. In a broad sense, it may be stated that anything which can give rise to a negligence cause of action may constitute a defect in strict liability.

Examples of products, which are defective by virtue of their “design,” are a lawn mower with hard to operate controls, a machine without a safety feature, or even dynamite with too short a fuse. As to products which are defective by virtue of their labeling or their failure to bear adequate or proper warnings for safe use, examples are a highly flammable cement which comes in a can which does not bear a warning about the need to keep the product away from ignition sources, or a machine without proper installation directions.

The question arises whether any culpability on the part of the supplier is necessarily to be shown in a case where the defect is one of design or labeling. That is, is it the mere presence of a design feature which produces injury, or the mere absence of a warning that makes out the “defect,” or must there be an impropriety involved? This is discussed below, in question 3.

There is no all-embracing definition of “defect” and there will never be. It must be developed by the courts. What is in back

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6. See citations at note 1 infra.
9. The Consumer Product Safety Act, 86 Stat. 1207, 15 U.S.C. § 2051 (1973), employs various descriptions and definitions of risks associated with product, the terms of which may in time affect the concept of “defect.” Under § 7, safety standards are to be set up for products which create “an unreasonable risk of injury.” “Risk of injury” is defined in § 3(a)(3) as “risk of death, personal injury, or serious or frequent illness.” Under § 12, a seizure may be made if the product presents “imminent and unreasonable risk of death, serious illness or severe personal injury.” Under § 15, notification, repair, refund and the like may be ordered if there is a “substantial product hazard,” defined in § 15(a) as either creating a “substantial risk of injury” or “creates a substantial risk of
of most decisions, however, is what may be called the "consumer expectation" test: did the product perform as a reasonable consumer would have expected?\textsuperscript{10}

3. What are the defenses to strict liability?

I. Relating to plaintiff and others:
   (a) Contributor negligence
   (b) Assumption of risk
   (c) Abuse of the product
   (d) Intervening acts

II. Relating to the defendant:
   (a) Unavoidably unsafe
   (b) State of the art
   (c) Undetectable, unpreventable, unavoidable, unforeseeable defect
   (d) Contract-type defenses

There is a great deal of confusion today as to whether or not contributory negligence is a defense; the same is true of assumption of the risk and the other defenses listed in I above. Many of the decisions can apparently be harmonized by agreeing on what these terms mean, but there are still minority and majority views on a number of points. The one harmonizing statement which would command the most following among the courts is that there is to be no defense based upon a mere failure of the user to discover the defect, but the continued use of the product with notice of the defect would be a defense to liability.\textsuperscript{11} Even the plaintiff's misuse of a product may not be a defense if a reasonable manufacturer should have foreseen it. (See question 12 below).

Probably more cases have held that contributory negligence is not a defense to strict liability than that it is, on the logic that since the defendant's conduct is no longer in question neither


\textsuperscript{11} See RESTATEMENT (SECOND) OF TORTS § 402A, Comment n.
should that of the plaintiff's be.\textsuperscript{12}

As to those defenses based upon the lack of knowledge or ability of the defendant to prevent the injury from the defective condition, there is both a lack of clarity in and much conflict among the decisions. On the one hand, the position can be taken (as it is by those who are plaintiff-oriented) that all such defenses are irrelevant since they are contradictory to the whole sense of imposition of liability without fault. If the defendant can assert as a defense that a defect was undetectable, for example, is he not being allowed to prove care on his part, with care being merely an aspect of fault? The defendant replies that this is the imposition of \textit{strict}, strict liability if he is to be stripped of a defense based upon unforeseeability or the like.\textsuperscript{13}

Since this issue is crucial to the future development of product liability litigation, several fact patterns may assist in analysis:

(1) A prescription drug, purely made, produces certain side effects inherent in its composition. The manufacturer's labeling omits any warning about a certain side effect, at a time when the manufacturer is unaware of it. It has used all due care to find out what are the side effects. Some time after plaintiff develops the side effect, but before trial, the manufacturer revises its labeling to add a warning about the new side effect. Is the company liable for the \textit{mere} absence of the warning at the time of injury or only if it was a culpable absence? If the test is phrased in terms of an "inadequate" or "improper" warning, does that mean the \textit{culpable} absence or the \textit{mere} absence?

(2) A pint of blood when transfused produces serum hepatitis due to the presence of hepatitis virus in the "donor." The proof is that the presence of the virus was undetectable.\textsuperscript{14} Should the

\textsuperscript{12} See general discussion in R. Hursh, \textit{American Law of Products Liability,} § 5A:26 (Supp. 1973) (hereinafter Hursh). Hursh is one of the two leading multi-volume product liability books, each of which in their own way covers the whole field of product liability law. The other is L. Frumer & M. Friedman, \textit{Products Liability} (hereinafter Frumer). Hursh is stronger on concrete slotting of cases into product categories, whereas the Frumer book is stronger on analysis.

\textsuperscript{13} An ambiguity arises when courts or writers refer to a matter being a "defense." On some matters, the fact to be proved may be defensive in nature, meaning that it should be heard by the jury for whatever weight it might carry. In other instances, a complete defense is referred to: something which when pleaded and proved will preclude the plaintiff from recovery. Thus, for example, "state of the art" testimony may create a complete defense or be merely some evidence of due care for the jury to consider.

\textsuperscript{14} Scientific advancements outdate the concept that the hepatitis virus is undetectable. It is standard procedure today to do an Australian antigen test to ascertain the
plaintiff be freed of having to overcome the defense of undetectability?

(3) A bottle with a gross flaw in its wall is filled with a beverage under pressure and later explodes, injuring a buyer. Should the manufacturer or the bottler be allowed to defend on the basis that it used due care in the inspection of the bottles it was making or filling?

In (3), most courts would not allow a defense of due care to be asserted, since that is transparently a negligence concept.

In (2), many courts would probably not allow a defense of undetectability, since the product was imperfect and not made pursuant to plan. They would, whether they have come to the point of verbalizing it or not, make a distinction between the pure and impure product, and allow these defenses, if at all, in the case of the former only.15

Drug cases, such as (1), raise special problems because of Comment k to § 402A, which would exempt from strict liability any drug which is "unavoidably unsafe." By that is meant the side effect of drugs, especially those which are essential for life. The Comment points out that "proper" labeling is required for a product to be unavoidably unsafe. Again, is proper to be taken in the negligence or non-negligence sense?16


16. The following cases have refused to grant Comment k immunity to prescription drugs because of a determination that the drug was or may have been improperly labeled. In few, if any of them, is there a discussion of what is meant by the term "proper:" Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (8th Cir. 1968); Tinnerholm v. Parke-Davis & Co., 411 F.2d 48 (2d Cir. 1969); Parke, Davis & Co. v. Stromsodt, 411 F.2d 1390 (8th Cir. 1969); Toole v. Richardson-Merrell, Inc., 251 Cal.App.2d 689, 60 Cal.Rptr. 398 (1967); Lewis v. Baker, 243 Ore. 317, 413 P.2d 409 (1966).
Finally, what is the vitality today of the “contract” defenses, which have been used over the years in commercial (warranty) cases: disclaimer, failure to give prompt notice, and the like? In a strict liability case, these defenses have been heavily circumscribed. No sale is required.\textsuperscript{17} No notice is required before suit can be commenced.\textsuperscript{18} Disclaimers may be found against public policy and, in any case, are inapplicable to injured persons not parties to the contract.\textsuperscript{19} Limitations of liability dressed up in “warranty” language are also often ignored, especially in contracts of adhesion like new car sales.\textsuperscript{20}

4. **May a wrongful death action be predicated on strict liability?**

Most courts have had no trouble reconciling the “wrongful” language in death statutes with the strict liability concept.\textsuperscript{21} Similarly, courts have allowed apportionment of fault under comparative negligence statutes in strict liability actions without any real problems.\textsuperscript{22}

5. **What sort of damage is covered by strict liability?**

The following are the types of damages which might be sought in a strict liability action, (for ease of illustration, we imagine a car going off the road):

(a) Personal injury to the driver owner;
(b) Personal injury to a passenger;
(c) Personal injury to a “bystander” waiting on the curb for a bus;
(d) Property damage to the picket fence;
(e) Property damage to the car itself;
(f) Loss of the bargain—lost profits the owner could have made if he had been able to use that car the next day in his business.

\textsuperscript{17} 2 FRUMER § 16A(5).
\textsuperscript{18} 2 FRUMER § 16A(5)(d).
\textsuperscript{19} 2 FRUMER § 16A(5)(k).
Every court includes (a) and (b) in strict liability. The battle about whether the bystander, (c), is covered is all but over today with most courts so extending strict liability.\(^2\) As to property damage, (d)-(f), some courts deny the applicability of strict liability, but many allow it for damage to property other than the chattel (d).\(^{24}\) There is a clear split on damage to the chattel itself (e), and consequential damages arising therefrom (f).\(^{25}\) The dominant rationale for refusing to extend coverage to damage to the chattel is that this is what the Uniform Commercial Code is intended to cover.

6. In personal injury cases, what is the role of breach of implied warranty and of the Uniform Commercial Code?

In those states which have adopted strict liability, some have done so to the exclusion of a cause of action for breach of implied warranty for a personal injury, while others continue to regard these as parallel remedies.\(^{26}\) In a few states strict liability has not yet been adopted, and the action for injury without proof of fault on the part of the defendant is still denominated implied warranty.\(^{27}\)

In most instances, it would make no difference to the outcome whether the action was called “strict liability” or “breach of implied warranty.” The “defect” of the former is the absence of “merchantability” or “reasonable fitness” of the other. The difference becomes crucial only on procedural matters, such as the statute of limitations and defenses based upon notice and the like.\(^{28}\)

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23. See question 18 in text infra.
26. See 2 FRUMER § 16A(3); HURSH, § 5A:3 (Supp. 1973). A fairly up-to-date chart of the state appears in CCH PROD. LIAB. Rptr. ¶ 4060.
27. Id.
28. As to “contract” defenses, see question 3 in text supra. As to the statute of limitations, some courts apply the tort or personal injury period to every injury case, no matter how pleaded (which is the more logical approach), while others apply separate periods. That usually means that a complaint framed under warranty or under the UCC has a 4- or 6-year period, whereas the tort period for strict liability is often 1 to 3 years. See 3 FRUMER ch. 12.
As to the Uniform Commercial Code, an occasional court will still attempt to apply its sales provisions to personal injury cases. This is a pretty well discredited practice today even though § 2-316 purports to cover injury actions. It should be regarded as intended for commercial cases, and superseded by the common law development of strict liability.

7. What difference does strict liability really make to the practitioner?

The advent of strict liability a decade ago was then hailed and still tends to be hailed today as a major change in product liability law. Without question, the "enterprise system" philosophy behind it is a major step forward in the social consciousness of the courts. What strict liability has done in fact for the consumer-plaintiff and his lawyer is another question. In my view, it has accomplished little for the consumer and it has had little impact upon practice.

More plaintiffs would prefer to present their respective cases to a jury on a negligence, rather than on a strict liability, basis. In McLunenesque terms negligence is "hot" and strict liability is "cold." It is easier to prevail by showing that the defendant did something wrong than that there is something technically defective about the product. It is easier to win (and collect substantial damages) by showing that a drug company concealed information about side effects than to show that in fact there was no warning on the labeling about the risks.

If strict liability makes a difference it is in the "impure" defect case. Here it makes counsel's life much easier if he can have the judge instruct the jury that the mere presence of glass in a can of spinach creates liability, than if he has to prove how the defendant carelessly put it in or failed to detect it. But those cases had traditionally been won by plaintiffs—in the rare instance when they weren't settled.

It is sometimes argued that the plaintiff in every type of strict liability case gains a direct benefit by having the defendant barred from proving due care. The trouble with this argument is that the defendant, directly or indirectly, does get this sort of


30. Are products now safer because manufacturers know that they are strictly liable? After all, what can motivate them to be more careful than the requirements of negligence law itself?
defense before the jury. Not only are many such defenses allowed (see question 3 above) but also § 402A does not really divorce itself from "negligence talk." Comment k, for example, cuts off a suit where the product was "unavoidably unsafe," unless the labeling is improper.31

B. NEGLIGENCE

8. How complete must a warning and set of directions be?

Over the years the manufacturer has been required to use "due care" to give "reasonable" warnings about the risks associated with the use of his product, and to give directions for use so as to avoid injury. A recent trend among the decisions, however, tends to expand the duty of the supplier to give a full warning, as compared to a "reasonable" one. A few examples of the trend toward requiring complete warnings and directions may help to show the change in emphasis:

(1) A label on a floor sander states that it should be used on 115 volts AC or DC. Plaintiff uses it on 220 DC and the machine explodes. The court held that this case should be submitted to the jury because there was sufficient evidence to show that the manufacturer knew that the machine would be used in an industrial setting.32

(2) A contact cement bears the warnings about the risk of explosion and the need to extinguish all fires. Plaintiff claims that it was an inadequate warning in that it did not state the true degree of risk, and was not labeled "extremely inflammable." The court agrees that this proof should have been shown to the jury.33

(3) A drug company undertakes to alert physicians to a newly

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31. In Schneider v. Chrysler Motors Corp., 401 F.2d 549 (8th Cir. 1968), it was observed that the standard of the safety of goods was the same under either theory.


discovered side effect by amending its official labeling, the package insert, among other means. Plaintiff should be allowed to show, it is held, that the manufacturer did not use every means available to it to alert physicians, including sending out salesmen to visit each doctor.\textsuperscript{34}

The rules which can be deduced from cases like these are that a complete warning is due of every risk involved. Further, the consequences of doing or not doing certain things should be spelled out. It is up to a jury to decide in every case whether the defendant’s conduct was careless or not. The amount and type of warning and directions for use are to increase as the likelihood and severity of injury increases.\textsuperscript{35} The cases also recognize that the last and poorest way to prevent injury is the warning, and, if it is to be relied upon, it must do the job.

The area of warning can be analyzed fully only in terms of the related question of what it is that a supplier is to foresee and guard against, and what type of user abuse is to be anticipated. This is covered in question 12 below.

The adequacy of the warning may also be a problem where the user: (a) speaks, reads, and understands a language which is different from the one in which the warning is given; (b) is preliterate, illiterate or senile; or (c) is one who did not read the label and is not the injured party, but whose conduct injures a bystander who did not have an opportunity to read it. These and the many other similar problems, which constantly arise in product litigation, have to be solved in terms of the foreseeability of the supplier and the social responsibilities which courts will be willing to impose. Where there is a sizeable foreign speaking populace (like Spanish-speaking persons in many parts of the United States), instructions should be multilingual.\textsuperscript{36} Where a child may

\textsuperscript{34} Hoffman v. Sterling Drug Co., Inc., CCH PROD. LIAB. RPTR. \$ 7003 (3d Cir. 1973); Singer v. Sterling Drug, Inc., 461 F.2d 288 (7th Cir. 1972); Sterling Drug Co. v. Cornish, 370 F.2d 82 (8th Cir. 1966); Schenebeck v. Sterling Drug, Inc., 423 F.2d 919 (8th Cir. 1970); Sterling Drug, Inc., v. Yarrow, 408 F.2d 978 (8th Cir. 1969); Krug v. Sterling Drug, Inc., 416 S.W.2d 143 (Mo. 1967); Bine v. Sterling Drug, Inc., 422 S.W.2d 623 (Mo. 1968). These seven cases—five of which are from Eighth Circuit territory—all hold that the Sterling Drug Co. failed to make adequate warnings about Aralen, a drug sold for rheumatoid arthritis and other conditions. A monument should be built by the plaintiffs’ bar to the counsel for the company which have so shaped the law by repeatedly trying and appealing a rather losing set of facts. With respect to pharmaceutical salesmen, see Comment, The Ubiquitous Detailman: An Inquiry Into His Functions and Activities and the Laws Relating to Them, 1 Hofstra L. Rev. 183 (1973).

\textsuperscript{35} See notes 32 and 33 supra.

\textsuperscript{36} Suggested at 2 HARPER & JAMES, TORTS, \$ 28.7 (1956).
use the product, and cannot be expected to read or understand the label, the reasonable steps which might be taken would include issuing a warning to keep the product out of the hands of children.\textsuperscript{37} Where the bystander is innocent, but there is an intervening act of the user in not heeding the labeling, the jury should be free to determine whether or not there was a foreseeable break in the chain of causation.\textsuperscript{38}

It is possible that some products can never be made safe enough for general consumer use, notwithstanding the finest labeling. It is open to argument that such a product is defective \textit{per se} and should not be on the market.\textsuperscript{38.1}

9. \textit{Is there a continuing duty to warn and is there any duty to recall, refund, or repair?}

What responsibilities rest upon the supplier who discovers something adverse about his product after he has released it onto the market?

Three different situations may exist:

\begin{itemize}
\item[(a)] a defect in the very product as sold is after-discovered;
\item[(b)] a safety device for the product, which was originally made properly, is invented after its original sale—an improvement in the state of the art;
\item[(c)] while the same product is being mass-produced year after year, a new risk is discovered which can be corrected or warned about as to products turned out thereafter.
\end{itemize}

The steps the supplier might take are:

\begin{itemize}
\item[(1)] alert the owner to the new information;
\item[(2)] offer to sell the new device or make the repair at the owner’s expense;
\item[(3)] recall the product and repair it, for free or at the owner’s expense;
\item[(4)] replace the product or refund the purchase price.
\end{itemize}

If the supplier discovers some time after the sale that he had turned out a defective product with an injury-producing potential, (a) above, then he must take steps to prevent injury.\textsuperscript{39} This

\textsuperscript{37} Spruill \textit{v. Boyle-Midway, Inc.}, 308 F.2d 79 (4th Cir. 1962); Blue \textit{v. Drackett Products Co.}, 143 So.2d 897 (Fla.App. 1962).


\textsuperscript{38.1} See, \textit{e.g.}, Denny \textit{v. Seaboard Lacquer Inc.}, 487 F.2d 485 (4th Cir. 1973). The government also has the power to ban dangerous products. See note 9 supra.

would normally consist of alerting the owner-user of the problem, and of steps which might be taken to correct it. The courts have not yet said, as a matter of common law, that the supplier must actually recall the product, let alone repair it at his own expense (or replace it or refund its price). The recall duty is created statutorily for automobiles and for other products. The effort which would be required of the supplier to trace down the present users of his products in a situation (a) or (b) above would depend upon the nature of the product. Where a few large machines were made, the owners would be notified directly. For a can of mushrooms perhaps, advertisements would be a reasonable step.

The analysis in the preceding paragraph ought not to turn on whether or not the after-discovered risk was one produced originally by the defendant’s fault. Since strict liability is involved in either case, the mere defectiveness should necessitate the reparative actions. A different and lesser responsibility might exist, however, where due to an advance in the state of the art a new device or technique is created which will make the product substantially safer. For example, a new guard is designed. It might be argued that the supplier has a duty at least to alert present owners who it can identify that a new device is available, and to make available the device, probably at cost.

In situation (c) above, where the particular product which is going to cause injury is supplied after discovery of a defect, there is obviously a duty to warn even if there was no duty when the first product of this kind was turned out some time before. This is the obvious application of the “continuing duty to warn.”

10. Of what vitality is the “allergy rule” today?

Although the allergy rule is, no doubt, alive and well in a number of states, numerous inroads have been made by plaintiff’s lawyers as well as by the courts into the doctrine, which, in its purest form, would dismiss any product case in which the plaintiff’s injury was due to “allergy.” The exceptions to the rule or the proof used to overcome it are as follows:

42. See, e.g., the Aralen cases, cited in note 34 supra.
(a) showing that there was a breach of an express warranty of non-reactivity;\textsuperscript{44}
(b) showing that a prescription drug was involved;\textsuperscript{45}
(c) arguing that there should be no “allergy rule,” as it is an irrational defense;
(d) showing that plaintiff reacted toxicly or directly and not allergically, as by expert testimony on the exact causal mechanism or by showing other injury, and by thus placing the burden on the defendant proving the allergy;
(e) showing that plaintiff, though an allergic reactor, was a member of a substantial minority of known reactors to the ingredient in defendant’s product;\textsuperscript{46}
(f) putting the burden of proof onto defendant to prove that plaintiff was in fact only the “one-in-a-million” who reacted, as by challenging the adequacy of the defendant’s reaction-gathering systems, and by showing how many reactions never get reported to the company.

11. \textit{How safe does the design of a product have to be?}

With respect to the responsibility of manufacturers and other defendants in product design cases, there has been a recent advance from the former simple requirement of “reasonable care” in design. The cases are tending toward allowing the jury to consider the following aspects of safe design:

(a) whether there was any safety feature omitted which, if present, would have prevented the accident;
(b) whether there was a better, safer way to make the product;
(c) whether the product created an unnecessary risk of injury;
(d) whether there was any unnecessary, ornamental feature which could have been left off without affecting function.

At what point the law stands today between “due care” in design and a duty to create a foolproof product is not settled, and it is likely that no clear line will ever be drawn. But, by permitting juries to ask the type of questions set out above, and by allowing a verdict to be based upon failures in those areas, the

\textsuperscript{44} Spiegel v. Saks 34th Street, 26 App.Div.2d 660, 272 N.Y.S.2d 972 (2d Dept. 1966) (mem.).
\textsuperscript{45} Basko v. Sterling Drug, Inc., 416 F.2d 417 (2d Cir. 1969); Sterling Drug, Inc. v. Cornish, 370 F.2d 82 (8th Cir. 1966); Krug v. Sterling Drug, Inc., 416 S.W.2d 143 (Mo. 1967).
supplier is drawn closer to the guarantor or foolproof standard.\textsuperscript{47} Under this new approach, the plaintiff endeavors to show the jury such facts as that competitors used the safety device which was missing here, or that a "cotter pin costing a penny" could have prevented the accident. The defendant points to such matters as cost, function, and competition as narrowing the design choices. He stresses "trade-offs." If the product would be unworkable when the alleged missing feature was added, or would be so expensive as to be priced out of the market, that would be relevant defensive matter.

Defendants often complain that the plaintiff is employing hindsight in evaluating a product's design: after the accident, plaintiff's engineers examine the product to see what \textit{could} have been done to prevent the accident. They then come to court to testify as to whatever it was that \textit{should} have been done when the product was made. In a sense, the plaintiff's hindsight is the defendant's foresight. It was the defendant who designed the product, knew its working environment, employed the engineers and consultant, and had the books at hand. So long as the state-of-the-art defense is retained, the "hindsight" approach seems reasonable.

A peculiar subpart of design responsibilities arises out of the "big machine" cases. In almost every case involving the very large machine, the plaintiff (the little man) wins.\textsuperscript{48} In this situation, courts and jurors seem to feel that there must have been something which the manufacturer could have done to have avoided the accident. A recent case found that a giant earth mover that backed over a worker should have been equipped with gongs, lights, bells, mirrors—or anything which would have announced its direction of motion.\textsuperscript{49}

The new rules suggested in this discussion and in the warning area (question 8 above) are, after all, but applications of the long recognized responsibility of a supplier to be skilled and knowledgeable about the nature of the product which it markets, and

\begin{footnotes}


\end{footnotes}
to keep abreast of new scientific developments which relate to the product.  

As a sub-question, do the rules as to products generally stated in this article apply to the containers in which they come? The answer is “yes.”

12. Does the supplier have to anticipate unintended uses of his product, modifications of the product, failure of buyers to make required modifications, and even actual abuse or stupidity on the part of the user?

The answer to this question today verges on “yes.” The supplier has to give careful evaluation to the total environment in which his product will be put to work, and to the ways in which his product may foreseeably be misused. This is an area of responsibility composed both of design liability and duty to warn. It is also as much within the ambit of strict liability as it is within negligence.

The parameters of the manufacturer's duties may be said to be whatever is foreseeable by application of due care. The old argument by suppliers that they were liable only for injuries arising out of intended uses, as compared to the broader category of foreseeable uses, is now dead. The courts would recognize that a screwdriver maker must anticipate, for example, that it will not

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only be used to turn screws (intended use) but also to pry open lids of cans, and must therefore make the shank strong enough for this sort of use.

One can go a step further and say that the supplier, because of its experience, may have to anticipate and guard against abuse on the part of users. A leading case involves the woman who heated her hair rollers according to instructions in a pan of water on a stove. She was not told of the risks of boiling all of the water out of the pan, although the manufacturer knew that to do so would mean that the paraffin inside the rollers would be released. The manufacturer also knew that the paraffin had a low flashpoint. The user decided to take a bath while waiting for the rollers to heat, and fell asleep in the tub. The house burned down. The supplier was held liable to the owner of the building for failure to provide the user with complete information. Confronted with a case like this, a plaintiff’s lawyer would seek to prove the foreseeability of this hazard by such matters as previous accidents, scientific tests, and knowledge of the general properties of the contents of the product. The supplier is similarly under a duty to gather information about the market experience of his product, and to use that as feedback for improvement of design or labeling.

In legal terms, conduct on the part of a person which may well amount to assumption of the risk or contributory negligence, or even abuse of the product, may be within the ambit of what it is that the manufacturer is to anticipate and guard against in the design and labeling of his product. This is especially true where a third party is the plaintiff, as in the hair roller case above, but it is also true when the careless actor is the plaintiff. His own conduct may not become a defense to the supplier’s liability either because his participation is shifted to the defendant as its responsibility to anticipate, or because under strict liability the type of conduct involved may not be a defense at all.

The common fact situation involving a brake press or similar machine without a safety guard is a good way to cover two further aspects of the “abuse” of the product situation. The machine may

54. See cases cited in note 52 supra.
56. Feedback and complaint review has been argued in many cases but has not resulted in a holding I can find. It is common and good industrial practice to analyze warranty claims, complaints and suits, plus tracing products in the field.
57. Chapman v. Brown, 198 F.Supp. 78 (D.Haw. 1961), aff’d 304 F.2d 149 (9th Cir. 1962) (use near fire puts product to the test). See also question 3 in text.
lack a guard either because the employer buying the machine has failed to put on a guard which the supplier required or recommended, or because he may have removed a guard originally provided by the supplier. Taking the former situation, some cases would hold today that the manufacturer is not to be insulated from liability merely because he has taken steps to shift to the employer the burden of making the product safe. If the machine could have been sold with a guard by the manufacturer he would be under a duty to do so, and, in relation to the injured worker, would not be able to assert a defense of intervening fault on the part of the employer in failing to follow directions to install an appropriate guard. Other action which might be required of the manufacturer would be to inspect the machine after installation to make sure that the employer had complied, or to affix an irremovable sign from the machine stating the machine should not be operated without a guard of some sort affixed, or to make it inoperative without a guard.

In the other common machine problem, the employer has removed the guard provided by the supplier, generally to increase the productivity of the machine. Here some courts would also allow the jury to determine whether the supplier was liable for an injury. The arguments open to the plaintiff are that the guard should have been irremovable (or the machine rendered inoperative by its removal), or that the machine was defective or in breach of a warranty if the guard had to be removed to provide the level of production the employer sought. Again, a plate which warned of the risks might be affixed.

Another aspect of intervening acts as potentially minimizing the supplier's liability is that which commonly arises in the prescription drug cases. Here the prescribing doctor makes one of two types of statements, either of which the manufacturer argues tends to insulate him from liability in the situation where the plaintiff is claiming a failure to warn because there is no statement about a certain side effect in the labeling. The doctor testifies either that he did not read and never does rely on the package insert (hence, how can the absent warning be the proximate cause


of the injury? or that he knew all about the risks from his own experience, reading of medical articles, and the like. Several recent decisions would nonetheless allow this sort of case to go to the jury.\textsuperscript{69} In a leading decision, the court found that the jury might disregard these types of assertions by the doctor and find that the manufacturer set out with a plan to overpromote the product and to underwarn the profession.\textsuperscript{61} Deception of the medical profession at large by failure to warn would be all that the plaintiff would have to show, without any tying down of proximate cause in his own case.

13. \textit{What is the vitality today of the “patent-latent” distinction?}

\textit{Campo}\textsuperscript{62} is on the demise. The philosophy of that case and those which followed it\textsuperscript{63} was that there could be no responsibility for injuries resulting from patent defects, as compared to those which were latent. Where there were “open and obvious” risks, the worker or other person using the product was deemed to be on a par with the manufacturer. This amounted to applying an assumption of the risk defense as a matter of law, with the added disadvantage that the defendant was relieved of the burden of proving that plaintiff had subjectively appreciated a known risk.

\textit{Campo} was and is an unrealistic approach to modern working conditions.\textsuperscript{64} The uneducated employee assigned to work at a machine which has dangerous whirling parts, unguarded by a device which the experienced manufacturer could have utilized, is on no par with that supplier. Momentary forgetfulness—an accepted fact of industrial life—will cost him his arm. His only means of avoiding injury is to give up his job, which is not a realistic choice to him. Thus, it is more justifiable to stop drawing lines of responsibility on latencypatency, and to allow the jury to ask whether the defendant used due care under the circumstances, whatever the obviousness of the defect.

Judicial and jury dislike for the \textit{Campo} rule may be ex-

\textsuperscript{64} See criticism in 1 FRUMER § 7.02; cf. Pike v. Frank G. Hough Co., 2 Cal.3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) and other cases cited in note 48 \textit{supra}. 

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pressed not in outright rejection, but in accepting the plaintiff's argument that the risk to him was not obvious, even though the dangerous condition was itself patent. Such a fine distinction does not usually exist, however, and it is more honest to do away with Campo directly.

14. What is the responsibility to design a "crashworthy" product?

The debate over a manufacturer's duty to design a "crashworthy" vehicle is all but over, now that the majority of appellate courts considering the issue have refused to draw a line which would immunize vehicle manufacturers from any responsibility to use due care in making a car in which it is safe to have an accident. They hold that the same amount of care which is due in designing and building a car which creates an accident is due in providing a safe environment in which to have an accident. Automobile accidents are recognized as an every day fact of life and within the ambit of foreseeability (see question 13 above).

Any discussion about "crashworthiness" should make the following introductory points:

(a) "Crashworthiness" is just one name, and not an all-inclusive one, for a group of cases dealing with injuries which occur after an accident has started to take place. Other terms or concepts are "enhanced damages" or "second collision" damages, or one can approach in terms of the "unnecessary ornament."

(b) Crashworthiness applies to all products, not just vehicles.

(c) Crashworthiness applies to strict liability and negligence alike, as well as to "pure" (design defect) and "impure" products.

As to the unnecessary ornament—the device on the vehicle which serves little or no function and yet causes injury after an


accident has started to take place—a recent case cast into liabil-
ity the manufacturer of a vehicle which had hubcaps made of
sharp projecting metal pieces ("Ben Hur" type chariot). Plain-
tiff's leg was injured when the motorcycle on which she was a
passenger brushed up against the hubcap.

So intent have plaintiffs been in recent years on avoiding
dismissal in "second collision" cases that they have lost sight of
their ultimate ability to win the case before a jury or judge. The
plaintiff must bear the burden of proof that had the vehicle been
designed as claimed, the injury would not have occurred or at
least would have been measurably less. Better design of a gas
tank might not be the means of preventing fire burns if the car
was involved in so mighty a collision that no car could have
survived structurally. 66

C. OTHER FORMS OF LIABILITY & PARTIES

15. What is the status today of a cause of action for fraud or
misrepresentation?

Although a cause of action for fraud is little used today in
product liability cases, it is a good alternate basis for recovery
and, in a few cases, may be the best if not the only way to get
the case to the jury. 68 In addition, a cause of action based upon
fraud may have a longer statute of limitations than one for negli-
gence, strict liability, or breach of warranty, and may open the
door to otherwise inadmissible proof.

The common law action for deceit or misrepresentation has
been supplemented by a strict liability type of fraud, set forth in
Restatement (Second) of Torts, § 402B. Section 402B is a little
used section which places liability upon the supplier of a chattel
where injury follows reliance by a user upon misrepresentations
about a material fact pertaining to the character or quality of the
product, even though the misrepresentations were not made neg-
ligently or fraudulently, and even though there is no contractual
relationship between the seller and the injured party. This is "no
fault" fraud. Thus, as in a leading case, where injury follows an
attempt to use a tractor for something mechanically beyond its

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67. Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972); see also
68. See the discussion in Rheingold, Pointers on a "Crashworthy" Plea, 8 TRIAL, 57
(March/April 1972).
69. See generally, 1 HUNSH ch. IV. A good example is Toole v. Richardson-Merrell,
ability, but something of which it has been said to be capable, liability follows even though the misrepresentation was entirely innocent. 70

16. What is the role of a cause of action for breach of an express warranty?

Even with the general replacement of the implied warranty action by strict liability, the action based upon breach of an express warranty has life today, and in a few instances may be the best route to recovery. 71 Whether this action is regarded (improperly) as arising out of provisions of the Uniform Commercial Code, or (properly) out of common law, the essential elements are a positive affirmation about the product upon which the user has relied. A good example of the modern express warranty action is a suit for an allergic reaction to a cosmetic which was sold with the statement on its label that it was "nonallergenic" or "safe." Here it has been held that the manufacturer is liable for breach of express warranty, even though it would not be liable because of a defense based upon the "allergy rule," were it sued in negligence. 72 Not every positive statement about a product may, however, give rise to the action, since some promises are so broad as to be puffing. 73

17. Under what circumstances may punitive damages be awarded in a product case?

States differ in their standards for allowing punitive damages, but in most, proof of gross, wanton, or reckless conduct (or, of course, intentional conduct) merits the jury's evaluation of whether such damages should be awarded. 74 Some states have the "complicity doctrine"—that the management of the company must have participated in some way in the conduct—a rule which often creates problems in product cases. Examples of situations in which exemplary damages have been awarded are: a new drug

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71. See generally, 1 Hurst ch. 3, § 3.36 ff. Among recent cases see Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965); McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967).
74. Generally, but from the defense point of view, see Tozer, Punitive Damages and Products Liability, 39 INS. COUNSEL J. 300 (1972).
as to which it was shown that the manufacturer concealed from physicians its awareness of its potential to cause injury, as shown in prior investigations, or a druggist who knowingly sold a prescription drug to a purchaser without a prescription.

18. **Who are the newer parties, plaintiff and defendant, to product litigation?**

The discussion in this article centers mainly upon the manufacturer, who is by far the most commonly sued defendant. There are, however, an ever-expanding number of persons with some connection, direct or remote, with the chain of product distribution who are potential defendants. At the same time, the type of plaintiffs are growing. This expansion is true both in negligence and strict liability, although it is in the latter that the main growth—and some controversy—exists today.

**a. Defendants**

1. The maker of a component part;
2. the assembler or subassembler, or the packager of the final product;
3. the wholesaler, distributor or middleman;
4. the importer, or one who holds the product out to be his own;
5. the retailer;
6. the new car dealer;

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76. Cox v. Laws, 145 So.2d 703 (Miss. 1962).

77. See generally, 1 FRUMER § 9. In a most interesting case, E.I. duPont de Nemours & Co. v. McCain, 414 F.2d 369 (5th Cir. 1969), it was held that while du Pont only made a harmless part of the final compound which exploded and which constituted only 2% of the whole, it was liable for failure to test the final compound since it allowed its name to be placed prominently on the label.

78. See generally, 1 FRUMER § 10.


82. 2 FRUMER ch. 18; on strict liability, see HURSH § 5A:24 (Supp. 1973).

7. the seller of used or reconditioned products; 84
8. the repairer or other contractor; 85
9. the bailor; 86
10. the operator of a store in which the public uses machines; 87
11. the vendor of real estate, the contractor, the architect, the builder, the lessor of real estate, and even the financier of a housing development; 88
12. licensors; 89
13. the guarantor, endorser or tester; 90
14. the advertising or promoting agency; 91
15. the restaurant serving food; 92
16. the beauty shop applying a hair product; 93
17. the hospital or physician using a product while rendering

84. See generally, 2 FRUMER § 19.03(5).
85. See 1 FRUMER § 5.03(3). One case has gone a step further holding liable to an injured third person a gas station operator who negligently inspected and certified a vehicle, Buszta v. Souther, 102 R.I. 609, 232 A.2d 396 (1967).
86. As to strict liability, see Price v. Shell Oil Co., 2 Cal. 3d 245, 466 P.2d 722, 85 Cal. Rptr. 178 (1970); Cintrone v. Hertz Truck Leasing & Rental Service, 46 N.J. 434, 212 A.2d 769 (1965). As to negligence, see 1 FRUMER § 5.03(4).
88. As to builders and contractors, see, as to strict liability, Kriegler v. Eichler Homes, Inc., 269 Cal.App. 2d 224, 74 Cal.Rptr. 749 (1969); State Stove Mfg. Co. v. Hodges, 189 So.2d 113 (Miss. 1966), cert. denied, 386 U.S. 912 (1967); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); and in negligence, see 1 FRUMER § 5.03(2)(a).
91. I know of no case which holds an advertiser responsible, but such liability is predictably close in coming.
medical treatment (service),\(^9\) including the transfusion of blood;\(^\text{85}\)
18. a whole industry, and its trade association;\(^\text{86}\)
19. the federal government.\(^\text{87}\)

b. Plaintiffs
1. A bystander;\(^\text{88}\)
2. a class of injured parties;\(^\text{29}\)
3. a recipient of a gift;\(^\text{109}\)
4. a rescuer.\(^\text{101}\)

D. Proof
19. What must the plaintiff show on the issue of causation?

As every school boy knows, the term causation covers two related matters: cause-in-fact (did the product cause the injury?) and proximate cause (did the defect or conduct cause the injury?). As to cause-in-fact, this is usually a matter of simple proof. Most cases are so clear that no expert evidence would be required, as for example, where glass from an exploding bottle flies into a person's eye. In other situations, however, the chief battle at trial may very well be over factual causation. In most drug injury cases, for example, there is nothing peculiar caused by the particular drug, and the defendant lays great stress on alternate causation—that the injury complained of was caused by

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\(^85\) Cases imposing strict liability are cited in note 15 supra.

\(^86\) Hall v. E. I. du Pont de Nemours & Co., Inc., 345 F.Supp. 353 (E.D.N.Y. 1972) (where there was evidence that they had adopted a common plan to remove identifying marks from their products, blasting caps); see also Borel v. Fibreboard Paper Products Corp., CCH PROD. LIABILITY Rptr. ¶ 7017 (5th Cir. 1973) (asbestosis from contact with multiple manufacturer's production).


\(^89\) So far the courts have refused to recognize as a true class a group of plaintiffs injured physically by the same product. See Gans & Rheingold, Multiple Litigation, 3 FRUMER ch. 16 A.

\(^90\) Pease v. Sinclair Ref. Co., 104 F.2d 183 (2d Cir. 1939); as to strict liability, see RESTATEMENT (SECOND) of TORTS § 402A, Comment l (1965).

the disease for which the product was being given, or that it was due to another drug, or that the condition was "idiopathic" or "congenital." Auto cases present similar problems, wherein the defendant calls the alleged defect "impact damage"—a product of the crash.

Proximate cause presents greater hurdles for plaintiff. In fact, one of the most common reasons for a plaintiff's losing a case at trial or upon appellate review is failure properly to demonstrate a proximate link between the defendant's conduct or defect and the injury. The typical case is the user who complains that there should have been a better warning on the product, and yet testifies that he did not read the label before first using the product. Or, in a drug case where it is claimed that the manufacturer failed to do adequate testing before marketing, the plaintiff may be undercut by the fact that when tests were done later (even after the injury) they proved negative. Hence, if done earlier, they could not have predicted plaintiff's injury. There has been some loosening of proximate cause requirements in the situations where potentially intervening conduct is involved, as discussed in question 12 above.

20. **What degree of proof of identity of the product is required?**

On rare occasions, plaintiff's presentation may be tripped up on an identity question: is the product which is in the courtroom or the one tested by plaintiff's expert the very one which caused his injury? Generally this issue does not arise, but when it does, the plaintiff should be prepared with proof of the chain of control. It is well to have the product labeled at the time it is removed from the car or is brought into the lawyer's office, and then to have proof how and when it was sent to the expert and protected by him there. Photographs are also helpful on control issues where they show unmounting and testing.

21. **What are the ways to prove the existence of a defect?**

The plaintiff has many ways of proving the existence of the

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102. See, e.g., McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62, 181 N.E.2d 430, 226 N.Y.S.2d 407 (1962). In Blue v. Drackett Products Co., 143 So.2d 897 (Fla. App. 1962) plaintiff was allowed to testify directly to the proximate cause issue. It was held that the mother who had purchased a product which injured her child should have been allowed to testify that if she had been warned of the risks, she would not have kept the product where the child could find it. See also Jacobs v. Technical Chem. Co., 472 S.W.2d 191 (Tex. Civ. App. 1971), rev'd 480 S.W.2d 602 (Tex. 1972).

103. Cf. Rheingold, supra note 5, at 339; 1 Horns § 1:19.
defect, where such is contested. The usual means is to call an
expert to testify as to the results of his examination of the prod-
uct. This witness makes the assertion, to whatever degree of cer-
tainty is required, and perhaps demonstrates visually to the jury
the existence of the defect. In some cases the defect may be so
obvious as to require no expert proof, such as the glass fragments
from the bottle that exploded.

The sources of proof of defect which are available to plaintiff
include the following:

(a) He may show the nature of the product and its capability
of producing the type of harm which is sued for, as for example
the consumption of food showed later to be contaminated.

(b) He may rely upon the pattern of evidence, as for example
using evidence of the point of collision or the movement of a car
as shown by its tire marks as being indicative of the type of defect
which has caused the loss of control of the vehicle.

(c) He may show facts about the life history of the product,
including similar previous failures or injuries, or even injuries
which it caused after the event. This might include repairs made
to the product afterward.

(d) He may point to what similar products have done, where
the similar product is another one just like the one in the accident
(another bottle from the same batch) or just bears some generic
similarity (a competitor's product).

(e) Elimination of alternative cause is usually insufficient in
itself to help the plaintiff provide the existence of a defect, but it
is a most helpful means of convincing the jury that there was an
actionable defect.

Does the mere happening of an accident in itself prove or
tend to prove the existence of a defect? In some recent cases the
answer has been most decidedly yes, although there are many
older cases which state that the mere happening of an accident
does not give rise to proof of defect. Those decisions which have

104. Rheingold, supra note 5, at 327-339. Phelan and Foer, Problems of Proof in

104.1 See also questions 26 and 30 in text.

105. See, e.g., Greco v. Bucciconi Eng'r. Co., 407 F.2d 87 (3d Cir. 1969); Elmore v.
American Motors Corp., 70 Cal.2d 578, 481 P.2d 84, 75 Cal. Rptr. 652 (1969); Stewart v.
Budget Rent-a-Car Corp., 52 Hawaii 71, 470 P.2d 240 (1970); Marathon Battery Co. v.
Kilpatrick, 418 P.2d 900 (Okla. 1966); Vanek v. Kirby, 253 Ore. 494, 450 P.2d 778 (1969);
less direct proof is needed in a strict liability case than in a negligence case).

106. See Rheingold, supra note 5, at 337.
allowed a case to go to the jury on nothing more than a demonstration that the accident took place, tend to deal by and large with the non-household type of product. Here, within the experience of the ordinary worker or consumer the product would not have failed but for the existence of a defect. In a leading case, a huge machine malfunctioned as it had never before, and amputated a worker’s arm. No more proof than the malfunction was required in order to submit the case to the jury on the issue of defectiveness. Indeed, the Pennsylvania cases have recently held that evidence of malfunction is sufficient proof of defect to send the case to the jury.

22. Must the specific causal mechanism or defect be proved?

The courts do not generally require that the plaintiff prove the exact or specific defect or the causal mechanism which caused the injury. In the typical case, involving an automobile accident, plaintiff must point to some part or system which caused the car to go off the road, but he is not required to show exactly how a particular part broke down. Or, if he points, for example, to a broken steering gear, he is not required to show why the metal broke in the way it did. Of course, the plaintiff is well advised to offer as much proof as possible on the specific cause, since it helps to convince a jury that there was a defect which proximately caused the accident.

23. To what extent may circumstantial evidence be relied upon to prove the existence of a defect?

Circumstantial evidence and inference generally may be relied upon in part or in full to prove the fact of a defect, and its role in the production of the injury for which plaintiff is suing. In the usual product case there is little “direct” evidence of what defect caused the accident and it is, therefore, often necessary to rely strongly upon circumstance.

A good illustration of proving a case wholly on circumstantial evidence involves the exploding grinding wheel. In one case, the

110. Rheingold, supra note 5, at 340-343.
wheel was destroyed by the explosion and there was nothing left to inspect. Plaintiff's proof that the wheel had been defectively made was based upon an inspection of the defendant's factory and its manufacturing process. It was shown that the process used lent itself to a lack of homogeneity in the grinding wheel's composition. An expert showed how this could make the wheel prone to disintegrate while being used. Similar problems and solutions can be found in the situation where an automobile goes out of control and is destroyed beyond the point of being capable of being inspected. Thereafter, we may imagine, the manufacturer issues a recall notice describing a defect which was of the type that could have caused the accident.

24. **What is the application of res ipsa loquitur to product litigation?**

Most courts would apply the doctrine of *res ipsa loquitur* to a product case as it would in any other type of case. The inherent hurdles in the application of the doctrine, most notably proof that the defendant had "control" over the chattel, does, however, tend to limit its usefulness. More importantly, the very type of case which is so obvious that "res ipsa" will carry it to the jury, is the type where expert testimony can readily be obtained. To rely on "res ipsa" here is to pass up an opportunity to prove a particularly strong case. Through the more convincing mode of expert testimony, attorneys sometimes try to use "res ipsa" to repair a gap in the case on the causation issue. Properly used, the doctrine would be of no assistance in proving that there was a defect in the product or that it caused the accident. "Res ipsa," rather, is concerned with the liability issue.

The case of the exploding bottle makes a wonderful exercise in putting together many of the points covered so far, not only in this proof section but in legal theories as well. We assume that plaintiff is the husband of the purchaser of a bottle of club soda, which explodes just as he goes to open it at home. The traditional

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112. In Carroll v. Ford Motor Co., 462 S.W.2d 57 (Tex. Civ. App. 1970), an after-received recall letter was held not to be sufficient proof of the existence of a defect.
113. See Rheingold, *supra* note 5, at 338. See generally 1 FRUMER § 12.03. Leading recent *res ipsa loquitur* cases include Grey v. Hayes-Simmons Chemical Co., 310 F.2d 291 (5th Cir. 1962) and Jimenez v. Sears, Roebuck & Co., 4 Cal.3d 379, 482 P.2d 681, 93 Cal. Rptr. 769 (1971).
114. See Rheingold, *supra* note 5, at 338.
defendants are the "Ma and Pa Grocery Store" which sold it to the plaintiff's wife, the bottler, and the bottle manufacturer. Assuming that the wife cleaned up the pieces of glass and threw them into the garbage, it would seem that the best action would lie against the retailer. The best theory against him would be in strict liability. Some courts would refuse to apply res ipsa loquitor because of doubts about proof of "control." There is no easy way to tie in the more remote defendants without the glass pieces, unless one wants to use the approach discussed in the preceding section as to grinding wheels, or some other special circumstantial proof. Assuming the bottle fragments are around for an expert to examine, and that after reconstruction he determines that there was a seam defect or an uneven wall, strict liability should apply up the line to everyone. As to a negligence theory, it would have to be shown that the defect was due to careless construction or that it went undetected because of a negligent failure to inspect the product.

25. How is "notice" proved? Are official reports, congressional hearings, and articles in the press admissible?

Proof that the defendant was on notice of certain information pertaining to risks of his product before the accident can come from many sources, a number of which are covered elsewhere: other complaints (question 26) and the very nature of the product (question 21).

In addition, the plaintiff often wishes to show that the defendant was placed on notice of the defect or danger of his product by virtue of some publication which had appeared before the time of his own injury. As a common example, in a drug injury case, the plaintiff offers copies of articles which had appeared in the medical press which reported the same injuries from use of the


117. See note 115 supra.

118. As with every other type of product, it is important to understand the technology involved. See Dingwall, Exploding Bottles, 11 NAACA L.J. 158 (1953), in Schreiber & Rheingold, Products Liability 14:57 (1st ed. 1967), and Spangenberg, Exploding Bottles, 24 Ohio St. L.J. 516 (1963), in Schreiber & Rheingold, supra, at 12:75. (A second edition of Schreiber & Rheingold, supra, will be issued in 1974.)
very same product." These articles are often limited to the issue of notice (as compared to a causation issue); sometimes only summaries or statistics are allowed and not the whole report with its details of the injuries. The basis for admissibility is that these reports are not hearsay because they are asserted not for the truth of their contents, but for the mere fact that they came to the defendant's attention; they might also be admitted as the basis of expert testimony. Of course, the use of journal articles is not limited to medical cases. In machine cases, the plaintiff may have turned up magazine or book discussions on the issue of risks with a certain design. In counterbalancing fashion, the defendant may be expected to offer proof, if it is so, that there was little or nothing in the literature up to the time of plaintiff's injury to alert it to any risky potential of the product.

It sometimes happens that a congressional committee has held hearings or made reports on the product involved, before the time of the accident. Or, a regulatory body may have made general pronouncements about it. Here the plaintiff offering such proof may argue an official report's exception to the hearsay rule, but this rationalization extends with some difficulty to hearings of a body as compared to its report.

26. Are other complaints and similar occurrences, both before or after the accident in question admissible? And what about proof of a long period of safe use?

On liability issues (notice), prior accidents, complaints, or the like are generally admissible. The plaintiff has a number of


120. Proposed Rule 703 of the proposed FEDERAL RULES OF EVIDENCE would allow a witness to base his opinion testimony on matters which are technically hearsay if of a type "reasonably relied upon by experts in the particular field." See also Rheingold, The Basis of Medical Testimony, 15 VAND.L.REV. 473 (1962).

121. In Blair v. American Motors Corp., 473 F.2d 740 (3d Cir. 1972), results of a testing laboratory study (Cornell Aeronautical Laboratories Automobile Crash Injury Research) were held admissible as some evidence of good design which the defendant could have used, but did not, in designing its door latches.

122. Official reports were allowed in Wright v. Carter Products, 244 F.2d 353 (2d Cir. 1957) (on notice issue); Stashinoukevich v. Nicolls, 168 F.2d 474 (1st Cir. 1948) (not a product case); Love v. Wolf, 226 Cal.App.2d 378, 88 Cal. Rptr. 183 (1964). Contra, Green v. American Tobacco Co., 391 F.2d 97 (5th Cir. 1968). See generally 1 FRUMER § 12.05-.06.

proofs to make in order to make such evidence admissible, including: the similarity of the other event to the one in question, the fact that the event came to the attention of the defendant, and foundational matters such as that the sheet of paper representing the complaint which the plaintiff has found in the defendant's files is a genuine copy. Events coming to the attention of the defendant only after the accident in question (or more accurately, in time before the accident for the defendant to have been able to do anything about it), would appear to have no relevance on notice issues. They are relevant on the causation questions, however, where the issue is whether the product is capable of causing a certain accident or injury. Here an event occurring on the eve of trial is as relevant on causation issues as one which occurred long before plaintiff was injured.

The defendant may want to prove a prior history of no accidents, either as to the product in question (as some proof that it was without a specific defect) or as to its line of products (to show that it had no notice of defect). At least in negligence actions, such proof should be admissible. Such proof is often of great weight in allergy cases (see question 10 above). Subsequent safe history is irrelevant on liability issues but is as relevant on causation as subsequent accidents are pertinent for the plaintiff.

There is no basis to establish a conclusive defense for a manufacturer merely because there had been a long history of safe use with the particular product involved before plaintiff's injury occurred. Large machine presses, for example, may be operated for 20 years without an accident occurring (that is to say, without the plaintiff being able to prove otherwise). This fact, while pertinent to the jury in determining whether in fact there was a defect in the machine (plaintiff might have caused the accident himself in some fashion), should in no way preclude proof of defect.

N.J. 413, 290 A.2d 286 (1972). See generally 1 Frumer § 12.01[2]. As to the discovery of other complaints, see Annot., 20 A.L.R.2d 1430. See also Annot., 95 A.L.R.2d 681.

124. See discussion of the practical problems of introducing records from the manufacturer's files into evidence, Gans & Rheingold, ch. 46A in 3 Frumer, at 16A-83-86.

125. I am unaware of any case which is a clear holding on this point, although it is often raised in trials, especially in prescription drug cases. The courts generally allow pretrial discovery of such complaints on the causation issue, see Annot., 20 A.L.R. 3d 1430; see Dipangrazio v. Salmonson, 64 Wash.2d 720, 393 P.2d 936 (1964) (evidence of risk of people running into glass doors admissible on issue of whether such doors are dangerous.


127. Carney v. Sears, Roebuck & Co., 309 F.2d 300 (4th Cir. 1962); Balido v. Im-
similar problem arises when a building falls after many years, and the original builder, contractor, or even architect are sought to be held responsible.

27. May the plaintiff prove deviation from a standard created by law or in an industrial code? If so, what is the effect of proof of deviation?

Increasingly today, courts are admitting proof of the existence of standards of all sorts for product design and construction. Such is the impact of proof of deviation of standard upon the trier of the fact that it behooves the lawyer during preparation of every type of product case to search for possible applicable standards from every conceivable source. The sources may be arranged as follows (with decreasing force):

(a) statutes and ordinances;
(b) regulations and codes passed pursuant to (a);
(c) industry wide standards and codes;
(d) defendant's own rules and regulations.

The potential legal and evidentiary uses to which departure from these standards may be put by plaintiff are as follows:

(1) to create a cause of action, either expressly or inferentially;
(2) to give standing to sue;
(3) to create negligence per se liability;


128. There are numerous sources for determining the existence of standards. By far the best compilation for lawyers is ROBB, PHILLO & GOODMAN, LAWYERS DESK REFERENCE (4th ed. 1971) (also very strong on experts and organizations). The most comprehensive set of standards is put out by the American National Standards Institute (formerly ASA) 1430 Broadway, N.Y., N.Y. 10018, which issues annually a free list of all of its standards. Other groups with multiple standards are the American Society for Testing and Materials (Philadelphia); National Fire Prevention Association (Boston); and National Safety Council (Industrial Data Sheets-Chicago). was to admissibility problems, see Note, Admissibility of Safety Codes, Rules and Standards in Negligence Cases, 37 TENN. L. REV. 581 (1970).

129. Few federal or state laws regulating products expressly create a private right of action for the injured consumer. An exception is under § 23 of the Consumer Product Safety Act, 15 U.S.C. § 2072 (1970), which authorizes suit for injuries due to a knowingly or willful violation of a safety standard, order, or rule of the commission. This is extremely limited and in practice will probably be of little use to litigants.

130. I am unaware of any product statute, state or federal, which grants a private party any special standing to sue such as exists in some environmental legislation.

131. As was allowed in Orthopedic Equipment Co. v. Eustler, 276 F.2d 455 (6th Cir.
(4) to establish a standard by which to measure the defendant's conduct as some evidence of want of due care on his part;\textsuperscript{122}

(5) to evidence a defect for strict liability purposes.\textsuperscript{123}

The most interesting and controversial area of standards has been the effort by plaintiffs to use non-official standards—industry sponsored or trade association standards—as a measure of the care up to which the defendant should have come. For example, in a power lawn mower case, plaintiff was allowed to prove what the ANSI standards were for proper design of the controls, blades and the like—conditions with which defendant's mower did not comply.\textsuperscript{134} While it would be proper in these cases to prove the standard itself as a separate item of evidence, and then read it to the jury, a preferable way to get the standard before the jury is through expert testimony. Not only does the expert explain it to the jury, but the court has less trouble with admissibility, especially if it wants to indulge in the concept that it is not being admitted but is taken only as the "basis" of the expert's testimony.

28. Is there a defense based upon compliance with standards, compliance with custom and practice, or governmental approval?

On the same liability issues as just covered in question 27, the defendant may be expected to offer proof on the following matters:


In Brooman v. Sears, Roebuck & Co., 387 F.2d 732 (6th Cir. 1967) it was held error to admit an ASA standard which had been published after the lawn mower in question was made. See generally, Note, The Admissability of Safety Codes, Rules and Standards in Negligence Cases, 37 TENN. L. REV. 581 (1970); Annots., 75 A.L.R.2d 488, 507; 81 A.L.R.2d 229, 247;

The standard may arise out of what the custom and practice of others in the industry were at the time the product was made. Blohm v. Cardwell Mfg. Co., Inc., 380 F.2d 341 (10th Cir. 1967).


(a) he complied with the statutes and regulations relating to his product;
(b) his product meets, if not exceeds, the standards set by the applicable industrial codes;
(c) a public regulatory body licensed or otherwise approved the marketing of the product;
(d) the labeling and other conditions of marketing have been reviewed by the governmental agency which has allowed the product to stay on the market;
(e) he was doing what other manufacturers at that time were doing, and hence he complied with the custom and practice in the trade.

There is little doubt that most courts should and would admit most of the proof just mentioned, but the force of the proof should only be as some evidence of due care on the part of the defendant.\textsuperscript{135} It would be improper to allow compliance with any law, or the fact of explicit government approval, to cause the issue of whether the defendant was negligent or otherwise liable to be removed from the consideration of the jury. To do so is to confuse the jury's role with the purpose of governmental oversight. The latter sets a minimum acceptable standard, whereas the former is whatever the common law says it is. Such standards as those set under the Flammable Fabrics Act\textsuperscript{136} have shown that the community (jurors') standard can and should be set much higher than whatever it is that the industry is able to work out in a behind-the-doors setting with bureaucracy.\textsuperscript{137} There is also a question as to whether defendant is offering anything more than self-serving proof when he offers to show that he complied with private standards which he himself helped to promulgate.

Even though governmental approval is not conclusive on the jury in its evaluation of the product, that fact is highly persuasive, as any trial lawyer knows. Many juries find a great bit of difficulty in being put in the role of second guessing the govern-

\textsuperscript{135} See, e.g., Savage v. Peterson Distrib. Co., Inc. 379 Mich. 197, 150 N.W.2d 804 (1967); see also cases cited in note 137 infra, and Annotations in note 132 supra.

\textsuperscript{136} 15 U.S.C. § 1191 et seq.

If the product was good enough for the United States government, how can they declare it defective? This is especially true for drugs which the FDA has approved or airframes which the FAA has certified as "airworthy." If the plaintiff cannot attack this "goodhousekeeping seal of approval" directly by showing that the defendant did not disclose all it knew about risks to the government, then he is remitted to the argument that the common law standard is higher.

The "custom and practice" defense is, upon analysis, the same issue as that of the governmental approval. It clearly is relevant, at least in negligence cases, for the jury to know that other manufacturers were doing the same thing at the same time. However, there should be no complete defense as a matter of law accorded to the man who does it the way everyone else does. The jury should be free to find the whole industry at fault by being behind the times, an approach sanctioned long ago in the famous T. J. Hooper decision by Judge Hand.138

29. What are the exceptions to the "repairs doctrine"?

The general rule against admission of otherwise highly relevant proof about modifications of the product after an accident is logically founded on the theory that potential defendants will otherwise be discouraged from making repairs.139 Nonetheless, many exceptions have been made to the "repairs doctrine" by the courts in product cases, each with its own rationale. This issue is not limited to actual repairs or design modifications but covers all post-accident events, such as modifications of labeling (as in drug cases), changes in the terms of a license or approval, recalls, and even censures and criticisms.

The established exceptions to the "repairs doctrine" in product cases are:

(a) feasibility—what it was that the defendant could have done before the accident, but carelessly failed to do;140
(b) proof of the very existence of a defect or proof of dangerousness;141

138. 60 F.2d 737 (2d Cir. 1932).
139. See generally 1 FRUMER § 12.04; Note, Products Liability and Evidence of Subsequent Repairs, 1972 DUKL.J. 837.
Often the defendant may open the door for proof of this sort by arguing that it complied with the rules or that there was nothing more it could have done within reason to have prevented the accident. Where an auto manufacturer recalls a line of vehicles some time after one of them has been involved in an accident, is it not relevant proof of the existence of a preventable defect if the plaintiff can show that the need for recall could have been earlier determined through the exercise of due care?

Since the rationale of the rule is that the defendant must not be discouraged from voluntarily correcting defects, it follows that there is no "repairs doctrine" barrier to proof of subsequent events which are compulsory, as where the government forces a change in design or labeling.¹⁴³

30. On what matters may the expert witness testify?

There is very little judicial hostility toward the expert in the product field, because, as in the malpractice area, the trier of the facts can bring little relevant experience to the evaluation of the issues. Hence, experts have been allowed to testify on a wide variety of topics, which may be outlined as follows:

(a) the product was defective, unsafe or the like;¹⁴⁴
(b) the defendant was careless or departed from the standard, whether the issue is one of design, testing, construction or labeling.¹⁴⁵


¹⁴³ Carter Carburetor Corp. v. Riley, 186 F.2d 148 (8th Cir. 1951); cf., Stahlheber v. American Cyanamid Co., 451 S.W.2d 48 (Mo. 1970).

¹⁴⁴ Roberts v. United States, 316 F.2d 489 (3d Cir. 1963); Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972); Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir. 1964); Robinson v. Reed-Prentice Corp., 286 F.2d 478 (9th Cir. 1961); Cronin v. J.B.E. Olson Corp., 8 Cal.3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972); Gates & Sons, Inc., v. Brock, 199 So.2d 291 (Fla.App. 1967); Bexiga v. Havir Mfg. Corp., 60 N.J. 42, 290 A.2d 281 (1972) (machine was a "booby trap").


(c) there was a better or safer way to make the product;\textsuperscript{146}

(d) causation.\textsuperscript{147}
