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Strict Products Liability - Its Application and Meaning

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A consumer injured by using a defective product has a number of remedies available for recovery against the manufacturer, the wholesaler or the seller despite the fact that no one expressly warranted the fitness of the product. The remedies are generally grouped under two headings, a tort action based upon negligence or a suit upon an implied warranty.

In Texas three theories of warranty are available in addition to the tort action. All are called “implied warranty,” although they are in fact very different from one another. The oldest of the three is an implied *contractual* warranty running from the seller of a product to his buyer. Privity of contract between these two parties is a necessary prerequisite for a suit. The second theory is tortious in nature and based upon public policy. Like the implied contractual remedy this method has developed by the common law process, but unlike the contractual remedy privity is not required. The third and latest theory arises from article two of the Uniform Commercial Code, dealing with sales. This code remedy supplants the older implied contractual warranty and more definitely defines the limits of its application. The latter two theories, implied warranty developed by a common law process and implied warranty under the Code, embody the developing concept of strict liability. The purpose of this Comment is to explore the development and meaning of these two doctrines.

I. Common Law Development of Strict Liability

In 1942 the Texas Supreme Court in *Decker & Sons v. Capps* held that an injured person could recover for personal injuries in a contaminated food consumption case without showing privity of contract between the parties or negligence on the part of the manufacturer. The court held that “the broad principle of the public policy to protect life and health" creates “an implied warranty imposed by operation of law." Significantly, the court distinguished this type of implied warranty from the older contractual variety by stating: “While a right of action in such a case

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2 The Code became effective at midnight, June 30, 1966.  
4 139 Tex. 609, 164 S.W.2d 828 (1942).  
5 Id. at 612, 164 S.W.2d at 829.  
6 Id.
is said to spring from a 'warranty' it should be noted that the warranty here referred to is not the . . . contractual warranty, but is an obligation imposed by law to protect public health." 

This type of implied warranty imposed a strict liability upon the manufacturer, thereby absolving the plaintiff from the requirement of proving privity of contract between himself and the manufacturer and from the duty of proving that the manufacturer had been negligent. Thus, an entirely new theory of recovery was created in Decker.

The implied warranty doctrine, imposing strict liability as to contaminated food for human consumption, has been followed in subsequent decisions rendered by Texas courts of civil appeals. The doctrine has been extended to apply to contaminated food for animals and to drugs for human use. However, in the absence of a precedent by the supreme court, courts of civil appeals demonstrated a strong reluctance to extend the Decker rule to non-food products other than drugs. In such instances it was necessary that a plaintiff plead and prove negligence of the manufacturer in order to sue in tort or that he demonstrate that privity existed in order to predicate the suit upon an implied contractual warranty.

Attempts have been made to extend the Decker doctrine against others

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7 Id. at 616, 164 S.W.2d at 831.
8 Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 10 MINN. L. REV. 791, 800-01 (1966); Wade, Strict Liability of Manufacturers, 19 SW. L. J. 5, 9-11 (1965); see text accompanying notes 97-132 infra.
than the original manufacturer. In *Griggs Canning Co. v. Josey*\(^{13}\) the supreme court held that the doctrine of implied warranty could also be applied to a retailer of contaminated food "even though such food is in sealed containers bearing the label of the manufacturer."\(^{14}\) But, in a later case, *Bowman Biscuit Co. v. Hines*,\(^{15}\) the supreme court refused to apply the doctrine against a wholesaler who dealt with foods in original packages put up by a manufacturer. The court indicated hostility towards its holding in *Griggs Canning Co. v. Josey*. However, the issue of extending the strict liability of *Decker* against a retailer was not before the court;\(^{16}\) therefore, the case did not overrule the *Josey* decision. The result was that a retailer could be held strictly liable for injuries resulting from a defective product which he sold, but a wholesaler could not be, provided he had no chance to alter the product while it was in his hands.

In the landmark case of *Putman v. Erie City Manufacturing Co.*,\(^{17}\) the Fifth Circuit in 1964 made "an Erie-educated guess"\(^{18}\) as to what Texas state courts would hold, and extended the *Decker* doctrine to the assembler of a wheelchair. The court held the assembler strictly liable for injuries resulting to a user because a component part was defective and rendered the entire product unreasonably dangerous. Likewise, the manufacturer of the defective component part was held strictly liable. Following the *Putman* case, a federal district court sitting in Texas held that a defective aluminum foil pie pan was an unreasonably dangerous instrumentality; the manufacturer was held strictly liable for resulting injuries.\(^{19}\)

Most Texas courts of civil appeals, however, refused to follow the lead of the Fifth Circuit. Several recent cases maintained the marked distinction between contaminated food cases and those involving other products. For example, in *Cruz v. Ansul Chemical Co.*\(^{20}\) the court held, notwithstanding *Putman*, that strict liability (implied warranty) was inapplicable when a defective fire extinguisher was involved. In *Copetillo v. Crosby County Fuel Assoc.*,\(^{21}\) the Amarillo Court of Civil Appeals held that the theory of implied warranty was not applicable in a non-food case brought against a middleman, i.e., a wholesaler or retailer.

This trend was interrupted when two intermediate appellate courts rendered conflicting decisions, one following the traditional approach and

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\(^{13}\) Id. at 623, 164 S.W.2d 835 (1942).

\(^{14}\) Id. at 634, 164 S.W.2d at 840.

\(^{15}\) Id. at 370, 251 S.W.2d 153 (1952).

\(^{16}\) See concurring opinion of Justice Wilson. Id. at 372, 251 S.W.2d at 168.

\(^{17}\) 338 F.2d 911 (1st Cir. 1964), noted in 19 Sw. L.J. 198 (1965).


the other extending the Decker doctrine of strict liability to a non-food case. In Sales Affiliates, Inc. v. McKisson the plaintiff’s wife, a beauty parlor owner, suffered loss of hair and severe scalp burns when a permanent wave lotion was applied to her bleached hair. Her husband sued the distributor of the product. The jury found that the lotion was not reasonably fit for use as a permanent wave preparation and that the use of such lotion proximately caused the injuries, but also found that a reasonably prudent beauty operator in the exercise of ordinary care would have known that the product should not be applied to bleached hair. The trial court held for the plaintiff. The court of civil appeals reversed the lower court, stating that privity was necessary since the doctrine of implied warranty had no application when dealing with a non-food product, and that contributory negligence was a complete defense in such a suit.

In the meantime, the Houston Court of Civil Appeals had rendered a contrary decision in Shamrock Fuel & Oil Sales Co. v. Tunks. There the plaintiff’s son was injured by an explosion when, pursuant to instruction of another, the son poured kerosene on a smoldering stick which he had taken from an incinerator. The kerosene, allegedly adulterated by addition of gasoline, had a flash point lower than that required by statute. The plaintiff sued the retailer, the distributor, and the manufacturer of the kerosene, alleging that the defendants had breached an implied warranty that the product was suitable for normal usage. The plaintiff offered evidence showing that kerosene meeting the statutory standards would not have exploded. The jury found that the plaintiff’s son was contributorily negligent but was unable to agree on answers to other material issues. The judge instructed a verdict in favor of the manufacturer and declared a mistrial as to the other defendants. The defendants filed an original proceeding for mandamus in the court of civil appeals to require the trial court to enter a judgment.

The court of civil appeals denied the mandamus and held that privity between opposing parties was unnecessary; that contributory negligence was not a defense in an implied warranty situation; and that the doctrine of implied warranty could be applied against a distributor. This decision represented a conspicuous departure from the steadfast position of most Texas courts in refusing to extend the Decker rule to non-food products.

The supreme court, speaking through Justice Norvell, resolved the conflict between Tunks and McKisson. In both instances the court applied the doctrine of strict liability to a non-food case. In Tunks, contributory negligence, i.e., the failure of the plaintiff to exercise ordinary care, was

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23 The lotion had been given to Mrs. McKisson by a salesman who was not a party to the suit.
25 Id. at 485
held not to be a defense to a strict liability action against a distributor.\textsuperscript{28} However, the doctrines of assumed risk and \textit{volenti non fit injuria} were recognized as valid defenses.\textsuperscript{29} In McKisson, privity of contract between the parties was held unnecessary when a defective and unreasonably dangerous product is involved.\textsuperscript{30} The court also quoted with approval from the \textit{Restatement (Second) of Torts}: "Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence."

Thus Texas, by virtue of the \textit{Tunks} and \textit{McKisson} cases, has joined the majority of jurisdictions in applying strict liability to non-food products. The trend in this direction represents one of the most explosive recent developments in any area of the law.\textsuperscript{25} Because of its new and volatile nature, however, the solutions have not necessarily been uniform, but instead have varied in degree and completeness. For example, several courts have broken away from the confusing warranty terminology and recognize the concept as one of strict liability in tort.\textsuperscript{26} Texas will encounter new questions which were unanswered by \textit{Tunks} and \textit{McKisson}. The \textit{Restatement} and the developed law in those states where strict liability has been used may indicate the direction Texas courts will take as these questions appear.

A major area of concern is who among the chain of sellers should be held liable. The term "seller" in the \textit{Restatement} means a person regularly engaged in the business of selling such products; not one who merely makes an occasional sale.\textsuperscript{34} By the expanding case law,\textsuperscript{28} a manufacturer,\textsuperscript{28} an assembler of parts,\textsuperscript{37} a manufacturer of a component part,\textsuperscript{38} a retail

\begin{footnotesize}
\textsuperscript{25} In n.3 the court states that strict liability in tort can be applied against a distributor as well as a manufacturer. It compares this with Bowman Biscuit Co. v. Hines, 151 Tex. 370, 251 S.W.2d 153 (1952), where a wholesaler, who dealt with foodstuffs in original containers was held to be immune from strict liability.

\textsuperscript{26} Shamrock Fuel & Oil Sales Co., v. Tunks, 416 S.W.2d 779 (Tex. 1967).

\textsuperscript{27} McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967).

\textsuperscript{28} Id. at 783-84.

\textsuperscript{29} Prosser, supra note 8; Wade, supra note 8. While in its formative years, this development was accurately predicted by Prosser in his now classic article, \textit{Prosser, The Assault Upon the Citadel (Strict Liability to the Customer)}, 69 YALE L.J. 1099 (1960).


\textsuperscript{31} \textit{Restatement (Second) of Torts} § 402A, comment f (1965). A seller includes a manufacturer, a wholesale or retail dealer, a distributor, and the operator of a restaurant. The occupation of the seller need not be solely that of selling such products.

\textsuperscript{32} See Prosser, supra note 8. Although these cases do not all cite § 402A, the defendants in all of them had been engaged in the business of supplying such goods.

\textsuperscript{33} Prosser, supra note 8.


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dealer," a wholesale distributor," and even a lessor of a motor vehicle have been held strictly liable. It should be remembered, however, that the Texas Supreme Court in *Bowman Biscuit Co. v. Hines* 48 declined to hold a wholesaler strictly liable for contaminated food sold in original sealed packages.

The class of persons entitled to use the remedy has also been a problem in Texas and other states. The Restatement provides that any "user or consumer" of the product is protected by the strict liability rule. Under the common law development of strict liability this has been held to include a final purchaser, the members of his family, his guests, his employees, his lessee, and his donee. The plaintiff need not acquire any interest in the chattel, except "the right to make a lawful use of it." Bystanders, therefore, have not been protected.

A third question involves the kind of product which will subject a seller to strict liability. The test under the Restatement is whether the product is "defective" and "unreasonably dangerous." A negative definition of defectiveness is provided: "A product is not in a defective condition when it is safe for normal handling and use." The question then becomes: "A product is "defective" and "unreasonably dangerous" when it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, under the circumstances in which it is used or consumed." The majority of the cases in notes 46-50 do not support this definition. See, e.g., Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Henningsen v. Bloomingdale Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942); cf., e.g., Conner v. Great Atl. & Pac. Tea Co., 25 F. Supp. 855 (W.D. Mo. 1939); Foley v. Weaver Drugs, Inc., 177 So. 2d 221 (Fla. 1967) (non-food products). *Contra*, Kroger Grocery Co., v. Lewelling, 165 Miss. 71, 145 So. 726 (1933). *Compare* dictum in *Bowman Biscuit Co. v. Hines*, 151 Tex. 370, 211 S.W.2d 153 (1952).


*Compare* *Bowman Biscuit Co. v. Hines*, 151 Tex. 370, 211 S.W.2d 153 (1952).

See generally Prosser, supra note 8. Not all the cases in notes 46-50 infra cite supra note 42.

*Id.*


with the ordinary knowledge common to the community as to its characteristics."

Finally, a problem arises if the manufacturer attempts to insulate himself from this liability. Disclaimers purporting to limit or eliminate liability are ineffectual under the Restatement and this proposition is supported by the vast majority of cases, at least when dealing with a manufacturer.

II. LIABILITY UNDER THE UNIFORM COMMERCIAL CODE

Remedies. Section 2-314(1) of the Code states, "Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." The most important definition appears in section 2-314(2) (c), which provides that merchantable goods are those which "are fit for the ordinary purposes for which such goods are used." This is strikingly similar to the definition of defectiveness under the Restatement.

However, a comment to section 2-314 of the Code states that "evidence indicating that the seller exercised care in the manufacture, processing or selection of the goods is relevant to the issue of whether the warranty was in fact broken." This language smacks of a negligence theory and is clearly contrary to the common law development of strict products liability, for in the latter the seller's negligence is immaterial. It appears, however, that, unlike a negligence situation, the burden under the Code would be on the defendant to prove that he exercised due care.

Section 2-315 provides an implied warranty of fitness for a particular purpose. The section is applicable when goods are to be used in the specific manner required by the plaintiff, as in his business; it does not encompass usage in an ordinary manner. This warranty arises when the

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54 Id. comment i.
55 Id. comment m.
57 UNIFORM COMMERCIAL CODE § 2-314(1).
59 RESTATMENT (SECOND) OF TORTS § 402A, comment b (1965).
60 UNIFORM COMMERCIAL CODE § 2-314, Comment 11.
61 Cases and secondary authority cited note 33 supra.
62 UNIFORM COMMERCIAL CODE § 2-315.
seller, at the time the contract of sale is made, has reason to know how
the goods are to be used and the buyer relies on the seller's skill and
judgment.\textsuperscript{66}

It is unnecessary that the seller have actual knowledge of the contem-
plated use, but the circumstances must be such that he "has reason to
realize the purpose intended or that the reliance exists."\textsuperscript{65} The buyer,
however, must actually rely on the seller.\textsuperscript{66} The element of reliance is
peculiar to this remedy;\textsuperscript{67} it does not appear either in section 2-314, dealing
with merchantability, or in common law strict liability. In addition,
section 315 does not require that the seller be a merchant with respect to
such goods, although it is generally expected that he will be.\textsuperscript{68}

\textbf{Privity of Contract.} The Code takes a cautious position on the contro-
versial element of privity. Section 2-318 of the official text\textsuperscript{66} abolishes
the requirement of privity for purposes of the Code's implied warranties when
dealing with injured plaintiffs who are in a horizontal relationship with
the buyer. Thus, people who are in the "family or household" of the buyer
or "guests in his home" are protected if it is reasonable to expect that such
people will use the product in question.\textsuperscript{69} For persons other than these,
the Code expresses no opinion as to the need for privity.\textsuperscript{70} In addition
to the immediate seller, a plaintiff has also been permitted, in most instances,\textsuperscript{71}
to sue the manufacturer.\textsuperscript{72}


seller with adequate notice of the particular purpose intended); Appeal of Reeves Soundcraft
Corp., 2 U.C.C. Rep. 210 (Armed Services Bd. of Contract App. 1964) (parol evidence ad-
missible to show knowledge on part of seller of particular purpose intended); Mennella v.
Schork, 49 Misc. 2d 449, 267 N.Y.S.2d 428 (5th Dist. Ct. 1966) (supplier of
automobile part for rebuilt engine which had been modified; modification was latent; necessary for plaintiff
to inform supplier of the change).

\textsuperscript{68}Yount v. Positive Safety Mfg. Co., 319 F.2d 324 (6th Cir. 1963); Standard Packaging
Brothers, 223 F. Supp. 896 (W.D. Pa. 1963); Vacuum Concrete Corp. of America v. Berlanti
Comment 1; Rapson, \textit{Products Liability Under Parallel Doctrines: Contrasts Between the Uniform

\textsuperscript{69}The Code makes an innovation by stating that the fact that the product has a trade or
patent name is not itself indicative of nonreliance. Uniform Commercial Code § 2-315,
Comment 5.

\textsuperscript{70}Id., Comment 4. Compare text accompanying note \textsuperscript{58} supra regarding § 2-314 with Prosser,
supra note 8, at 814.

\textsuperscript{71}ALI Uniform Commercial Code, 1962 Official Text With Comments (1963). For
deviations from the official text see Weaver, \textit{Allocation of Risk in Products Liability Cases: The
1028, 1050 (1966).

\textsuperscript{72}Uniform Commercial Code § 2-318. See Rapson, supra note 66. See, e.g., Allen v.
Savage Arms Corp., 2 U.C.C. Rep. 975 (C.P. Pa. 1962) (plaintiff was minor son of buyer);
cf. Miller v. Preitz, 221 A.2d 320 (Pa. 1966) (buyer was aunt of deceased child living
next door; child's representative allowed to sue retailer but not distributor or manufacturer);

\textsuperscript{73}Uniform Commercial Code § 2-318, Comment 3. Compare Mitchell v. Miller, 26 Conn.
Supp. 142, 2 U.C.C. Rep. 1152 (Super. Ct. 1965), where a bystander was allowed recovery
against a manufacturer.

\textsuperscript{74}In Miller v. Preitz, 221 A.2d 320 (Pa. 1966) a recovery was permitted only against
the immediate seller.

1964); Duckworth v. Ford Motor Co., 211 F. Supp. 888 (E.D. Pa. 1962); Mitchell v. Miller,
As enacted in Texas, section 2-318 is even more neutral than that in the official version:

This Article does not provide whether anyone other than a buyer may take advantage of an express or implied warranty of quality made to the buyer or whether the buyer or anyone entitled to take advantage of a warranty made to the buyer may sue a third party other than the immediate seller for deficiencies in the quality of the goods. These matters are left to the courts for their determination.76

Therefore, the importance of the McKisson case77 is readily apparent. Its abolition of the privity requirement greatly expands the scope of both the common law and the code remedies.

Limitations on Liability. Section 2-316 (2) states that a seller may modify or even exclude the implied warranty of merchantability by a disclaimer which mentions the word "merchantability." If the disclaimer is in writing, it must be conspicuous.78 The same may be accomplished as to the implied warranty of fitness for a particular purpose by a writing which is conspicuous.79 Section 1-201(10) explains:

A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals . . . is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color . . . . Whether a term or clause is 'conspicuous' or not is for decision by the court.79

However, even though a disclaimer complies with section 2-316 (2), a court may find as a matter of law that it was "unconscionable at the time it was made" and not enforce it.79


However, "oral language of disclaimer may raise issues of fact as to whether reliance by the buyer occurred and whether the seller has 'reason to know' under the section on implied warranty of fitness for a particular purpose." UNIFORM COMMERCIAL CODE § 2-316(2), Comment 5.


excluded.” First, when phrases such as “as is” or “with all faults” or other clear language of total disclaimer are used, all implied warranties are deemed to be overcome. Second, when a buyer examines the product (or a sample or model) as much as he desires or has refused to examine the product prior to entering into a contract, there is no implied warranty concerning defects which an examination should have revealed to him. This does not merely mean that the product was available for inspection; the seller must make a demand that the buyer examine it. Also, “The particular buyer’s skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination.” Latent defects may not be excluded by simple examination. Finally, a course of dealing or a practice in the business can exclude or modify an implied warranty.

Instead of excluding the warranty itself, an agreement between the buyer and seller may attempt to modify or restrict the remedy for the breach. Section 2-719 (3) allows consequential damages to be limited or excluded unless this is unconscionable. A limitation on damages for human injuries, however, is deemed to be prima facie unconscionable. This appears to create an incongruity within the Code. If a seller inserts a total disclaimer of warranty in the contract of sale which complies with section 2-316 (2), he may be protected even though the buyer has suffered personal injuries. Yet, if the terms of a contract purport to exclude the right to recover for personal injuries caused by breach of an implied warranty, it is presumptively unconscionable and of no effect.

Notice. One further obstacle faces the would-be plaintiff under the Code. Section 2-607 (3) (a) requires that the buyer give notice to the seller “within a reasonable time after he discovers or should have discovered any breach.” If he does not, he is barred from recovery. A reasonable time is said to depend upon the “nature, purpose and circumstances.” However, section 1-204 (1) provides that a time may be specified by agreement as long as it is not “manifestly unreasonable.” In one case a sale of
defective flower bulbs had been made. The contract of sale stated that all claims for breach of warranty would be deemed waived unless presented within eight days after receipt of the bulbs. Long after the eight-day period, when it was discovered that the bulbs would not flower, the buyer brought suit. The court held that a limitation which renders warranties ineffective as to latent defects not discoverable within the limitation period of the contract is "manifestly unreasonable" and therefore invalid.  

III. COMPARISON OF THE COMMON LAW AND CODE REMEDIES

The common law remedy and the Code impose liability mainly on a professional who sells defective goods. Consequential damages are recoverable under both. The Code, as enacted in Texas, is strictly neutral as to the requirement of privity of contract; this is expressly made dependent upon the developing case law.

It will be remembered that the Restatement (Second) of Torts requires that a product be "defective" and "unreasonably dangerous," while section 2-314 of the Code calls for "unmerchantable" goods. The definitions of "defective" and "unmerchantable" are similar, and therefore a plaintiff suing under the Code is spared from proving the extra requirement that the product in question was "unreasonably dangerous."

This is a delusive victory for a plaintiff, however, for the Code is fraught with technical restrictions not found in the common law remedy. The buyer is required to give notice to the seller of the breach of warranty within a reasonable time after he discovers or should have discovered the breach. This operates as a trap for the unwary. Also, the Code is seller-oriented in that the implied warranties may be disclaimed. The Code contains the vestige of a negligence theory in that evidence showing that the seller exercised care in the preparation of the product is relevant as to whether a warranty was breached. Finally, an implied warranty may not exist if the buyer has been invited to examine the product prior to sale and has failed to uncover defects which he would be expected to find.

One would have to conclude that the common law remedy is generally more advantageous for a plaintiff than the remedy provided under the Code. However, in some instances the Code may have definite advantages. For example, section 2-725 of the Code states that a four-year statute of limitations applies to actions for breach of implied warranty. This may be contrasted with the two-year limitations period for personal injury actions in Texas. However, this longer limitations period under the Code begins as soon as the seller tenders the defective goods, while under the

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94 Id.
95 Cf. text accompanying note 68 supra.
96 In their agreement the parties can reduce the limitations period to not less than one year; however, they can not extend it beyond four years. Uniform Commercial Code § 2-725.
98 Uniform Commercial Code § 2-725(2). However, when a warranty applies to future performance of the goods, the limitations begin to run when the breach is or should have been found. Id. Wolverine Ins. Co. v. Tower Iron Works, Inc., 3 U.C.C. Rep. 1034 (1st Cir. 1966); Rafco v. Bastian-Blessing Co., 417 Pa. 107, 207 A.2d 823 (1965); Champlain Milk Prods. Inc. v. M.E. Franks, Inc., 26 App. Div. 2d 988, 275 N.Y.S.2d 172 (1966).
common law remedy the two-year period begins only when an injury occurs.\(^{99}\) Moreover, under the Code the buyer's lack of knowledge of the breach of warranty is immaterial.\(^{100}\) Thus, the four-year limitations period, although long, may run easily.

In some situations it may be desirable to characterize an action as one in contract or as one in tort. For example, a plaintiff anxious to attach property of the defendant would be wise to frame the action as one in contract under the Code rather than tort. A Texas statute provides that, in order to attach property of another, one must allege that the other is justly indebted to him and must state the amount of the indebtedness.\(^{101}\) This has been construed to mean contract claims, which create a debt of a sum certain, and to exclude tort claims which do not.\(^{102}\) On the other hand, if one is suing a non-resident, it may be advantageous for the action to be characterized as tort to obtain service of process under the long arm statute.\(^{103}\) For example, if the contract has been executed and performed outside the state but the injury has occurred within the state, a tort suit would allow the application of the long arm statute. Likewise, the characterization may prove valuable in a conflict-of-laws situation.\(^{104}\) Finally, the Code allows recovery for commercial loss,\(^{105}\) while the common law remedy does not.\(^{106}\)

IV. THE SIGNIFICANCE OF STRICT LIABILITY

Burden of Proof. The use of the term "strict liability" is perhaps unfortunate in that the absolute liability of an insurer is implied. It is most assuredly not that. As seen earlier, strict liability abolishes the need for privity of contract and relieves the plaintiff from proving that the defendant was negligent. However, a plaintiff is still faced with an arduous burden of proof.\(^{107}\) He must prove that:

1. the product in question was defective (or unmerchantable);
2. the defect existed at the time the product left the hands of the defendant;
3. because of the defect the product was unreasonably dangerous (this is not required when suing under the Code);


\(^{100}\) Note 98 supra.


\(^{102}\) Hochstader Bros. v. Sam, 73 Tex. 315 (1889).

\(^{103}\) Tex. Rev. Civ. Stat. Ann. art. 2031b (1964). Section 4 provides that the defendant "shall be deemed doing business in this State by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this State, or the committing of any tort in whole or in part in this State."

\(^{104}\) Weintraub, Choice of Law for Products Liability: The Impact of the Uniform Commercial Code and Recent Developments in Conflict Analysis, 44 Texas L. Rev. 1429 (1966).


\(^{107}\) Prosser, supra note 32, at 1114.

\(^{108}\) The allegations presented in the text are considered the most important ones. For a more complete list of suggested allegations see Emroch, Pleading and Proof in a Strict Products Liability Case, 1966 Ins. L.J. 981.
(4) the defect was the proximate cause of the injury;
(5) he was injured or suffered damages.\textsuperscript{109}

In addition, one suing under the Code should allege and prove that notice of the breach of warranty has been given to the defendant.\textsuperscript{110} If an implied warranty for a particular purpose is involved, the defendant's knowledge of such purpose and the plaintiff's reliance on the defendant should also be included.\textsuperscript{111}

\textbf{Defect.} A plaintiff must prove that a product was defective or otherwise unsafe for his use.\textsuperscript{112} This usually requires that the nature of the defect be established precisely by scientific analysis of the product in question.\textsuperscript{113} If possible the plaintiff should present testimony yielding direct evidence of the defect, such as a manufacturing flaw or a faulty design.\textsuperscript{114}

His next best move is to present circumstantial evidence bearing on a specifically alleged defect in the product.\textsuperscript{115} If these courses are unavailable, direct evidence of the user and other eyewitnesses as to the product failure may be sufficient to indicate a defect if supported by expert opinion testimony as to probable causes for the failure.\textsuperscript{116} Finally, by negating other probable causes, the plaintiff may be able to create an inference of a defect.\textsuperscript{117}

\textbf{Defect at Time of Sale.} If the defectiveness is proved, the plaintiff then faces the difficult task of proving that the product was in this faulty condition when it was sold by the defendant.\textsuperscript{118} He presents the strongest case when he can offer direct evidence that the product was defective due to a manufacturing flaw or a faulty design.\textsuperscript{119} In the absence of direct evidence, circumstantial evidence which creates an inference that a dangerous condition existed prior to the sale of the product to the plain-

\textsuperscript{110} Uniform Commercial Code § 2-607; Emroch, supra note 108, at 587.
\textsuperscript{111} Uniform Commercial Code § 2-607; Emroch, supra note 108, at 587. See Uniform Commercial Code § 2-719(1).
\textsuperscript{112} For a definition of "defective" under § 402A of Restatement (Second) of Torts see text accompanying note 55 supra. As to merchantability under § 2-314 of the U.C.C. see text accompanying note 61 supra.
\textsuperscript{114} Evans v. General Motors Corp., 319 F.2d 822 (7th Cir. 1966), noted in 21 Sw. L.J. 332 (1967); Swift & Co. v. Wells, 201 Va. 213, 110 S.E.2d 201 (1959).
\textsuperscript{120} Emroch, supra note 108, at 390; Proser, Strict Liability to the Consumer in California, 18 Hastings L.J. 9 (1966).
tiff is admissible.” Failing at this, the plaintiff must negate other possible causes for the malfunction of the product, causes for which the defendant would not be responsible. If the evidence is equal that the defect might have developed after the product left the control of the defendant, no liability has been established.

**Unreasonably Dangerous Product.** The plaintiff must prove that the product was unreasonably dangerous. The *Restatement (Second) of Torts* would impose liability for a product which is "dangerous to an extent beyond which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Thus, the degree of danger necessary is considerably less than ultra-hazardous. It has been suggested that a clearer test would be that of "not reasonably safe." It will be recalled that federal courts deciding cases arising in Texas have determined that a defective wheelchair, from which a wheel became disengaged, and an aluminum foil pie pan were unreasonably dangerous. Likewise, the Texas Supreme Court in the *McKisson* and *Tunks* cases has held that a permanent wave preparation which burns bleached hair and kerosene with a flash point below the statutory minimum can be unreasonably dangerous.

A comment to the *Restatement (Second) of Torts* provides another test when dealing with unavoidably unsafe products. It calls for a balancing of the social utility of the dangerous product against its hazards. An example is the vaccine treatment of rabies which is painful and dangerous and yet has no real alternative.

**Proximate Cause.** Plaintiff must show that the defect contained in the product was a substantial factor in producing his injury. He may do so in a number of ways: he may be able to show that the defect had been troublesome before the accident; he may place an expert on the witness stand to testify as to his opinion concerning the causation; he may place...
attempt to eliminate other causes. The plaintiff can also testify as to his injurious experience in using the product. Perhaps this can be buttressed by testimony of other eyewitnesses to the injury. Based upon this, an expert's opinion that any one of several actual, probable, or possible causes was responsible for the injury would be admissible.

The classic example of this procedure is the case of *Henningsen v. Bloomfield Motors, Inc.* There the plaintiff testified that while driving her automobile she heard a loud noise "by the hood" and that it "felt as if something cracked." She testified that the steering wheel revolved in her hands and that the automobile turned sharply off the road. The automobile was damaged so extensively that subsequent examination did not reveal whether the steering mechanism had been defective prior to the accident. The plaintiff produced an eyewitness who testified as to the erratic path of the automobile at the time in question. This was followed by expert testimony of an insurance inspector that in his opinion the accident "must have been due to mechanical defect or failure." The manufacturer and the dealer were held liable for resulting injuries, despite an extensive clause in the contract of sale purporting to limit the liability.

It appears that a plaintiff must prove not only that a defect caused his injury, but also that it was the *proximate* cause. The test of proximate cause involves an element of foreseeability—a defendant should not be liable unless he could have foreseen that his product would cause harm. A comment to the Uniform Commercial Code states that to be actionable a breach of warranty must be the proximate cause of the loss sustained.

Under the common law remedy, the requirement of foreseeability has been recognized as a factor limiting liability in two types of cases. First, if the plaintiff is allergic to a product, he must show that he belongs to a class of people who might have been foreseen to be adversely affected by the product in question. A purely individual idiosyncrasy is not foreseeable. The second type of case requiring foreseeability arises when the state of scientific or medical knowledge is limited so that a defendant could not reasonably have foreseen harm to any user. A prime example

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136 161 A.2d at 75.


of this is a suit by a cancer victim against a manufacturer of cigarettes prior to the government announcement as to the occurrence of cancer among smokers.\footnote{141}{See Ross v. Philip Morris & Co., 328 F.2d 3 (8th Cir. 1964); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963).}

In Texas \textit{Cudmore v. Richardson-Merrell, Inc.}\footnote{142}{398 S.W.2d 640 (Tex. Civ. App. 1965) error ref. n.r.e., cert. denied, 385 U.S. 1003 (1967), noted in Note, Foreseeability as a Limiting Factor in Applying Strict Products Liability, in this issue.} held that proximate cause is the proper criterion when an uncontaminated drug is involved. In that case the jury determined that the plaintiff's injuries were an "abreaction" to a drug manufactured by the defendant.\footnote{143}{398 S.W.2d 640, 644 (Tex. Civ. App. 1965). [Editor's Note: There is some confusion as to the meaning of the term "abreaction." \textsc{Webster's New World Dictionary} (1964) gives the following definition: "in psychoanalysis, the relieving of a repressed emotion, as by talking about it." As used by the Texas courts it seems to be a hybrid composed of the two words "abnormal" and "reaction."]}

The defendant escaped liability because the plaintiff did not establish that harmful consequences to any appreciable class of users were foreseeable. Indeed, the state of scientific knowledge was such that the defendant could not reasonably have foreseen harm to any user.\footnote{144}{Id.}

Foreseeability also comes into play when the plaintiff uses a product in an unusual manner which the defendant could not be reasonably expected to foresee.\footnote{145}{Emroch, \textit{supra} note 108, at 595; Prosser, \textit{supra} note 8, at 824-25.} An abnormal use of a product, therefore, will operate as a defense in a strict liability suit.\footnote{146}{This is discussed more fully in text accompanying notes 155-59 infra.}

\textbf{Defenses.} If the plaintiff sustains his burden of proof, the defendant may yet be relieved from liability by asserting a number of possible defenses. Among these are contributory negligence, assumption of risk, and abnormal use of the product. If the suit is predicated upon the implied warranty provisions of the Code, the defendant may be protected by a disclaimer in the contract for sale.

\textit{Contributory Negligence and Assumption of Risk.} The Texas Supreme Court has already decided that contributory negligence will not serve to bar recovery in a strict liability suit where the plaintiff's negligence consists of a failure to discover a defect or to guard against the possibility of its existence.\footnote{147}{See text accompanying note 30 \textit{supra}.} However, the court did indicate that assumption of risk was a valid defense.\footnote{148}{416 S.W.2d 779 (Tex. 1967).}

Other jurisdictions are split as to the validity of contributory negligence as a defense.\footnote{149}{R. Hursh, \textit{American Law of Products Liability} § 3:9 (1961).} Most of the cases which do not allow the defense are those in which the plaintiff negligently failed to discover the defect in the product.\footnote{150}{L. Frumer & M. Freedman, \textit{Products Liability} § 16.01(3) (1960); W. Prosser, \textit{supra} note 121, § 93, at 616-17; Emroch, \textit{supra} note 108, at 13-94; Prosser, \textit{supra} note 8, at 838; Prosser, \textit{supra} note 32, at 1147; Comment, \textit{Products Liability-The Expansion of Fraud, Negligence and Strict Tort Liability}, 64 Mich. L. Rev. 1150, 1384 (1966); cf. Annot., 4 A.L.R.2d 501 (1966).}

On the other hand, most cases which have allowed contributory
negligence as a defense have been ones in which the plaintiff discovered the defect but nevertheless continued to use the product.\(^{184}\) This actually comes under the theory of assumption of risk which was accepted as a defense by the Texas court.\(^{185}\) Prosser reports that, "There are only a few cases which have recognized the distinction, but it seems quite clear that it is made in fact."\(^{186}\) Under the Code, however, actual knowledge of a defect is not required in order to bar liability. Section 2-316 (b) provides that there is no implied warranty if the buyer examines the product and fails to detect defects "which an examination ought in the circumstances to have revealed to him."\(^{187}\) Thus, negligence by the plaintiff at this stage will preclude recovery under the Code.

**Abnormal Use.** A product must be reasonably safe for ordinary use. A defendant, however, is not under a duty to foresee danger created by an abnormal use which he did not intend.\(^{188}\) Thus, if a plaintiff uses a deodorant as a mouthwash and is injured thereby, the defendant-manufacturer should not be held liable.\(^{189}\) But if the use, although unconventional, is not altogether different from that intended, it then becomes a jury issue as to whether it was so irregular as to bar recovery.\(^{190}\) In this connection, the manufacturer of a grass hula skirt was held strictly liable for burn injuries resulting from its being worn near a fire.\(^{191}\) For such uses which are not completely unconventional it has been held that the defendant must at least provide a warning.\(^{192}\)

**Other Defenses.** The intervening conduct of a wholesaler or dealer might relieve a manufacturer from liability. In one case, an intermediate seller knew of a danger and gave no warning to the purchaser; the manufacturer escaped liability.\(^{193}\)

If a plaintiff fails to notify a defendant of a defect, this will not bar

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\(^{184}\) See authorities note 130 supra.


\(^{186}\) W. Prosser, supra note 121, § 95, at 657.


\(^{189}\) Brown v. Chapman, 304 F.2d 149 (9th Cir. 1965).


him from recovery according to the common law remedy. As pointed out earlier, however, notice is required under the Code; failure to give notice within a reasonable time after a plaintiff discovers or should have discovered a flaw in the product will preclude a later suit for resulting injuries.

Disclaimers purporting to limit or eliminate liability are ineffectual according to the common law remedy, at least when a manufacturer is involved. However, the Code allows implied warranties to be disclaimed. If a seller complies with the express guidelines provided in the Code, a buyer may be precluded from recourse.

Finally, if a suit is predicated upon the Code’s implied warranty of fitness for a particular purpose, a seller may offer the defenses that he did not know of the intended usage or that the buyer did not in fact rely on the skill and judgment of the seller.

V. Conclusion

The recent extension of the strict liability theory in Texas to encompass non-food products has raised a hue and cry among some defense attorneys. However, it should be remembered that strict liability means only that the plaintiff is relieved from proving that privity of contract existed with the defendant and from proving that the defendant was negligent. The latter admittedly is somewhat of a boon to the plaintiff; yet he is still faced with a formidable burden of proof which closely parallels that in a negligence action. Moreover, if the plaintiff sustains his difficult burden of proof, the defendant may yet be able to allege an affirmative defense such as assumption of risk, volenti non fit injuria, or abnormal use of the product. Strict liability therefore, is in no sense absolute liability.

161 See cases cited supra note 56.
162 See text accompanying note 91 supra.
164 See notes 55-56 supra.
165 See text accompanying notes 76-90 supra.
166 Uniform Commercial Code § 2-316.
167 See note 79 supra.
168 See notes 64-66 supra.