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Strict Tort Liability in Automobile Liability Legislation

William M. Hoffman

STRICT TORT LIABILITY IN AUTOMOBILE LIABILITY LEGISLATION

INTRODUCTION

The assault upon the citadel, having proceeded apace for 35 years,[1] has achieved spectacular victory. Strict liability in tort as a remedy for the manufacture and sale of defective products has won the day.[2] Once applied only in the food and beverage area, strict liability is now being applied to consumer products of every type, and the *Restatement*[3] reflects this strong judicial trend. It is difficult to speculate as to the impact strict liability will have on the various industries to which it is now being applied. Not enough cases have been decided in any particular area to elicit any definite reactions. Strict liability seems to be, in fact, just one part of a political and social climate exhibiting increased concern for the consumer, and it is probable that the most significant changes in the consumer products industries will result from legislation,[4] not tort verdicts.

1. Justice Cardozo observed, in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931), "The assault upon the citadel of privity is proceeding in these days apace." Dean Prosser came to the same conclusion in 1960. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1148 (1960).

2. The background and development of strict tort liability has been extensively discussed. See, in particular, the following authorities: 1 FRUMER & FRIEDMAN, PRODUCTS LIABILITY §§ 16-16A (1963); 2 HARPER & JAMES, TORTS § 28.16 (1956); 1 HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 6.62 (1961); PROSSER, TORTS § 97 (3d ed. 1964); Feezer, *Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles*, 37 MICH. L. REV. 1 (1938); Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1 (1963); James, *Some Reflections on the Bases of Strict Liability*, 18 LA. L. REV. 293 (1958); James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957); James, *Products Liability*, 34 TEXAS L. REV. 192 (1955); Jeanblanc, *Manufacturer's Liability to Persons Other Than Their Immediate Vendees*, 24 VA. L. REV. 134 (1937); Keeton, *Products Liability—The Nature and Extent of Strict Liability*, 1964 U. ILL. L. F. 693; Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963); Keeton, *Products Liability—Current Developments*, 40 TEXAS L. REV. 193 (1961); Keeton & Roberts, *Implied Warranties—The Privity Rule and Strict Liability—The Non-Food Cases*, 27 MO. L. REV. 194 (1962); Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 SO. CAL. L. REV. 30 (1965); Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446 (1964); Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963 (1957); Pound, *Problem of the Exploding Bottle*, 40 B.U.L. REV. 167 (1960); Prosser, *Spectacular Change: Products Liability in General*, 36 CLEVELAND B.A.J. 167 (1965); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965); Note, *Limitations Upon the Remedy of "Strict Tort" Liability for the Manufacture and Sale of Goods—Has the "Citadel" Been Devastated?*, 17 W. RES. L. REV. 300 (1965); Note, *Sales—Liability of Manufacturer to Remote Vendee for Breach of Warranty—"Privity of Warranty,"* 29 B.U.L. REV. 107 (1949).

3. RESTATEMENT (SECOND), TORTS § 402A (1965) [hereinafter cited as RESTATEMENT].

4. Regulatory legislation in the various consumer products industries, analogous to the food and drug statutes, would be one possibility. Another would be a Code approach,

Strict liability, nevertheless, does have an effect on the character of products liability litigation, and it is reasonable to expect that this effect will be felt more strongly in some industries than in others. An example of a large and important consumer products area where strict liability might be expected to have a significant impact is the automobile industry.

The automobile manufacturers, we are told,[5] have met the advent of strict liability with patient resignation, insisting that they have won most of the cases brought against them and stressing that most automobile accidents are still the fault of the driver. The automobile industry does admit to certain worrisome aspects of the doctrine of strict liability, particularly that an inference can always be drawn, when the manufacturer makes necessary design changes or incorporates new safety devices, that previous models were not made as safely as possible, and were thus defective.[6] Many authorities in the area believe this inference to be more than justified. They claim that automobiles have not been made as safely as possible, and that much of the responsibility for the annual tragedy on the highways can be traced directly to the automobile manufacturers.[7] The increase in the number of lawsuits against automobile manufacturers in recent years indicates, at least *prima facie*, that this view is becoming widespread. Approximately 1000 such suits were brought in 1964, and it has been predicted that some 5000 suits will be brought in 1966.[8] Further geometric increases in the number of automobile products liability suits are expected,[9] and many, if not most, of these suits will be tried under the strict tort liability theory. It shall be the purpose of this comment then, to examine the effect of strict liability on what promises to be one of the most active areas of products liability litigation.

WHAT IS "STRICT TORT" LIABILITY?

Before turning to an examination of the effect of strict tort liability on automobile products liability litigation, it is essential to first define strict tort liability and state generally how it changes prior theories in the products liability area. The history of products liability and the evolution

providing a single unified system of products liability law. See, for a strong argument as to the need for this, 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).

5. BUSINESS WEEK, Aug. 28, 1965, p. 30.

6. *Id.* at 31.

7. See, *e.g.*, NADER, UNSAFE AT ANY SPEED (1965); Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); Nader, *Automobile Design: Evidence Catching Up With the Law*, 42 DENVER L.C.J. 32 (1965); O'Connell, *Taming the Automobile*, 58 NW. U.L. REV. 299 (1963); Philo, *Automobile Products Liability Litigation*, 4 DUQUESNE L. REV. 181 (1965).

8. BUSINESS WEEK, Aug. 28, 1965, p. 30.

9. Philo, *supra* note 7, at 182.

of the strict tort remedy have been discussed extensively,[10] and there is no need for repetition here. The *Restatement* recognizes the strict tort liability of the seller of defective products, and this provides a convenient basis for discussion. The *Restatement* provides:

> § 402A *Special Liability of Seller of Product to User or Consumer*
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to reach the user or consumer in the condition in which it is sold.
>
> (2) The rule stated in subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Strict tort liability, as defined by the *Restatement*, is essentially the same as the sales warranty of merchantability stripped of all contractual elements.[11] Subsection (1)(a) limits coverage to sellers engaged in the business of selling such a product, which is similar to the requirements of section 15 of the Uniform Sales Act and section 2-314 of the Uniform Commercial Code. Subsection (2)(b) recognizes that privity of contract is no longer a requirement, and thus any seller in the distributive chain is potentially liable to the ultimate user or consumer. Overcoming the privity requirement was probably the major step in the evolution of strict tort liability,[12] but other contractual aspects of warranty also caused complications. Two such problems, both recognized under the Uniform Sales Act and the Uniform Commercial Code, were the requirement of giving notice of breach of warranty by the buyer to the seller and the possibility of disclaimer of warranties by the seller. Several of the leading strict liability cases were especially concerned with elimination of these problems.[13] The recognition of the sale of a defective product as a *tortious* wrong existing apart from any contract between the parties now makes

10. See authorities cited note 2 *supra*.

11. Greeno v. Clark Equip. Co., 237 F. Supp. 427, 429 (N.D. Ind. 1965).

12. PROSSER, TORTS § 95, at 677-78 (3d ed. 1964).

13. See, *e.g.*, Santor v. A & M Karagheusian, 44 N.J. 52, 207 A.2d 305 (1965) and Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rep. 697 (1963), dealing with the notice problem, and Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rep. 896 (1964) and Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), treating the problem of disclaimer of warranties.

notice requirements, disclaimers, and other agreements between the parties inapplicable.[14]

Long before the days of strict liability, three exceptions to the privity requirement were developed by the courts: (1) a seller who knew a product was dangerous and neglected to inform the buyer of this fact could be held liable to a third person injured by such use;[15] (2) a seller could be held liable when the product was used on his premises, the user being treated as an invitee;[16] (3) a seller could be held liable to a third party for injuries caused by a product "imminently" or "inherently" dangerous to human life or safety.[17] In *MacPherson v. Buick Motor Co.*,[18] the class of inherently dangerous articles was greatly extended by Judge Cardozo's statement that, "if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger."[19] The rule of the *MacPherson* case was extended by degrees, to impose *negligence* liability upon the supplier of any chattel or component part for personal injury or property damage to anyone in the vicinity of its probable use.[20] Subsection (2)(a) of section 402A eliminates negligence as a requirement, and thus the *Restatement* would seem to include all three of the early exceptions to the privity requirement within its rule. The *Restatement*, however, extends its coverage to a "user or consumer" only, and in a *caveat* states that it expresses no opinion as to whether the section will apply to persons other than users or consumers or to the seller of a component part. Thus the present coverage of strict tort liability, according to the *Restatement*, is not as broad as under a negligence theory, even though intermediate sellers in the distributive chain, previously not liable unless negligent, are now strictly liable.

Section 402A(1) requires that the defective condition of the product at the time of sale render it "unreasonably dangerous to the user or consumer or to his property." Comment *d* to section 402A indicates that the strict liability rule applies "to products which, if they are defective, may be expected to and do cause 'physical harm'." Thus, the "unreasonably dangerous" defective product, required by the *Restatement*, is

14. RESTATEMENT, § 402A, comment *m*; Prosser, *Spectacular Change: Products Liability in General*, 36 CLEVELAND B.A.J. 167, 168 (1965). But see Shanker, *supra* note 4, at 23-30 for an analysis of the leading strict tort cases and the conclusion that the same results in these cases could have been reached under the Uniform Commercial Code.

15. PROSSER, *op. cit. supra* note 12, at 659-60.

16. *Id.* at 660.

17. *Ibid.*

18. 217 N.Y. 382, 111 N.E. 1050 (1916).

19. *Id.* at 389, 111 N.E. at 1053.

20. Prosser, *supra* note 1, at 1100-02.

essentially the same as the "imminently" or "inherently" dangerous article defined in *MacPherson v. Buick Motor Co.*,[21] and this requirement does not seem to be a limitation on the strict tort liability theory. Subsection (1)(b) requires that the defective product "reach the user or consumer without substantial change in the condition in which it is sold," and Comment *g* states that the burden of proving the condition is upon the injured plantiff. Existence of the defect at the time the product left the seller's possession and control was always a requirement in both a negligence action and in an action for breach of implied warranty of merchantability,[22] and strict tort liability thus retains it. The reason for this requirement, of course, is that otherwise the defect could not be attributed to the seller in any way, and there would be no justification for holding him liable. The *Restatement* in a *caveat* states that it expresses no opinion as to products which are expected to be processed or otherwise substantially changed before they reach the user or consumer. This is related to the question of the liability of the manufacturer of component parts, on which the *Restatement* also expresses no opinion. Comment *p* to section 402A suggests, for products that are to be processed or substantially changed, that the question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. The same question applies when considering the liability of the manufacturer of component parts. Whether or not the courts will adopt a test of this type remains to be seen.

To summarize, then, the plaintiff in a strict tort action must be a user or consumer of the defective product. The defendant can be any seller of the defective product in the distributive chain who is engaged in the business of selling such products. The plaintiff, to make out a *prima facie* case, must prove first that his injury was factually caused by a defect in the product and second that the defect existed when the product left the hands of the defendant. Defendant's primary defense is to rebut plaintiff's proof of causation and existence of the defect when it left defendant's hands. Since plaintiff is not required to prove that defendant was negligent, contributory negligence is not an affirmative defense.[23] Evidence in the nature of contributory negligence could be offered, however, in rebutting plaintiff's *prima facie* case. Assumption of the risk, defined as voluntarily and unreasonably proceeding to encounter a known danger, is recognized as a defense.[24] Finally, Comment *h* to section 402A states that a product is not defective if it is safe for normal handling and

21. *Supra* note 18.
22. Prosser, *supra* note 1, at 1114.
23. RESTATEMENT, § 402A, comment *n*.
24. *Ibid.*

consumption, and therefore a "use different from or more strenuous than that contemplated to be safe by ordinary users/consumers, that is, 'misuse,' would either refute a defective condition or causation."[25]

Turning now to the specific application of the strict tort liability theory to automobile products liability litigation, the analysis will employ the following general categories: the defective product, the parties to the litigation, plaintiff's *prima facie* case, and available defenses.

THE DEFECTIVE PRODUCT

Ever since *MacPherson v. Buick Motor Co.*,[26] it has been recognized that the automobile[27] is a thing of danger if defectively made, and no one seriously doubts this. The annual toll of 50,000 deaths and two million disabilities resulting from automobile accidents[28] indicates that the automobile is a thing of danger even if not defective. The presence of a defect is required, however, if the seller or manufacturer is to be held liable under strict tort, just as it was under a negligence theory and in an action for breach of implied warranty of merchantability, for, as has been pointed out, there would otherwise be no justification for holding the seller or manufacturer liable. The automobile manufacturers and dealers are not insurers in the sense that they guarantee accident-free use of their product. Under strict tort liability, however, they do guarantee that the automobile they sell is not defective and are held liable for any injuries caused by the defective condition without regard to the degree of care exercised.

A defect in a part or system of the automobile related to its operation in motion, such as the steering or braking system, is the type of defect ordinarily thought to make the automobile unreasonably dangerous. Whether a defect in an automobile can cause harm without having rendered the automobile unreasonably dangerous is a question which has not been discussed in any of the strict tort cases. This is, at least, theoretically possible, but it would seem that such defects would occur, if at all, in systems other than those related to the operation in motion of the automobile. This is not to say, however, that the only defects from which liability will result must be in the braking system, steering, tires, and the like. In *Blitzstein v. Ford Motor Co.*,[29] for example, plaintiff recovered for injuries suffered when gasoline vapors, escaping from a leak in the gasoline tank positioned in the trunk in such a way that the

25. Greeno v. Clark Equip. Co., *supra* note 11, at 429.

26. *Supra* note 18. In this case the manufacturer was held liable to the purchaser for injuries suffered in an accident caused by a defective wheel on the automobile.

27. Although this comment is primarily concerned with automobile cases, the same principles apply generally to all motor vehicles.

28. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1963-64 ed.).

29. 288 F.2d 738 (5th Cir. 1961).

vapors filled the car instead of being dispersed in the atmosphere, exploded when plaintiff switched on the ignition. Other less obvious defects which have been the basis of litigation are defective designs of various automobile systems, such as the rear suspension system,[30] the hood latch,[31] and the ignition and gear control system.[32] In *Mickle v. Blackman, Cherokee Const. Co. & Ford Motor Co.*,[33] plaintiff, a passenger in a car involved in an accident, recovered from the manufacturer for injuries suffered when, as a result of the crash, she was thrown against and became impaled upon the gearshift lever which was inadequately guarded. A comprehensive treatment of the defects from which liability will result is beyond the scope of this comment.[34] It is to be noted that strict liability is not of any aid here. Better techniques of proof, coupled with the attorney's imaginative investigation and construction of his case, are the significant elements in proving that an automobile was defective.

PARTIES TO THE LITIGATION

Plaintiffs

The plaintiff in a strict tort action must, at present, be a user of the automobile. Comment *1* to section 402A of the *Restatement* provides that passive users, such as passengers in a car or airplane, are included in the coverage of the section. The lessee of an automobile would also be considered a user as would a member of the family of the owner or lessee. Those possible plaintiffs excluded from the coverage of section 402A are pedestrians, owners of property damaged by the defective automobile, and the driver and passengers of other cars on the road. This distinction cannot logically be defended, and seems to be the last remnant of the old privity idea. For example, an employee of a gasoline station injured when the brakes on a car fail while its owner is driving it into the station could not sue in strict tort, but if the owner had left the car at the station for servicing and the same accident happened while the car was being driven by another employee, then the injured party would presumably have an action in strict tort. Similarly, if the same accident happened, and the car struck a group of pedestrians, one of whom was a member of

30. See the discussion of the Corvair cases in NADER, UNSAFE AT ANY SPEED, Chap. 1 (1965).

31. Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840 (1946). The defective latch would permit the hood to spring when the car was subjected to a severe jolt or jar.

32. Muncy v. General Motors Corp., Civil No. 906 E.D. Tex., Marshall Div., April 10, 1964 (appeal pending in U.S. Ct. of Appeals for 5th Cir.). Plaintiff showed that it was possible to remove the ignition key from the switch with the motor running and the car in a forward drive position. Plaintiff was injured when a passenger accidentally stepped on the accelerator while disembarking from the car in that exact situation, causing it to jump the curb and pin plaintiff against a wall.

33. Circuit Ct., 6th Judicial Cir., York County, S.C., March (1963).

34. See Philo, *supra* note 7, at 196-213 for a checklist of various types of defects.

the owner's family, that person could presumably sue in strict tort, while the other injured pedestrians could not. The illogic of this distinction is thus apparent.

Under any of the theories advanced as a justification for the adoption of strict tort liability the limitation that plaintiffs must be users or consumers cannot be defended. The risk-spreading argument[35]—that manufacturers as a group should absorb the inevitable losses which must result in a complex civilization from use of their products, because they are in a better position to do so, and can, through their prices and liability insurance, pass on such losses to the community at large—would surely include injuries to bystanders as part of the inevitable losses which result from use of a product. Furthermore, since the loss is to be distributed to the community at large, there is all the more reason not to deny the benefit of an action in strict tort to any member of the community who may foreseeably be injured. The argument that the public interest in human life, health, and safety demands the maximum possible protection that the law can give against dangerous defects in consumer goods[36] would likewise extend to injured bystanders the same protection accorded users or consumers. Finally the argument that strict liability was adopted through consumer pressure, since, by placing the goods on the market, the supplier represents to the public that they are suitable and safe for use, and that the consumers rely on this when making purchases[37] would not exclude bystanders from coverage. It would not require a presumption of a high degree of altruism on the part of the user to assume that in addition to himself and his family, he also would not want the product he buys to injure others. Thus an action in strict tort should not be limited to users or consumers, but should be available to any foreseeable plaintiff who is injured in the vicinity of probable use of the product.

Defendants

Sellers engaged in the business of selling automobiles include manufacturers, new car dealers, used car dealers, wholesale distributors, and foreign car importers, and any of these sellers in the distributive chain of a defective automobile could be held strictly liable in tort to the ultimate user for injuries caused by the defect. If the automobile has passed through the hands of several retail dealers before being sold to a consumer, as is very common in automobile merchandising, all of these dealers would be potentially liable in strict tort to the user. Any liability of one seller to another in the nature of indemnification, however, would

35. This has been attributed to Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944).

36. Prosser, *supra* note 1, at 1122-23.

37. *Id.* at 1123.

be determined under commercial law, not strict tort. An owner, not in the business of selling automobiles, who sells his car to another private individual or even to a dealer knowing that it will be resold, is also not included within the coverage of strict tort. Such occasional sellers could be liable for negligence, however, as for example, selling a car with a known defect without giving notice of this to the buyer. The manufacturers of components may, at present, be liable for negligence only, but it is possible that they may be strictly liable if the courts adopt a test of whether their component was incorporated without the responsibility for discovery and prevention of dangerous defects shifting to the manufacturer. Tires, for example, may be the type of component for which the tire manufacturers would be held strictly liable. Assuming such a test were adopted, the liability of the manufacturer of the component would nevertheless not discharge the liability of the manufacturer and sellers of the automobile. Strict tort liability, by definition, arises from the sale of a defective product no matter where the defect originated, and holding the manufacturer of a component strictly liable would thus provide the plaintiff with another potential party to sue. Again, any liability of the manufacturers of components to the automobile manufacturers would be determined under commercial law, not strict tort.

The liability of new car wholesalers and retailers is significantly broader under strict tort than it was under the negligence or sales warranty theories, while the liability of the manufacturers is not significantly affected. The intermediate sellers of a new automobile usually can not be held liable under a negligence theory, since they have no duty of inspection and testing of every system of the automobile which might contain a latent defect, and, in a usual case, are simply not negligent.[38] Under the sales warranty theories, privity and notice requirements and the possibility of disclaimer of liability operated as a bar to many of the plaintiffs who now have an action against these intermediate sellers in strict tort. The liability of the manufacturers, on the other hand, is not significantly affected by the adoption of a strict tort theory. Manufacturers are liable for negligence, and the point has been made[39] that once the plaintiff has proved that the defect in the product caused his injury and existed when the product left the hands of the defendant, he can rely on the doctrine of *res ipsa loquitur* or its practical equivalents to get his case to the jury on the negligence issue. Plaintiff's burden of proof in a strict tort action is thus essentially the same as in a suit based on a negligence theory. It is true that in a negligence action the manufacturer can introduce evidence of due care to rebut the inference of negligence, but as a practical matter, "in cases against manufacturers, once the cause of the

38. Prosser, *supra* note 1, at 1118.

39. *Id.* at 1114-15.

harm is laid at their doorstep, a jury verdict for the defendant on the negligence issue is virtually unknown."[40]

It would seem, then, that the plaintiff in an automobile products liability action involving a defective new car has gained very little by the adoption of the strict tort theory. The manufacturers are the most financially responsible of any of the defendants now possible under strict tort, and they are the parties which plaintiffs desire to sue, not the intermediate sellers. Jurisdiction in a suit against a manufacturer does not seem to be a problem, as the manufacturers do business in every state, and suits against them have been tried in practically all jurisdictions.[41] In a usual case, then, a plaintiff would have no occasion to sue the intermediate sellers. Furthermore, under a negligence theory, the liability of the manufacturer of components and the coverage of all foreseeable plaintiffs is well settled, and is not questionable as it is under strict tort. Strict tort may make a difference, however, where foreign cars are involved and the manufacturer is out of the jurisdiction. In this case, an action in strict tort against the importer or seller (often an American manufacturer) would give purchasers of foreign cars the same protection presently enjoyed by purchasers of domestic automobiles. Another case in which it has been suggested[42] that strict tort may make a difference in the products liability area would be a situation where plaintiff can prove that the product was defective at the time he received it from the retail dealer, but cannot prove that it was defective when it left the manufacturer's factory. This would commonly occur in the food and beverage area, for example, where plaintiff's injury is caused by a broken glass container (particles of glass in the food) and where it would be practically impossible to prove that the glass was broken at the time it left the manufacturer's factory. It is doubtful, however, whether this situation is important in the automobile products liability area. An automobile remains relatively unchanged as it moves from the manufacturer, to the dealer, and finally to the consumer. Also, even if the final inspections, corrections, and adjustments necessary to make the car ready for use are left to the dealers, *Vandermark v. Ford Motor Co.*[43] held that this fact does not enable the manufacturer to escape liability even if the defect may have been caused by something one of its authorized dealers did or failed to do, because it is, in a sense, a delegation of the final steps of the manufacturing process to its authorized dealers. The effect of strict tort on automobile products liability litigation involving *new* cars is therefore not very great, and the position of the plaintiff is not really improved by suing under strict tort rather than under a negligence theory.

40. *Id.* at 1115.

41. See Annot., 78 A.L.R.2d 460 (1961).

42. Prosser, *supra* note 1, at 1117.

43. 37 Cal. Rptr. 896, 899, 391 P.2d 168, 171 (1964).

Strict tort may be significant, however, in actions involving used cars. No case has yet been decided holding a used car dealer strictly liable in tort, but nothing in the strict tort theory would prevent such a result. The used car dealer is a seller engaged in the business of selling automobiles, and the automobile industry certainly includes used car sales as part of its merchandising scheme, since new car dealers also sell used cars. Also, all of the arguments which have been advanced in favor of strict liability, the need for maximum protection of the public, risk spreading, and the like, apply equally well to used car sales. These dealers can likewise protect themselves by products liability insurance, the cost of which they pass on to the public at large, just as sellers of new cars are now expected to do. Related to the problem of used car sales is the question of the strict liability of the manufacturer as to "old" cars. Does the manufacturer's liability, which attaches when the automobile is manufactured, follow the automobile into and out of the hands of various users and used car dealers until it finally reaches its ignoble end in a junk yard? The answer should be yes, so long as the plaintiff can prove that the defect existed when it left the manufacturer's hands. In *Mickle v. Blackman, Cherokee Const. Co. & Ford Motor Co.*,[44] plaintiff recovered in 1963 for injuries caused by a design defect in a 1949 Ford, and in general, the manufacturer's liability on old cars will be largely for basic designed-in defects. As to other defects, it would normally be difficult, if not impossible, to prove that an accident caused by a locked steering wheel, for example, was due to a defect existing when the automobile left the manufacturer's hands if no trouble was experienced with the steering for ten years prior to the accident. Similarly, the manufacturer will not be liable for injuries caused by worn-out parts of the type which are expected to wear out and require replacement, as for example, brake linings and tires. It is in this area that strict tort will aid the purchaser of an old car, in that the used car dealer will be held strictly liable for selling a car with a defect which cannot be traced back to the manufacturer.

PLAINTIFF'S PRIMA FACIE CASE

Plaintiff's *prima facie* case in a strict tort action is to prove that his injury was factually caused by a defect in the product and that the defect existed when the product left the hands of the defendant. As has been pointed out, this is essentially the same burden of proof which the plaintiff has under the negligence and sales warranty theories, and represents the real hurdle which a plaintiff must overcome if he is to recover. Conversely, the defendant's best defense is to rebut plaintiff's *prima facie* case. In this part of the litigation, strict tort theory is of absolutely no help; the strength of plaintiff's case depends, rather, on methods of obtaining the available evidence and techniques of proof, and, in general, improve-

44. *Supra* note 33.

ments in these methods and techniques will produce a much more significant increase in the liability of manufacturers and sellers of defective products than produced by the advent of strict tort. A detailed examination of the multitude of proof problems which can arise in automobile products liability litigation would be far beyond the scope of this comment, and would probably require a treatise. It shall be the purpose of this section, rather, to point out a few of the most frequently occurring problems which plaintiff must overcome in order to meet his burden of proof.

As a general proposition, the mere fact that an automobile was involved in an accident does not raise a presumption that it was defective. The plaintiff must allege and prove by specific evidence that a defect existed. In *Sugai v. General Motors Corp.*,[45] for example, the plaintiff had alleged that the defective condition of the left rear wheel and brake assembly caused the wheel to lock and the automobile to go out of control, causing his injuries. Plaintiff had no specific evidence that a defect existed, however, and merely contended that because the rear wheel locked, there must have been a defect. The court gave judgment for the defendant, holding that plaintiff had failed to meet his burden of proof. The nature of the defect need not be precisely established, however,[46] and this is an area in which expert testimony is usually essential. In *Vandermark v. Ford Motor Co.*,[47] plaintiff's expert witness could not testify as to the precise cause of the defective condition of the brakes, but offered to show by his testimony that there were only six possible causes, one or more of which would have constituted a defect in design or manufacture attributable to the defendant. The trial court rejected this offer, but was reversed, the court holding that it was unreasonable to require the plaintiff to make an election among a variety of possible defects, and that the exact nature of the defect was a question of the jury. The same requirement of specific proof would also be applicable in proving causation, and merely proving that an accident occurred would similarly be insufficient.[48]

Proof that the automobile was defective some time after the occurrence of the accident is no proof that the product was in the same defective condition at the time of the accident without a showing that the condition did not change in the interim.[49] It is thus essential for the attorney in preparing his case to allow the expert witness to make his examination of the automobile soon after the accident, or else take steps to preserve the automobile in an unchanged condition until the expert does make his

45. 137 F. Supp. 696 (Idaho 1956).
46. Gugliardo v. Ford Motor Co., 184 N.Y.S.2d 1012, 7 App. Div. 2d 472 (1959).
47. *Supra* note 43.
48. Young v. Willys Motors, Inc., 271 F.2d 209 (8th Cir. 1959).
49. McNamara v. American Motors Corp., 247 F.2d 445 (5th Cir. 1957).

examination. Otherwise the expert's testimony could be rejected as incompetent, as in *Kanatser v. Chrysler Corp.*,[50] where the expert did not inspect the automobile until some two years after the accident, and there was no showing of lack of change in condition in the interim. Similarly, proof that the automobile was defective at the time of the accident does not raise a presumption that it was defective at the time it was under the control of the manufacturer,[51] and plaintiff must also show here that there was no change in the particular defective part between the time it left the manufacturer's control and the time of the accident. In rebuttal, defendant can introduce evidence that the automobile was entirely satisfactory up until the occurence of the accident, as evidence of freedom from defect.[52]

Finally, even if a component is found broken after the occurrence of an accident, this does not, in and of itself, establish that the component was defective or prove that the breaking of the component was the cause of the accident. In *Fisher v. Sheppard*,[53] plaintiff claimed that a defective sleeve in the gear system had broken and caused the accident in which he was injured. The judgment for plaintiff was reversed on appeal, the court holding that there was not enough evidence to establish that the sleeve was defective prior to the collision and that it was equally probable that the break resulted from the terrific impact of the crash. Proof that the component was broken after the occurrence of the accident is generally held to be some evidence that it was defective before the accident and that its breaking was the causative factor of the accident,[54] but the defendant can always rebut by showing that the post-accident condition of the component was a result of the accident rather than indicative of its pre-accident condition.[55]

These few examples should serve to illustrate that the task of the attorney handling an automobile products liability case is not an easy one.[56] Careful investigation must be made at the scene of the accident, and care must be taken to retain the automobile involved in the accident in an unchanged condition until it can be examined by an expert. An expert witness is a necessity in most cases, because of the difficult

50. 199 F.2d 610 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953).

51. Maryland Casualty Co. v. Independent Metal Products Co., 203 F.2d 838 (8th Cir. 1953).

52. McNamara v. American Motors Corp., *supra* note 49.

53. 366 Pa. 347, 77 A.2d 417 (1951).

54. Lovas v. General Motors Corp., 212 F.2d 805 (6th Cir. 1954). In this case, the issue was whether the nut fastening the steering wheel to the shaft was defectively made and caused the steering wheel to come off, or whether it came off as a result of the accident.

55. Lovas v. General Motors Corp., *supra* note 54; Peterman v. Indian Motorcycle Co., 216 F.2d 289 (1st Cir. 1954).

56. See Philo, *The Plaintiff's Attorney and the Products Liability Case*, 3 DUQUESNE L. REV. 39 (1964).

technical questions involved, and in some cases an accident reconstruction specialist could be used advantageously. The attorney himself must also research sources of engineering information and techniques, and, as a practioner in the area, should keep generally up-to-date on technical developments in the industry. Finally, careful preparation for trial is required, including the extensive taking of depositions and interrogatories, if plaintiff is to recover.

AVAILABLE DEFENSES

Defendant's primary defense, as has been pointed out, is to rebut plaintiff's proof of causation and existence of the defect when it left the control of the defendant, and defendant may utilize the same techniques of proof in defense as are available to the plaintiff in making out his *prima facie* case. In successfully defending the second "Corvair case,"[57] for example, General Motors, to counter the claim that the Corvair's doors were weak, brought in a metallurgist from the University of Illinois and an accident specialist from U.C.L.A., and reconstructed aspects of the accident by crashing three cars, taking motion pictures of the crashes in both color and black and white. Although contributory negligence is not an affirmative defense under the strict tort theory, evidence in the nature of contributory negligence could be offered to rebut plaintiff's *prima facie* case. In *Ford Motor Co. v. Mondragon*,[58] although not a strict tort case, there was evidence that plaintiff failed to heed a highway warning sign and failed to timely observe the car with which he collided. The court held that plaintiff's evidence of defective brakes was insufficient and that these other factors were more probably the cause of the accident. Similarly, in *Young v. Willys Motors, Inc.*[59] the court held that the more probable cause of the accident was the driver losing control of the automobile because of the slippery roadway and not the alleged defect in the brakes which caused them to lock. Related to proof in the nature of contributory negligence is proof of misuse, which is recognized as an affirmative defense.[60] There are no cases employing this defense in the automobile products liability area, but hypothetical cases could be constructed where it might apply, as for example, where the plaintiff used the automobile to haul a trailer which was too heavy for an automobile, and the brakes failed while going down a steep hill.

Finally, assumption of the risk is still retained as an affirmative defense, but for this to apply, plaintiff must have voluntarily and unreasonably proceeded to encounter a known danger.[61] This situation will probably

57. See Time, Sept. 10, 1965, p. 37.

58. 271 F.2d 342 (8th Cir. 1959).

59. *Supra* note 48.

60. Greeno v. Clark Equip. Co., *supra* note 11.

61. RESTATEMENT, § 402A, comment *n*.

not arise very often, and will undoubtedly be limited to those cases where the manufacturer notifies the owner directly about the defect and its dangerous propensities, but the owner fails to allow the manufacturer to repair the defect.[62]

CONCLUSION

Strict tort will not have a significant effect on automobile products liability litigation, and will make a difference only where foreign cars and used cars are involved. In particular, the liability of the automobile manufacturers is not affected by adopting the strict tort theory, and the only difference in the character of the litigation against manufacturers in strict tort will be that the manufacturers will no longer introduce evidence of due care. Improvements in methods and techniques of proof of causation and defective condition would produce a much more significant increase in the liability of manufacturers and sellers of defective products than produced by the advent of strict tort liability.

William M. Hoffman

62. See Jones v. Hartman Beverage Co., 29 Tenn. App. 265, 203 S.W.2d 166 (1946), where, under these facts, it was held that the causal chain was broken.