University of Baltimore Law Review

Volume 7
Issue 1 *Fall 1977*

Article 2

1977

Product Liability in Maryland Revisited

Edward S. Digges Jr.
Piper and Marbury

PRODUCT LIABILITY IN MARYLAND REVISITED

Edward S. Digges, Jr.†

The author discusses and compares the various theories of recovery available in a product liability case. He concludes that merger of the various theories into a single basic product cause of action might be procedurally beneficial. Various defenses available in product litigation, as well as procedures for invoking indemnity and contribution, are also discussed.

I. INTRODUCTION

Since the issue of this Law Review devoted to product liability,[1] the Court of Appeals of Maryland has confirmed its previously intimated pro-consumer stance on the subject.[2] Strict liability in tort has been added to the arsenal of recovery theories,[3] and warranty has been stripped of some technical hurdles.[4] The recent product liability decisions[5] bring Maryland into step with modern thought

---

† B.A., 1968, Princeton University; J.D., 1971, University of Maryland; Partner, Piper and Marbury, Baltimore, Maryland; Member of Maryland Bar.

The author gratefully acknowledges the assistance of Kathleen M. Howard, Articles Editor, University of Baltimore Law Review.

1. Product Liability Law Symposium, 5 U. BALT. L. REV. 1-151 (1975).
2. Frericks v. General Motors Corp., 274 Md. 288, 336 A.2d 118 (1975); Giant Food, Inc. v. Washington Coca-Cola Bottling Co., 273 Md. 592, 332 A.2d 1 (1975); Moran v. Fabrege, Inc., 273 Md. 538, 332 A.2d 11 (1975); Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974).
3. Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976). The suit was before the Court of Appeals of Maryland on a question certified by the United States District Court for the District of Maryland, Civil Action No. M75-1560. The case involved an action brought by an automobile dealership service writer who was injured when the vehicle he was test driving left the highway and crashed into a tree. The complaint contained allegations that the acceleration mechanism of the vehicle became stuck due to a latent defect in either the accelerator, the carburetor, or the motor mounts, and thereby caused the automobile to accelerate suddenly and uncontrollably to a high rate of speed. *See generally* 6 U. BALT. L. REV. 295, 296 (1977).
4. Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976) (cause of action for loss of consortium by third party beneficiary premised on breach of Uniform Commercial Code warranties provided in Sections 2-313 to -315 via Section 2-318 allowed if proved on remand); Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460 (1976) (third party beneficiary of Uniform Commercial Code warranties provided in Section 2-313 to -315, pursuant to Section 2-318, not required to give "Notice" prescribed in Section 2-607(3)(a) when suing for breach of enumerated warranties).
5. Eaton Corp. v. Wright, 281 Md. 80, 375 A.2d 1122 (197); Mattos, Inc. v. Hash, 279 Md. 371, 368 A.2d 993 (1977); Burton v. Artery Co., 279 Md. 94, 367 A.2d 935 (1977); Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976); Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460 (1976); Frericks v. General Motors Corp., 274 Md. 288, 336 A.2d 118 (1975); Giant Food, Inc. v. Washington Coca-Cola Bottling Co., 273 Md. 592, 332 A.2d 1 (1975); Moran v. Fabrege, Inc., 273 Md. 538, 332 A.2d 11 (1975); Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974).

on this subject. At the same time, these decisions raise a variety of new issues for the practitioner. It is the intent of this article to discuss many of these issues in an effort to guide the practitioner as he deals with this rapidly developing area of the law.

Each of the three commonly used theoretical vehicles for recovery in product litigation — negligence, breach of warranty and strict liability — is now available to a product plaintiff.[6] Distinguishing characteristics, as well as common elements of the various theories must be well understood. To recover under any theory, defect, attribution, and causation must be proved. A discussion of these elements follows a highlighting of the distinctive features of the three commonly employed theories of recovery. Also included is a practitioner's guide to defenses frequently used in product liability actions, and a discussion of indemnity and contribution within the product liability context.

II. THREE CAUSES OF ACTION

A. Negligence

Basic tort law requires that a cause of action founded upon negligence allege a duty requiring conformity to a certain standard of conduct for the protection of others against unreasonable risk, a failure to conform to the prescribed standard, and a causal relationship between the conduct and a resulting injury.[7] From a plaintiff's viewpoint, negligence is the most difficult theory of recovery because a duty of care does not arise unless the plaintiff

---

6. Another possible theory of recovery, deceit, rarely proves viable as a basis for recovery in a product case because the theory of deceit necessarily focuses on the distinction between negligent misrepresentation and fraud. A representation made without knowledge of its truth or falsity, for the purpose of inducing a sale, is a mere negligent misrepresentation, while a representation made with knowledge of its falsity, for the purpose of inducing a sale, amounts to a fraud. Appel v. Hupfield, 198 Md. 374, 84 A.2d 94 (1951); Lustine Chevrolet v. Cadeaux, 19 Md. App. 30, 308 A.2d 747 (1973). Most jurisdictions, including Maryland, recognize a clear distinction between representation of past or existing fact and expression of opinion as to future performance; fraud may not be based on statements which are promissory in nature. Appel v. Hupfield, 198 Md. at 379, 84 A.2d at 95-96; *cf.* King v. O'Reilly Motor Co., 16 Ariz. App. 518, 494 P.2d 718 (1972) (condition of demonstrator car represented "as good as new"). In short, failure to fulfill a promise is merely a breach of contract which must be enforced, if at all, by an action on the contract. Levin v. Singer, 227 Md. 47, 175 A.2d 423 (1961). Of course, an action for deceit may be premised upon an active concealment, *id.* at 64, 175 A.2d at 432.

Occasionally, a plaintiff in a product case may have available a statutory cause of action, i.e., a private action for violation of the Consumer Product Safety Act, 15 U.S.C. §§ 2051 to -2081, or the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 to -2401. These laws prescribe the prerequisites to such an action and the available remedies.

7. *See* W. PROSSER, LAW OF TORTS 143 (4th ed. 1971).

can show that the defendant knew or should have known that his product was dangerous.[8]

Proof of negligence may be inferred under certain circumstances. The doctrine of *res ipsa loquitur* is a rule of evidence which creates a rebuttable preseumption of a defendant's negligence. The presumption arises when the plaintiff proves that the injury-causing instrumentality was under the exclusive control of the defendant at the time of injury, and that the injury was such that it would not have happened if those who had management or control had used proper care.[9] Product cases found ripe for the application of *res ipsa loquitur* generally have been confined for definitional reasons to situations involving adulterated sealed food products and capped beverages and situations involving exploding containers when there is proof of proper handling subsequent to the defendant's relinquishing control.[10] The elemental hurdle, usually precluding use of the "*res ipsa* doctrine" in routine product litigation, is the "exclusivity of control" requirement.[11] Strict adherence to the rule that the injury-producing object must have been within the exclusive management and control of the defendant at the time of the accident defeats recovery in many cases.[12]

The Maryland Court of Appeals' trilogy of exploding container cases, *Joffre v. Canada Dry Ginger Ale,*[13] *Leikach v. Royal Crown Bottling Company,*[14] and *Giant Food, Inc. v. Washington Coca-Cola Bottling Company,*[15] illustrates the historical development of the *res ipsa* doctrine in Maryland, and provides a readily accessible review of the nationwide library of similar cases. The trilogy also exhibits a trend-setting approach favorable to claimants.[16] The court's early

8. Wooley v. Ubelhor, 239 Md. 318, 325, 211 A.2d 302, 305-06 (1965); Braun v. Ford Motor Co., 32 Md. App. 545, 555, 363 A.2d 562, 568 (1976).
9. *See* Munzert v. American Stores, Inc., 232 Md. 97, 192 A.2d 59 (1963); Dageforde v. Potomac Edison Co., 35 Md. App. 37, 369 A.2d 93 (1977). *See generally* 9 WIGMORE, EVIDENCE § 2509(A), at 3556-57 (2d ed. 1915).
10. *See* Leikach v. Royal Crown, 261 Md. 541, 276 A.2d 81 (1971); Joffre v. Canada Dry Ginger Ale, Inc., 222 Md. 1, 158 A.2d 631 (1960). The reason *res ipsa* is normally confined to such situations is because the "exclusivity of control" requirement is more easily met.
11. *See, e.g.,* Undeck v. Consumer's Discount Supermarket, Inc., 29 Md. App. 444, 349 A.2d 635 (1975) (directed verdicts for distributor and retailer on failure of evidence to satisfy attribution of alleged latent defect to them).
12. *See* 58 AM. JUR. *Negligence* § 496 n.15 (1971).
13. 222 Md. 1, 158 A.2d 631 (1960).
14. 261 Md. 541, 276 A.2d 81 (1971).
15. 273 Md. 592, 332 A.2d 1 (1975).
16. The Court of Appeals of Maryland liberally interpreted the term "sale" within the context of a warranty action involving the self-service establishment. Giant Food, Inc. v. Washington Coca-Cola Bottling Co., 273 Md. 592, 332 A.2d 1 (1975). *Giant Food* has been favorably reviewed in two recent extra-jurisdictional opinions. *See* Fender v. Colonial Stores, Inc., 138 Ga. App. 31, 225 S.E.2d 691 (1976); Barker v. Allied Supermarket, 20 U.C.C. Rep. 6 (Okla. Ct. App. 1976).

comment on the subject in *Joffre,* evidenced a strict adherence to the "exclusivity of control" requirement. The court denied recovery for an injury caused by an exploding beverage bottle because the plaintiff failed to disprove the possibility that the negligence of another had intervened and caused the injury.[17] In *Leikach* and *Giant Food,* however, the court approved application of *res ipsa* in similar situations, holding proof of an injury caused by an exploding container, together with proof of proper handling subsequent to the defendant's relinquishment of control, sufficient.[18] In neither case was the plaintiff put to the insurmountable task of accounting for every moment of the bottle's existence but was required only to prove general care in handling the bottle subsequent to the defendant's relinquishment of control.[19] If a litigant's case happens to fall within the well-defined factual limits of *Leikach* and *Sheeskin,* his recovery route will have few of the usual stumbling blocks.

The routine negligence approach often fails because a product defendant's duty is discharged if his product functions properly and its functioning creates no peril unknown to the user.[20] This concept barring recovery for injuries caused by a known danger is labelled the "patent danger doctrine," or the "latent-patent rule."[21] The New York case of *Campo v. Scofield*[22] is viewed as the rule's decisional genesis. In Maryland, the rule has been openly considered and followed,[23] despite much contemporaneous extrajurisdictional criticism.[24] The Court of Appeals of Maryland, in the first of its recent

17. Joffre v. Canada Dry Ginger Ale, Inc., 222 Md. 1, 10, 158 A.2d 631, 636 (1960).
18. Giant Food, Inc. v. Washington Coca-Cola Bottling Co., 273 Md. 592, 597-99, 332 A.2d 1, 4-6 (1975); Leikach v. Royal Crown, 261 Md. 541, 547-50, 276 A.2d 81, 84-86 (1971).
19. Giant Food, Inc. v. Washington Coca-Cola Bottling Co., 273 Md. 592, 597-99, 332 A.2d 1, 4-6 (1975); Leikach v. Royal Crown, 261 Md. 541, 547-50, 276 A.2d 81, 84-86 (1971).
20. Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975) (failure to place warning as to flammability on cologne bottle actionable negligence when plaintiff burned while pouring cologne on lit candle; peril not known to user).
21. *See* Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1959).
22. 301 N.Y. 468, 471, 95 N.E.2d 802, 804 (1950) (injury alleged to have occurred because of absence of guard or stopping device on onion topping machine).
23. Patten v. Logemann Bros. Co., 263 Md. 364, 368-70, 283 A.2d 567, 569-70 (1971) (injury alleged to have occurred because of absence of a mesh or guard over lubrication hold on side of paper baling machine); Blakenship v. Morrison Machine Co., 255 Md. 241, 245-46, 257 A.2d 430, 431-33 (1969) (injury alleged to have occurred because of absence of protective guards and shields and automatic shutoff switch on sanforizing cloth machine); Myers v. Montgomery Ward & Co., 253 Md. 282, 292-95, 252 A.2d 855, 862-63 (1969) (injury alleged to have occurred because of absence of safety shield surrounding blade of power lawn mower).
24. *See* Brandon v. Yale & Towne Mfg. Co., 342 F.2d 519 (3d Cir. 1965); Campbell v. Siever, 253 Minn. 257, 91 N.W.2d 474 (1958); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 81, 207 A.2d 314, 320 (1965).

wave of product liability decisions, *Volkswagen of America, Inc. v. Young,*[25] acknowledged the rule's continued existence.[26]

In recent years, however, various courts have reexamined the underlying policy for this rule, and the concept has undergone some substantial erosion,[27] especially in the context of industrial accidents. Moreover, the *Campo* court has now reversed itself, holding that the obviousness of the danger should reflect only on the issue of contributory negligence and should not operate to bar an action for negligence:[28]

> *Campo* suffers from its rigidity in precluding recovery whenever it is demonstrated that the defect was patent. Its unwavering view produces harsh results in view of the difficulties in our mechanized way of life to fully perceive the scope of danger, which may ultimately be found by a court to be apparent in manufactured goods as a matter of law. . . . Apace with advanced technology, a relaxation of the *Campo* stringency is advisable.[29]

It would appear that the doctrine is now ripe for reexamination in this jurisdiction. Application of the doctrine amounts to an assumption of risk defense as a matter of law without any proof requirement that plaintiff subjectively appreciated a known danger,[30] a result which seems offensive to a recent court of appeals pronouncement that assumption of risk is ordinarily a defense requiring trier of fact consideration.[31] From a policy viewpoint, the opinion of the Washington State Appellate Court in *Palmer v.*

---

25. 272 Md. 201, 321 A.2d 737 (1974). In *Young,* fatal injuries were suffered in a rear-end collision as a result of decedent being thrown into a rear passenger compartment of his vehicle, when the seat assembly was torn from the floor. Plaintiff contended that the seat assembly was unreasonably susceptible to separation from the floor upon collision, and that the rear compartment structures were unreasonably dangerous in the event of collision.
26. *Id.* at 216, 321 A.2d at 744.
27. Orfield v. Int'l Harvester Co., 535 F.2d 959 (6th Cir. 1976); Collins v. Ridge Tool Co., 520 F.2d 591 (7th Cir. 1975); Beloit v. Harrell, 339 So. 2d 992 (Ala. 1976); Byrns v. Riddel, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976); Blaw-Knox Food & Chemical Equip. Corp. v. Holmes, 348 So. 2d 604 (Fla. Dist. Ct. App. 1977); Casey v. Gifford Wood Co., 61 Mich. App. 208, 232 N.W.2d 360 (1976).
28. Micallef v. Miehle Co., D. of Miehle-Gross Dexter, 39 N.Y.2d 37, 348 N.E.2d 571 (1976) (operator of photo off-set press machine injured when hands caught and pulled into press while attempting to remove foreign particle from face of printing plate while press, which had no protector guards, in operation; held not barred by *Campo* doctrine).
29. *Id.* at 385, 348 N.E.2d at 577.
30. *See* Rheingold, *Expanding Liability of the Product Supplier: A Primer,* 2 HOFSTRA L. REV. 521, 541 (1974).
31. Hooper v. Mougin, 263 Md. 630, 636, 284 A.2d 236, 238 (1971) (shooting injury caused by negligent hunter unsuccessfully defended on grounds of plaintiff's contributory negligence or assumption of risk).

Massey-Ferguson, Inc.,[32] seems to be more consistent with the Maryland Court of Appeals' recent product decisions: "The manufacturer of the obviously defective product ought not to escape because the product was *obviously* a bad one. The law, we think, ought to discourage misdesign rather than encouraging it in its obvious form."[33]

As the Court of Appeals of New York explained in reversing *Campo,* the obviousness of a danger should remain a relevant consideration with respect to ultimate responsibility despite renunciation of the patent danger doctrine:

> As now enunciated, the patent-danger doctrine should not, in and of itself, prevent a plaintiff from establishing his case. That does not mean, however, that the obviousness of the danger as a factor in the ultimate injury is thereby eliminated. . . . Rather, the openness and obviousness of the danger should be available to the defendant on the issue of whether plaintiff exercised that degree of reasonable care as was required under the circumstances.[34]

B. Warranty

The "Sales" title of the Uniform Commercial Code[35] provides a comprehensive risk-apportioning scheme principally focusing on commercial transactions, but also providing remedies for personal injuries caused by defective products. The code provides for three types of warranties, each of which may provide the basis for a personal injury action: express warranty,[36] implied warranty of merchantability,[37] and implied warranty of fitness for a particular purpose.[38]

Regardless of the type of warranty in issue, a personal injury plaintiff must show not only the existence of the warranty, but also that the warranty was broken and that the breach was the

32. 3 Wash. App. 508, 476 P.2d 713 (1970) (plaintiff sued manufacturer of hay baler for injuries sustained while adjusting a drawbar).
33. *Id.* at 517, 476 P.2d at 719 (emphasis added).
34. Micallef v. Miehle Co., D. of Miehle-Gross Dexter, 39 N.Y.2d 376, 387, 348 N.E.2d 571, 578 (1976). In Bexiga v. Havir Mfg. Co., 60 N.J. 402, 412, 290 A.2d 281, 286 (1972), the defendant asserted that the plaintiff's act of placing his hand under the ram of a punch press while at the same time depressing the foot pedal was negligent. The court held, however, that the defendant was strictly liable for its failure to install a safety device which would have precluded the possibility of this very injury. The court stated:
> It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against.
35. MD. COM. LAW CODE ANN. §§ 2-101 to -725 (1975).
36. *Id.* § 2-313.
37. *Id.* § 2-314.
38. *Id.* § 2-315.

proximate cause of the loss sustained.[39] The express warranty premise is used frequently as a theory for recovery, as is the implied warranty of fitness for a particular purpose, but the implied warranty of merchantability is the most successful.[40]

As useful as warranty actions have shown themselves to be, strict liability in tort gained acceptance due to a view taken by courts and commentators that the contractual nature of the warranty remedy failed adequately to define a manufacturer's liability to those injured by his defective products. The rules defining and governing warranties were designed to deal with commercial transactions, and were considered ill-suited for personal injury product litigation.[41] The Maryland Court of Appeals has now adopted the most effective vehicle for recovery — strict liability in tort.[42] The characteristics which distinguish strict liability from warranty actions are (1) a different limitations period[43] and (2) a prerequisite of notice to the seller[44] in a buyer's suit based on warranty.

C. *Strict Liability*

In *Phipps v. General Motors Corp.*[45] the Maryland Court of Appeals applied the rule of strict liability expressed in the *Restatement (Second) of Torts* § 402A.[46] Strict liability, like warranty

39. Giant Food, Inc. v. Washington Coca-Cola Bottling Co., 273 Md. 592, 608-09, 332 A.2d 1, 10 (1975); Undeck v. Consumer's Discount Supermarket, Inc., 29 Md. App. 444, 349 A.2d 635 (1975).
40. *See* W. PROSSER, LAW OF TORTS § 97 (4th ed. 1971).
41. *See, e.g.,* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). *See generally* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer),* 69 YALE L.J. 1099 (1960).
42. Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976). *See generally* 6 U. BALT. L. REV. 295 (1977).
43. The cause of action for strict liability in tort, like a negligence action, will accrue on the date of injury and is subject to the state's general statute of limitations. Phipps v. General Motors Corp., 278 Md. 337, 350, 363 A.2d 955, 962 (1976). On the other hand, the Uniform Commercial Code warranties are subject to the limitations provided in § 2-725 of the Maryland Commercial Code, which prescribes a four-year limitations period that commences on the date of a product's sale. *See* Burton v. Artery Co., 279 Md. 94, 99, 367 A.2d 935, 938 (1977); Phipps v. General Motors Corp., 278 Md. 337, 349-50, 363 A.2d 955, 962 (1976); Frericks v. General Motors Corp., 278 Md. 304, 316, 363 A.2d 460, 466 (1976).
44. Mattos, Inc. v. Hash, 279 Md. 371, 368 A.2d 993 (1977); Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460 (1976).
45. 278 Md. 337, 363 A.2d 955 (1976). *See generally* 6 U. BALT. L. REV. 295 (1977).
46. Section 402A provides:

> Special Liability of Seller of Product for Physical Harm 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

and unlike negligence, focuses on the product itself rather than on the conduct of those in the distributive chain.[47] This difference in focus is the crucial distinction between strict liability and warranty on the one hand, and the third theory of recovery, negligence on the other. Thus, the seller in a warranty or strict liability context is effectively the guarantor of his product's safety. His liability is not, however, the absolute liability of an insurer.[48] Liability hinges on the existence of a defect that makes the product "unreasonably dangerous"[49] for its intended use in the case of strict liability actions, and on some defect rendering the product unmerchantable in the case of warranty actions. The determination of whether a product is unsafe for its intended use or is unmerchantable involves nothing more than a societal value judgment in many cases.[50]

Imposition of the "unreasonably dangerous" standard in strict liability actions represents an attempt by the courts to enunciate society's expectations of product safety in a manner that will allow an objective determination of a seller's liability for product-related injuries; the code's "merchantability" standard is an attempt to reach a similar goal within a commercial framework. Those closely connected with the subject matter realize the need for an objective standard of liability in product litigation in order to maintain a proper balance between the competing interests of seller and consumer. Without such a standard, a jury is left with little more than its intuitive understanding of product safety requirements with which to evaluate the condition of a product.[51]

The basic elements of strict liability are (1) sale of a product (2) in a defective condition (3) which is unreasonably dangerous (4)

(b) it is expected to and does reach the user or consumer without substantial change 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.

47. Phipps v. General Motors Corp., 278 Md. 337, 344, 363 A.2d 955, 958 (1976).

48. If it were, a plaintiff would need only to prove that the product was an actual cause in producing his injury. Wade, *On the Nature of Strict Tort Liability for Products,* 44 MISS. L.J. 825, 826 (1973). Comment k of § 402A states that the seller is not liable for injuries caused by unavoidably unsafe products.

49. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

50. After all, the reasons for imposing liability are societal in nature: (1) the public interest in human life and health; (2) the invitations and solicitations of the distributive chain to purchase the product; and (3) the justice of imposing the loss on the distributive chain member who created the risk and reaped the profit by placing the product in the stream of commerce. *See* Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

51. The presence of an objective standard is particularly critical in design defect cases. Without an objective standard in these cases, a jury intuitively determining that a product is defective, and that the defect was the cause in fact of the plaintiff's injury, may hold a seller liable even though his product's condition meets society's expectations of product safety.

when it leaves the hands of the defendant, and (5) which is the proximate cause of the plaintiff's injury, and (6) has reached the consumer without substantial change in its condition. Most of the enumerated elements — sale, defective condition, attribution, causation and injury — are identical to those of a warranty action.

The requirement of an unreasonably dangerous, defective condition, however, is peculiar to strict liability. Section 402A explains this requirement as follows:

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. *The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.*[52]

To satisfy the unreasonably dangerous requirement, a plaintiff must prove not only that the product was dangerous to a degree beyond that which he expected, but also that it would be considered dangerous to such a degree by the ordinary consumer.[53] The unreasonably dangerous requirement represents a recognition by the drafters of Section 402A that even the most benign product can cause injury under certain circumstances.[54]

III. PARTIES

A. Party Plaintiffs

In a product suit based on negligence, the legal duty of care involved exists in spite of the absence of a contractual relationship between any member of the distributive chain and the plaintiff.[55] On the other hand, a buyer historically could maintain a product suit

52. RESTATEMENT (SECOND) OF TORTS § 402A, Comment i (1965) (emphasis added).
53. Glass v. Ford Motor Co., 123 N.J. Super. 559, 304 A.2d 562 (1973) (so describing the unreasonably dangerous requirement and then rejecting it for that reason).
54. A few courts, however, have expurgated the unreasonably dangerous requirement from strict liability theory. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). These courts attempt to "[i]nsure that the costs of injuries resulting from defective products are borne by the manufacturers." Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).
55. W. PROSSER, LAW OF TORTS § 100 (4th ed. 1971).

based on warranty theory only against his immediate seller under the requirement of vertical privity. Similarly, the requirement of horizontal privity limited warranty recovery to the purchaser of a product. In 1969, the Maryland General Assembly amended the Uniform Commercial Code, expanding the definition of seller so as to abolish the requirement of privity along the vertical chain,[56] and expanding the calss of persons entitled to warranty benefits, effectively abolishing the requirement of privity along the horizontal chain.[57]

The Restatement's version of strict liability in tort expressly extends to "the user or consumer."[58] The open question in Maryland is whether the concept should be regarded as extending to a bystander.[59] Commencing with *Elmore v. American Motors Corp.*,[60] courts faced with the issue consistently experienced little difficulty including the bystander within the ambit of strict liability.[61] The following reasoning is indicative of judicial treatment generally:

> To restrict recovery to those who are users is unrealistic in view of the fact that bystanders have less opportunity to detect any defect than either purchasers or users. Our decision is one of policy but is mandated by both justice and common sense.[62]

It is reasonable to expect that the Court of Appeals of Maryland will not disregard the trend when confronted with the bystander issue.

B. Party Defendants

In product actions based on negligence, the defendant need not bear a special relationship to the plaintiff, and an individual will be liable so long as he acts negligently and his actions cause harm to a

---

56. Law of April 23, 1969, ch. 249, 1969 Md. Laws 709 (*codified at* MD. COM. LAW CODE ANN. § 2-314(1)(a) (1975)).
57. Law of April 23, 1969, ch. 249, 1969 Md. Laws 709 (*codified at* MD. COM. LAW CODE ANN. § 2-318 (1975)).
58. *See* RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).
59. Some cases have allowed recovery by bystanders. Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1972); Wasik v. Borg, 423 F.2d 44 (2d Cir. 1970); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969); Mitchell v. Miller, 26 Conn. Supp. 142, 214 A.2d 694 (Super. Ct. 1965); Lomendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969). *Contra,* Torpez v. Red Owl Stores, Inc., 228 F.2d 117 (8th Cir. 1955) (purchaser's sister injured; no implied warranty of fitness when product selected by self-service); Rodriguez v. Shell's City, Inc., 141 So. 2d 590 (Fla. Dist. Ct. App. 1962) (§ 402 not discussed because court required injured *user* of product).
60. 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (vehicle veered across center line of highway and collided head-on with plaintiff).
61. *See* Annot., 33 A.L.R.3d 415 (1970).
62. Ciampichini v. Ring Bros., 40 App. Div. 2d 289, 339 N.Y.S.2d 716 (1973).

foreseeable plaintiff.[63] Within the warranty and strict liability context, however, the relationship between the plaintiff and defendant may be crucial, responsibility depending upon the scope of the term "seller." Amendments to the Uniform Commercial Code[64] by the Maryland Legislature in 1969 expanded the term "seller" for warranty purposes and the term now includes all persons in the distributive chain.[65] Thus, a manufacturer of a product as well as a maker of a component part, a distributor, and a retailer, as well as an importer,[66] a licensor,[67] or a bailor,[68] may all be compelled to respond in damages for breach of warranty.

The term "seller," for purposes of strict liability, has been construed in other jurisdictions to include the maker of a product component,[69] as well as an importer,[70] wholesaler, distributor, retailer, and manufacturer.[71] The reasoning of the Maryland Court of Appeals in *Phipps*[72] requires a similar broad interpretation of the term "seller."

Although a statutory enactment was necessary to impose warranty responsibility on bailors and lessors,[73] a broad judicial

63. W. PROSSER, LAW OF TORTS § 100 (4th ed. 1971).
64. Law of April 23, 1969, ch. 249, 1969 Md. Laws 709 (*codified at* MD. COM. LAW CODE ANN. § 2-314 (1975)).
65. *See* Frericks v. General Motors Corp., 278 Md. 304, 309-310, 363 A.2d 460, 463 (1976).
66. The distributive chain has been construed extra-jurisdictionally to include the importer, Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975), and an exclusion in Maryland is unlikely in light of the broadening intent permeating the 1969 legislative amendment expanding the definition of "seller."
67. *See, e.g.,* Carter v. Joseph Bancroft & Sons Co., 360 F. Supp. 1103 (E.D. Pa. 1973) (case involving licensor of "Ban-Lon" trademark submitted to jury on the three standard theories).
68. Legislative amendments have included the bailor or lessor within the circle of parties subject to warranty responsibility. Law of May 4, 1976, ch. 500, 1976 Md. Laws 1316 (*codified at* MD. COM. LAW CODE ANN. § 2-314 (Supp. 1976)); Law of April 30, 1974, ch. 315, 1974 Md. Laws 1376-77 (*codified at* MD. COM. LAW CODE ANN. § 2-315 (1975)).
69. *See, e.g.,* E.I. duPont de Nemours & Co. v. McCain, 414 F.2d 369 (5th Cir. 1969) (defendant, maker of harmless part of final compound, held liable under Texas law for failure to test final compound, which exploded).
70. *See, e.g.,* Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975) (defendant, importer of Volkswagen Microbus, held liable under strict liability theory for vehicle snub-nose design).
71. Comment f to § 402A of the Restatement (Second) of Torts states that the rule is intended to apply to any manufacturer, wholesaler, retail dealer, or distributor. *See, e.g.,* Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977); Dunham v. Vaughan & Bushnell Mfg. Co., 42 Ill. 2d 339, 247 N.E.2d 401 (1969); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362 (Mo. 1969); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966).
72. 278 Md. 377, 363 A.2d 955 (1976).
73. Law of May 4, 1976, ch. 500, 1976 Md. Laws 1316 (*codified at* MD. COM. LAW CODE ANN. § 2-314 (Supp. 1976)); Law of April 30, 1974, ch. 315, 1974 Md. Laws 1376-77 (*codified at* MD. COM. LAW CODE ANN. § 2-315 (1975)). Judicial extension had been rejected in Bona v. Graefe, 264 Md. 69, 285 A.2d 607 (1972) (plaintiff injured when brakes of leased golf cart failed to operate properly).

interpretation of the term "seller", imposing strict liability on such persons, is a likely step for the Maryland courts. The reasoning of *Cintrone v. Hertz Truck Leasing & Rental Service,*[74] imposing strict liability on bailors and lessors, will probably prove sufficiently persuasive to place Maryland among its several adherents:[75]

> A bailor for hire, such as a person in the U-drive-it business, puts motor vehicles in the stream of commerce in a fashion not unlike a manufacturer or retailer. In fact such a bailor puts the vehicle he buys and then rents to the public to more sustained use on the highways than most ordinary car purchasers. The very nature of the business is such that the bailee, his employees, passengers and the traveling public are exposed to a greater *quantum* of potential danger of harm from defective vehicles than usually arises out of sales by the manufacturer. We have held that the liability of the manufacturer might be expressed in terms of strict liability in tort. . . . By analogy the same rule should be made applicable to the U-drive-it bailor-bailee relationship. Such a rental must be regarded as accompanied by a representation that the vehicle is fit for operation on the public highways. . . . Accordingly, we are of the opinion . . . that the nature of the U-drive-it business is such that the responsibility of Hertz may properly be stated in terms of strict liability in tort.[76]

A duty to inspect and test for defects has traditionally been imposed on a licensor of a product made by another.[77] Failure to comply with this duty is negligence for which liability may be imposed, if resulting in injury to a foreseeable plaintiff. The licensor of a product, as contrasted with an endorser,[78] has also traditionally

74. 45 N.J. 434, 212 A.2d 769 (1965).
75. Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976); Galluccio v. Hertz Corp., 1 Ill. App. 3d 272, 274 N.E.2d 178 (1971); Stang v. Hertz Corp., 83 N.M. 730, 497 P.2d 732 (1972); George v. Tonjes, 414 F. Supp. 1199 (W.D. Wis. 1976). *But see* Bona v. Graefe, 264 Md. 69, 285 A.2d 607 (1972).
76. 45 N.J. 434, 450, 212 A.2d 769, 777-79 (1965).
77. *See, e.g.,* Carter v. Joseph Bancroft & Sons Co., 360 F. Supp. 1103 (E.D. Pa. 1973).
78. Endorsers include those entities whose recommendations, through approval seals or guarantees, induce consumers to purchase a particular product. The most feasible theory for recovery by one who purchases a product in reliance on an endorser's certification of quality, and is thereafter injured by a defect in the product, would appear to be negligent misrepresentation. *See* Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del. 1967) (testing laboratory's summary judgment motion in case applying Virginia law denied, when person injured by exploding fire extinguisher; laboratory had inspected and approved design of product and had authorized manufacturer to affix label stating that extinguisher had been tested for 500 pounds of internal pressure, when in fact it had not been so tested); RESTATEMENT (SECOND) OF TORTS §§ 311, 324 (1965). The attractive warranty theory to date has run afoul the sales-service distinction, and endorsers have not been held liable for breach of warranty. Likewise, strict liability is regarded as unavailable for the reason that an endorser does not technically place goods in the stream of commerce.

been considered a link in the distributive chain.[79] By virtue of placement in the chain, the licensor is also potentially subject to liability premised on breach of warranty and strict liability, regardless of his exercise of due care. Consequently, the licensor enters a field of exposure not previously of practical concern.

The seller of a used or reconditioned product, somewhat like the licensor, now finds himself inextricably involved with product litigation, principally as a result, once again, of the shift in focus from "care" to "product performance." Originally, strict liability was thought inapplicable to the seller of a used or reconditioned product because such a seller could not be regarded as participating in the "creation of the risk," a touchstone of the strict liability theory.[80] The Illinois intermediate appellate court, however, jettisoned the seller of a used or reconditioned product into the sphere of potential strict liability exposure through the following rationale:[81]

> Manufacturers of defective products are strictly liable for harm caused by such products as public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in such products which reach the market. Similarly, the imposition of strict liability upon a retailer arises from that person's integral role in the overall producing enterprise and affords additional incentive to safety. . . . Although the seller of used motor vehicles is not an immediate participant in the overall producing process as is the manufacturer or retailer, the fundamental safety, or deterrence purpose behind strict liability mandates the rule's application in this case. That is to say, if the seller of used motor vehicles knows that he may be held strictly liable for the sale of a defective vehicle that may result in injury to the purchaser or another, he will obviously exert every precaution to avoid the potential injury and liability that may occur. This factor of deterrence as justification for the imposition of strict products liability is well established. . . . Our holding, therefore, should effectuate safer used motor vehicles to be placed into the stream of commerce; for this has been the desired result of the doctrine's application to manufacturers and retailers.[82]

---

79. *See* Carter v. Joseph Bancroft & Sons Co., 360 F. Supp. 1103 (E.D. Pa. 1973).
80. Negligence and warranty theories, practically speaking, have proved to be somewhat inappropriate for the sale of used or reconditioned products. Lack of due care is difficult to prove when dealing with reconditioned products, and the warranty premise is usually confronted with disclaimers of "As Is" or express warranties of only thirty days duration.
81. Peterson v. Lou Backrodt Chevrolet Co., 17 Ill. App. 3d 690, 307 N.E.2d 729 (1974), *rev'd,* 61 Ill. 2d 17, 329 N.E.2d 725 (1975) (action against used car dealer to recover for wrongful death of one child and for severe injury to another when children struck by allegedly defective used car sold by defendant).
82. *Id.* at 694, 307 N.E.2d at 732.

Although the intermediate court was reversed by the Illinois Supreme Court, its trend-setting rationale has gained impetus as a result of recent decisions in other jurisdictions.[83] It seems reasonable to expect that when the Maryland Court of Appeals is confronted with the issue, it will not disregard the indicated trend, so long as that trend's present decisional strength is maintained.

IV. THE UNIVERSAL ELEMENTS

Regardless of theory, a plaintiff must satisfy three product litigation basics from an evidentiary standpoint: (1) the existence of a defect, (2) the attribution of the defect to a "seller," and (3) a causal relation between the defect and injury. The Maryland Court of Appeals in *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*,[84] in noting these prerequisites to recovery, quoted Dean Prosser with approval:[85] "The plaintiff must prove . . . that he was injured because the product was defective, or otherwise unsafe for his use. . . . Further, the plaintiff must prove that the defect was in the product when it was sold by the particular defendant."[86]

A. Defect

From a practical viewpoint, a defect for negligence purposes is often a defect for warranty or strict liability purposes as well. Yet "defect" may be conceptualized somewhat differently, depending on the theory. A defect in the negligence sense would include a failure to meet intended specifications, whether in construction, fabrication, manufacture, assembly, or inspection.[87] A defect for negligence purposes would also arise when a product meets specifications, but has a dangerous design or was inadequately tested before marketing, or lacks sufficient warnings or directions for use.[88] A defect in the warranty sense arises when the product does not conform to express representations made by the seller,[89] or when the product is unfit, unmerchantable, unwholesome, unsafe, or unfit for its particular purpose.[90] A defect for purposes of strict liability results

83. Turner v. Int'l Harvester Co., 133 N.J. Super. 277, 366 A.2d 62 (1975) (action against truck manufacturers and dealer to recover for death of buyer when cab of used truck, which had to be raised to obtain access to engine, collapsed and fell on buyer); Hovendon v. Tenbush, 529 S.W.2d 302 (Tex. 1975) (action for damages resulting from alleged deterioration of walls due to defect in used bricks that defendant sold to plaintiff).
84. 273 Md. 592, 332 A.2d 1 (1975).
85. Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).
86. 273 Md. 592, 609, 332 A.2d 1, 11 (1975).
87. *See* W. PROSSER, LAW OF TORTS § 96 (4th ed. 1971).
88. *See, e.g.*, E.I. duPont de Nemours & Co. v. McCain, 414 F.2d 369 (5th Cir. 1969); Moran v. Fabrege, Inc., 273 Md. 538, 332 A.2d 11 (1975).
89. *See* W. PROSSER, LAW OF TORTS § 97 (4th ed. 1971).
90. *Id.*

when the product contains a physical flaw, or does not meet specifications, or where it is manufactured pursuant to specifications, but a flaw exists in the design, testing methods, or instructions.[91]

Product defects may be proved by direct or circumstantial evidence, or by a combination of both.[92] The predominant method of proof of "defect" is through the use of expert testimony.[93] The expert testifies to the results of his examination of the product, and opines, to the degree of requisite certainty, the existence of the defect. An expert can be used to testify that the product was defective or unsafe,[94] or that there was a safer way to design the product within present industry standards.[95] Expert testimony on the availability of a safer alternative method of manufacture is particularly pertinent in crashworthiness or second collision cases.[96] In such cases a manufacturer may be liable in negligence for a design defect that aggravates injuries received in an accident, even though the defect was not the cause of the accident.

The thesis of the crashworthiness recovery approach, which has developed in automobile product litigation, is that manufacturers have a duty to design and construct automobiles that will not expose the occupants to an unreasonable risk of injury in the event of a collision.[97] Determining whether creation of an unreasonable danger has occurred involves a balancing of the gravity and likelihood of possible harm against the burden of precautions which would be effective to avoid the harm.[98] Some basic proof requirements in crashworthiness cases have been pronounced:

> Unlike orthodox products liability or negligence litigation, crashworthy or second collision cases impugning the design of an automobile require a highly refined and almost invariably difficult presentation of proof in three aspects.

---

91. *Id.* § 98.
92. *See, e.g.,* Browder v. Pettigrew, 541 S.W.2d 402 (Tenn. 1976).
93. *See* Radman v. Harold, 279 Md. 167, 367 A.2d 472 (1977) (qualifications of expert for particular testimony).
94. *See, e.g.,* Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972) (punch press was "booby trap" due to lack of safety devices in basic design).
95. *See, e.g.,* Finnegan v. Havir Mfg. Co., 60 N.J. 413, 290 A.2d 286 (1972) (substitution of electrical pedal for mechanical foot treadle on punch press).
96. *See, e.g.,* Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).
97. *See* Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (1974).
98. *Id.*; Dreisonstock v. Volkswagenwerk, A.G., 489 F.2d 1066 (4th Cir. 1974). Factors to be considered in determining whether an unreasonable risk of injury exists in the event of collision are the defect's obviousness, the vehicle's purposes, design, utility style, attractiveness, and marketability, the vehicle's price and, in particular, the effect which added safety features would have upon the price relative to marketability, and finally, the circumstances of the particular collision. *See generally* Digges, *The Impact of Liability for Enhanced Injury,* 5 U. BALT. L. REV. 1 (1975).

> *First,* in establishing that the design in question was defective the plaintiff must offer proof of an alternative, safer design, practicable under the circumstances. . . . *Second,* the plaintiff must offer proof of what injuries, if any, would have resulted had the alternative, safer design been used . . . . *Third,* as a corollary to the second aspect of proof, the plaintiff must offer some method of establishing the extent of enhanced injuries attributable to the defective design.[99]

A product, otherwise sound, may be held defective for lack of an adequate warning.[100] When a product's warnings and instructions will be sufficient in the consumer marketplace to insulate the product seller from responsibility for inadequacy of the warning is unpredictable.[101] The purpose of a warning, of course, is to give the user knowledge and an opportunity to appreciate danger. Historically a negligence concept, the absence of a warning or lack of an adequate warning is today regarded as rendering a product defective for purposes of any of the commonly used theories.[102] The Maryland Court of Appeals' decision in *Moran v. Faberge, Inc.,*[103] is representative of precisely why the inadequate warning type of defect is troublesome to a seller. The court stated its view as follows:

> [W]e think that in the products liability domain a duty to warn is imposed on a manufacturer if the item it produces has an inherent and hidden danger about which the producer knows, or should know, could be a substantial factor in bringing injury to an individual or his property *when the manufacturer's product comes near to or in contact with the elements which are present normally in the environment where the product can reasonably be expected to be brought or used.*[104]

---

99. Huddell v. Levin, 537 F.2d 726, 737-38 (3d Cir. 1976). In *Huddell,* plaintiff's decedent received fatal injuries allegedly because his head was driven into the protruding edge of a head restraint when his vehicle was rear-ended while stopped on a bridge. Plaintiff's substantial verdict was later vacated, and the matter remanded for a new trial because of an improper standard of proof employed by the trial judge.
100. *See* Moran v. Fabrege, Inc., 273 Md. 538, 332 A.2d 11 (1975).
101. Adequacy or effectiveness of a product's warning will almost always be an issue for the trier of fact. *See, e.g.,* Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958).
102. *See, e.g.,* Hiigel v. General Motors Corp., 544 P.2d 983 (Colo. 1975) (purchaser of motor home who sued manufacturer and seller for damages sustained because of defective wheel studs stated cause of action under strict liability or warranty theories; purchaser had been instructed on use and maintenance of wheel studs, but not of inherent risks he could encounter if instructions were not followed).
103. 273 Md. 538, 332 A.2d 11 (1975) (manufacturer who failed to warn of flammability of perfume held liable to plaintiff who poured perfume on base of lit candle).
104. *Id.* at 552, 332 A.2d at 20 (emphasis added).

In *Moran,* the court injected into the duty to warn an additional duty to foresee any danger that might result when the product enters its normal environment. This duty is indeed an expansive one, since any home or business establishment in which a product is used will normally contain numerous environmental factors which might affect product performance.[105] One caveat to the plaintiff seeking to recover on the defect theory of inadequate warning is that there is no right to recover when the party to be warned is already appreciative of the danger.[106]

The failure or malfunction of a product, alone, is not sufficient circumstantial evidence that the product is, or was, defective.[107] A plaintiff must prove that the product failed because it was defective.[108] Likewise, the mere fact that the product caused injury standing alone is not sufficient evidence to establish the existence of a defect.[109] "[T]he addition of very little more in the way of other facts,"[110] however, is required to support the inference.

Some general categories of circumstantial evidence are invariably given probative value in determining the existence of a defect. The product's nature and the accident's pattern are always the subject of evidence. Although proof of the product's physical and

105. *Cf.* Kidwell, *The Duty to Warn,* 53 TEXAS L. REV. 1375, 1395-1406 (1975).
106. *See, e.g.,* Martinex v. Dixie Carriers, Inc., 529 F.2d 457 (5th Cir. 1976) (manufacturer of petrochemical not liable to widow of decedent barge worker, who was overcome by noxious fumes); Burton v. L.O. Smith Foundry Products Co., 529 F.2d 108 (7th Cir. 1976) (action against supplier of compound which ignited and fatally burned decedent failed when, prior to accident, decedent's employer knowingly added kerosene to compound); Wilhelm v. Globe Solvent Co., 373 A.2d 218 (Del. 1977) (cleaning solvent manufacturer not liable for failure to warn when plaintiff had actual knowledge of flammability).
107. *See, e.g.,* Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967) (evidence of wheel malfunction insufficient to prove prima facie that wheel failed to perform as ordinary customer would have expected).
108. *See, e.g.,* Jakubowski v. Minnesota Mining and Mfg. Co., 42 N.J. 177, 199 A.2d 826 (1964) (plaintiff failed to prove that abrasive disc, which broke and struck him, was defective); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969).
109. *See, e.g.,* Bruce v. Martin-Marietta Corp., 544 F.2d 442 (10th Cir. 1976) (action to recover for deaths and injuries caused by plane crash predicated on alleged uncrashworthiness of plane); Kupkowski v. Avis, 395 Mich. 155, 235 N.W.2d 324 (1976) (evidence presented by plaintiff insufficient to sustain claim that car brakes defective); Logan v. Montgomery Ward & Co., 216 Va. 425, 219 S.E.2d 685 (1976) (mere fact of explosion did not establish stone defective).
110. Prosser, *The Fall of the Citadel,* 50 MINN. L. REV. 791, 843 (1975); *accord,* Greco v. Bucciconi Eng'r Co., 407 F.2d 87 (3d Cir. 1969) (defective condition of magnetic sheet piler inferred from proof that it functioned improperly in absence of abnormal use and reasonable secondary causes); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (inference that subsequently discovered defect existed at time of sale permitted when car newly purchased); Stewart v. Budget Rent-A-Car Corp., 52 Haw. 71, 470 P.2d 240 (1970) (evidence that just prior to accident car veered sufficient to show defect in automobile); Vanek v. Kirby, 253 Or. 494, 450 P.2d 778 (1969) (vehicle uncontrollable in normal operation sustained claim of existence of defective mechanism).

chemical qualities, propensities, and activities does not generally prove that the product caused the accident, the evidence often goes to the threshold issue of whether the product was defective and could have caused the accident.[111] Evidence offered on the circumstances surrounding the accident generally shows only that a defect could have been operative in causing the accident, but such evidence might prove to be the key to ultimate persuasion of the trier of fact. Proof of passage of time between the sale and accident can disprove the existence of a defect.[112] Some products are more likely to wear out by use than others, and when the product is such that its failure could be the result of use during the period after sale, lapse of time and use tend strongly to establish that the defect was not present when the product left the seller's hands.[113] Introduction of facts about the life history of a product, including similar previous failures or injuries and subsequent repairs may be circumstantial evidence of defect.[114] Product history evidence can be equally valuable to a defendant where a product has been used for a substantial period of time without the alleged defect having in any way manifested itself.[115]

B. Attribution

Sometimes referred to as identity, the elemental requirement of attribution in product litigation is usually not difficult to satisfy. The plaintiff must prove that a particular defendant is responsible for

111. *See, e.g.,* Moraca v. Ford Motor Co., 66 N.J. 454, 332 A.2d 599 (1975).

112. *Compare* Tucson Gen. Hosp. v. Russell, 7 Ariz. App. 193, 437 P.2d 677 (1968) (x-ray machine that injured plaintiff had been disassembled twice since sold to defendant fourteen years before accident) *with* Clary v. Fifth Ave. Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969) (plaintiff alleged that carbon monoxide poisoning due to defects in two-week old car).

113. *See, e.g.,* Kleve v. General Motors Corp., 210 N.W.2d 568 (Iowa 1973); *cf.* Hawkins v. Larrance Tank Corp., 555 P.2d 91 (Okla. Ct. App. 1976).

114. Courts are split on the question of whether prior similar complaints are admissible to show a causal relationship between a particular product and an accident. *Compare* Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3d Cir. 1958) *with* Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962). Despite the split, the evidence may be admissible on other grounds, since both *Prashker* and *Spruill* held that such evidence was admissible to show defendant's notice.

Evidence of subsequent repairs, alterations, or warnings has been held admissible to show that defendant had control of the product that caused the accident, or over the place where it occurred, *e.g.,* Wallner v. Kitchens of Sara Lee, Inc., 419 F.2d 1028 (7th Cir. 1969), to prove feasibility of a safer design, *e.g.,* Stark v. Allis-Chalmers & Northwest Roads, Inc., 467 P.2d 854 (Wash. Ct. App. 1970), or to prove the state of a manufacturer's knowledge of the dangers of a product prior to the accident, *e.g.,* Sterner v. U.S. Plywood Champion Paper, Inc., 519 F.2d 1352 (8th Cir. 1975). The rule prohibiting evidence of subsequent repairs to show implied acknowledgement of the defective condition is becoming the exception rather than the rule. *E.g.,* Smyth v. Upjohn Co., 529 F.2d 803 (2d Cir. 1975); Ault v. Int'l Harvester Co., 13 Cal. 3d 129, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974); Shaffer v. Honeywell, Inc., 249 N.W.2d 251 (S.D. 1976).

115. *See, e.g.,* Tucson Gen. Hosp. v. Russell, 7 Ariz. App. 193, 437 P.2d 677 (1968).

the product in the capacity in which he issued it,[116] and the product's defect must be tried to a point in time when a particular defendant in the distributive chain had control.[117]

Occasionally, however, this requirement can be troublesome.[118] The Maryland Court of Special Appeals' decision in *Undeck v. Consumer's Discount Supermarket, Inc.*[119] is illustrative. There plaintiff sought recovery from the manufacturer and seller of the disinfectant-cleaner known as Lysol for injuries sustained when the bottle fell from its cardboard container and shattered on the supermarket's floor. Plaintiff's evidence failed to mention the name of the manufacturer, and was imprecise in identifying the retailer of the allegedly defective product. The trial court directed verdicts for the two defendants. The appellate court, which affirmed after a review of the merits of the case generally, made this statement on the attribution issue:

> We hold that the rule is that in proving the identity of an individual party in a case, something more than bald identity of names is required, and that in proving the identity of a corporate or other business entity which is a party in a case, something less than precise identity of names may be sufficient.
>
> In expressing this rule we reemphasize that precision in the proof of names of parties involved in litigation is highly important, especially because such proof is ordinarily easy to obtain and simple to produce, and because failure to produce it may prevent the decision of a case on its merits.[120]

C. Causation

Regardless of theory — negligence, breach of warranty, or strict liability — a causal connection between the defective condition and the plaintiff's injury must be shown. In Maryland, "causation in fact" is considered separately from the related issue involving scope of duty.[121]

Causation in fact is a question for the jury and involves a determination of whether the alleged defective condition was a substantial factor in bringing about the claimed loss.[122] Occasionally, it is quite difficult to prove that the alleged defect in fact caused

116. *See, e.g.,* Champlin v. Oklahoma Furniture Mfg. Co., 324 F.2d 74 (10th Cir. 1963).
117. *See, e.g.,* McNamara v. American Motors Corp., 247 F.2d 445 (5th Cir. 1957); *cf.* Eaton Corp. v. Wright, 281 Md. 80, 375 A.2d 1122 (1977).
118. *See, e.g.,* Springer Corp. v. Dallas & Mavis Forwarding Co., 90 N.M. 58, 559 P.2d 846 (1976); Beasley v. Coca-Cola Bottling Co., 239 N.C. 681, 80 S.E.2d 642 (1954).
119. 29 Md. App. 444, 349 A.2d 635 (1975).
120. *Id.* at 453, 349 A.2d at 640.
121. Certain-teed Products Corp. v. Goslee Roofing & Sheet Metal, Inc., 26 Md. App. 452, 339 A.2d 302 (1975), *cert. denied,* 276 Md. 739 (1975).
122. Peterson v. Underwood, 258 Md. 9, 264 A.2d 851 (1970); RESTATEMENT (SECOND) OF TORTS § 431 (1965); W. PROSSER, LAW OF TORTS § 41, at 240 (4th ed. 1971).

the injury. A component failure may be the cause of an occurrence, or may be caused by an occurrence. In most cases, expert testimony is essential to prove the causal relationship between the product, the accident, and the injury.[123] In some cases, however, the circumstantial evidence may warrant an inference that a defect in the product caused the harm.[124] Determination of the scope of a defendant's duty to a particular plaintiff will turn on the degree of the defendant's contact with the distributive chain responsible for an allegedly defective product.[125]

Several of the substantive defenses, discussed in more detail below, actually involve issues of causation. Such defenses deal with conduct of the plaintiff, or another, alleged to affect the performance of the product to such an extent that the conduct is a superseding cause of the harm.

V. DEFENSES

The traditional cliche "Let the Buyer Beware" has undergone substantial alteration during the recent rise in product litigation. It now reads: "Let the Seller Beware." This phenomena is dramatically illustrated by the evolution of affirmative defenses in product suits. Today the defendant focuses almost entirely on the conduct of the plaintiff — the manner in which the product was being used at the time of the accident, the plaintiff's relationship to such use, and the plaintiff's prior knowledge of the product's condition or its instructions for use, including warnings, if any. This focus results in widespread use of the defenses of contributory negligence, assumption of risk, misuse or abuse of the product, and alteration or modification of the product.[126] With the exception of the statutes of limitations, technical defenses of a self-determinative character, such as lack of privity, or failure to give notice, are essentially nonexistent.[127]

123. *See, e.g.,* Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965).
124. *See, e.g.,* Lindroth v. Walgreen Co., 407 Ill. 121, 94 N.E.2d 847 (1950).
125. E.I. duPont de Nemours & Co. v. McCain, 414 F.2d 369 (5th Cir. 1969); *see* Certain-teed Products Corp. v. Goslee Roofing & Sheet Metal, Inc., 26 Md. App. 452, 339 A.2d 302 (1975).
126. These substantive defenses, which often tend to blend together in product liability actions, actually tend to counter plaintiff's proof of causation.
127. Privity requirements and disclaimer availability in warranty actions were eliminated by statutory amendments even before adoption of strict liability in tort. Law of May 17, 1971, ch. 505, 1971 Md. Laws 1131-32 (*codified at* MD. COM. LAW CODE ANN. § 2-316.1 (1975)); Laws of April 23, 1969, ch. 249, 1969 Md. Laws 709 (*codified at* MD. COM. LAW CODE ANN. §§ 2-314, 2-318 (1975)). Since adoption of strict liability in tort, the notice requirement of § 2-607(3)(a) has been construed to pertain only to a buyer. Mattos, Inc. v. Hash, 279 Md. 371, 389 A.2d 993 (1977); Frericks v. General Motors Corp., 278 Md. 304, 363 A.2d 460 (1976). The *Phipps* case contained a collateral warranty issue that focused on the restrictiveness of the "injured in person" language contained in 2-318. The *Phipps* court gave the language a broad reading. *See* Phipps v. General Motors

A. Contributory Negligence

Proof of contributory negligence is a defense standard to negligence actions which, by its nature, involves a showing that the plaintiff violated an applicable standard of care.[128] If the defendant can demonstrate that the plaintiff was negligent in his own conduct at the time injuries were sustained, he will be absolved of all responsibility.[129]

There has been conflict over the applicability of the defense in warranty actions. This conflict arises because of the conceptual difficulty in invoking a defense standard to tort actions in an action for breach of warranty. Several courts have held that contributory negligence will not bar an action in contract for breach of warranty.[130] Others have held that contributory negligence may be invoked in warranty actions as well as in tort actions.[131] Several cases refusing to apply contributory negligence as a bar to warranty actions nevertheless allow evidence of such negligence to negate the plaintiff's case under one of the following approaches: (1) the conduct is actually not negligence, but assumption of risk;[132] (2) the conduct which amounts to no more than traditional negligence is considered as rebuttal to plaintiff's allegations of defectiveness;[133] (3) the conduct, not the defective product, is the proximate cause of the injuries.[134] The third approach appears to have the favor of the Maryland Court of Appeals.[135]

The defense of contributory negligence is not an available defense to strict liability in tort premised on Section 402A, at least

---

Corp., 278 Md. 337, 353-56, 363 A.2d 955, 963-65 (1976). In view of this interpretation, Maryland courts will probably have little difficulty with allowing a Maryland wrongful death action to be premised on breach of a Uniform Commercial Code warranty. *See generally* Freeman & Dressel, *Warranty Law in Maryland Product Liability Cases: Strict Liability Incognito?*, 5 U. BALT. L. REV. 47 (1975).

For choice of law purposes, breach of warranty actions are treated as contractual in nature, while negligence and strict liability actions are considered tortious in nature. *See* Frericks v. General Motors Corp., 274 Md. 288, 336 A.2d 118 (1975).

128. *See, e.g.,* Hutzler Bros. Co. v. Taylor, 247 Md. 228, 230 A.2d 663 (1967).
129. *See, e.g.,* Crouse v. Hagedorn, 253 Md. 679, 253 A.2d 834 (1969).
130. *See* Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty,* 52 MINN. L. REV. 627, 631 n.25 (1968).
131. *Id.* at 650 n.104.
132. This approach avoids the involvement of negligence concepts in warranty law. *See* Carmen v. Eli Lilly Co., 109 Ind. App. 76, 32 N.E.2d 729 (1941).
133. This approach is premised on the thought that if, in the absence of the plaintiff's conduct, the product would have performed properly, the trier of fact may be persuaded that the product was not defective. *See* Youtz v. Thompson Tire Co., 46 Cal. App. 2d 672, 116 P.2d 636 (1941).
134. Erdman v. Johnson Bros. Radio & Television Co., 260 Md. 190, 271 A.2d 744 (1970).
135. *Id.* (plaintiff's knowledge that television set defective barred recovery for resulting fire damage).

when the alleged contributory negligence is a failure on the part of a plaintiff to detect or guard against the defect's existence.[136]

B. Assumption of Risk

A defense available in a product action, regardless of recovery theory, is assumption of risk; a person may not recover for an injury received when he voluntarily exposes himself to a *known* and *appreciated* danger.[137] To invoke the defense the defendant must show that the plaintiff

(1) discovered the defective condition,
(2) fully understood the danger,
(3) disregarded the known danger, and
(4) voluntarily exposed himself to it.[138]

The existence of knowledge of the specific defect on the part of the plaintiff is critical.[139] The fact that the injured person should have known of the danger is generally insufficient, but a person may be charged with knowledge when he has actual knowledge of facts which should make the danger clear and obvious to him.[140]

The test for measuring the plaintiff's knowledge is subjective since the knowledge, understanding, and appreciation of the danger that the actual user possessed must be considered, rather than that possessed by the mythical reasonably prudent person.[141] In short, the knowledge requirement is joined with an appreciation require-

136. Comment n to RESTATEMENT (SECOND) OF TORTS 402A clarifies this rule:

> n. Contributory negligence. 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. On the other hand, the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

137. Western Maryland Ry. v. Griffis, 253 Md. 643, 253 A.2d 889 (1969); Chalmers v. Willis, 247 Md. 379, 231 A.2d 70 (1967); *see* Henderson v. Ford Motor Co., 519 S.W.2d 87 (Tex. 1974) (evidence insufficient to sustain claim that plaintiff assumed risk by continuing to drive after discovery of defective throttle).

138. *See* Western Maryland Ry. v. Griffis, 253 Md. 643, 253 A.2d 889 (1969).

139. For example, knowledge of the general hazard involved in operating a punch press machine will not alone support the defense. *See, e.g.,* Rhoads v. Service Machine Co., 329 F. Supp. 367 (E.D. Ark. 1971); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Ct. App. 1976).

140. Kuka v. Harley-Davidson Motor Co., 36 Ill. App. 3d 752, 344 N.E.2d 655 (1976) (jury verdict that plaintiff assumed risk of alleged design defect in motorcycle as to moving parts in which jacket could become entangled upheld).

141. *See, e.g.,* Doran v. Pullman Standard Car Mfg. Co., 45 Ill. App. 3d 981, 360 N.E.2d 440 (1977) (railway worker lacked knowledge of risk in moving under cars assigned for cleaning); Heil Co. v. Grant, 534 S.W.2d 916 (Tex. Ct. App. 1976) (decedent killed when bed of brother's dump truck descended while decedent working beneath raised bed).

ment and if by reason of age, lack of information, experience, intelligence or judgment, the plaintiff did not understand the risk involved, he will not be taken to have assumed that risk.

C. Misuse/Abuse

Regardless of recovery theory, a manufacturer is not responsible if his product becomes dangerous because of misuse by a consumer; the manufacturer has no duty, generally, to design safeguards into a product in anticipation of misuse.[142] Misuse involves a use of the product in a manner not reasonably foreseeable by the seller or manufacturer.[143] A product is not misused, however, merely because the manufacturer intended that it be used in a different manner. The manufacturer must show that the use which caused the injury was not reasonably foreseeable.[144] A traditional argument by manufacturers that liability exists only for injuries arising out of intended uses, as compared to the broader category of foreseeable uses, is essentially extinct.[145] The reasoning of the Maryland Court of Appeals in *Moran v. Faberge, Inc.*,[146] on the issue of foreseeability of use in a negligence context, suggests future adherence to a strict treatment of the misuse defense when the issue is posed in the context of the other product theories. In *Moran,* the court held that a jury question was presented on the foreseeability of use issue when the plaintiff was severely burned by a flash explosion which resulted when the plaintiff's friend poured some cologne on the base of a lit candle. In defining the requisite degree of foreseeability, the court stated:

> [T]he unusual and bizarre details of accidents, which human experience shows are far from unlikely, are only significant as background facts to the individual case; it is not necessary that the manufacturer foresee the exact manner in which accidents occur. Thus, in the context of this case, it was not necessary for a cologne manufacturer to foresee that

142. *See, e.g.,* Latimer v. General Motors Corp., 535 F.2d 1020 (7th Cir. 1976) (action to recover for personal injuries failed when manufacturer had no duty to foresee cotter pin disjuncture from drive shaft machanism).
143. *See, e.g.,* Procter & Gamble Mfg. Co. v. Langley, 422 S.W.2d 773 (Tex. Ct. App. 1967) (plaintiff's knowing violation of plain, unambiguous instructions that accompanied allegedly defective permanent hair wave product held to constitute misuse and bar recovery).
144. Tucci v. Bossert, 53 App. Div. 2d 291, 385 N.Y.S.2d 328 (1976); Olson v. A.W. Chesterton Co., 256 N.W.2d 530 (N.D. 1977); Otis Elevator Co. v. Wood, 436 S.W.2d 324 (Tex. 1968).
145. *See, e.g.,* Kudelka v. American Hoist & Derrick Co., 541 F.2d 651 (7th Cir. 1976) (plaintiff sued manufacturer of crane that collapsed and injured him during attempt to lift excessive weight); Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970) (plaintiff machine operator sued manufacturer of trenching machine that allegedly lurched, threw him, and then ran over him).
146. 273 Md. 538, 332 A.2d 11 (1975).

> someone would be hurt when a friend poured its product near the flame of a lit candle; it was only necessary that it be foreseeable to the producer that its product, while in its normal environment, may be brought near a catalyst, likely to be found in that environment, which can untie the chattel's inherent danger.[147]

The strict standard for application of the misuse/abuse defense is aptly stated in *Bradford v. Bendix-Westinghouse Auto Air Brake Co.*:[148]

> Section 402A does recognize a defense for the manufacturer where the consumer or user mishandles or misuses the product and thereby *creates* the dangerous condition. Primarily this defense is intended to protect the manufacturer from becoming an absolute insurer for all injuries arising out of the use of his product. The usual situation in which the defense will arise is where the product is being used in a way in which it was not intended to be used. However, a prerequisite for the defense is that the product must have been in a safe condition when it reached the user. If it was unreasonably dangerous at that time, the 'intervening' acts of the user can only be additional proximate causes making the two parties joint tortfeasors.
>
> . . .
>
> Of course, the defect in the product must itself be a proximate cause of the plaintiff's injury before the plaintiff can recover. The manufacturer could not be held liable simply because of the existence of the defect when the real cause of the accident was the conduct of the user of the product. Only in this sense can the manufacturer be relieved of liability due to the acts of the user or a third party.

Gardner v. Q.H.S., Inc.,[149] presents an instructive situation in which foreseeable misuse did not absolve a manufacturer of liability. The case involved a woman who heated her hair rollers, according to instructions, in a pan of water on the stove. Although the manufacturer knew that paraffin inside the rollers would be released if all of the water was boiled out of the pan, and that paraffin had a

147. *Id.* at 553, 332 A.2d at 20.

148. 517 P.2d 406, 413 (Colo. 1973). The majority in Findlay v. Copeland Lumber Co., 265 Or. 300, 306, 509 P.2d 28, 31 (1973), explained:

> As we understand comment h, to Section 402A, "abnormal" use does not mean every instance of negligence, however slight, in connection with the use of the product. The product must be safe for "normal" handling and consumption. Misuse, to bar recovery, must be a use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it — a use which the seller, therefore need not anticipate and provide for.

149. 448 F.2d 238 (4th Cir. 1971).

low flashpoint, the plaintiff was given no warning of the risks involved. The user decided to take a bath while waiting for the rollers to heat and fell asleep in the tub. The released paraffin ignited, and the house burned down. The manufacturer was held responsible to the owner of the building for failure to provide the user with complete information.

Another good illustration of the misuse defense in operation is *McCready v. United Iron and Steel Co.*[150] There the court, in the context of a negligence action, used language equally applicable to implied warranty or strict liability in tort. The court held that the manufacturer of steel casement windows could not be held liable for the death of a workman who fell while using a casement as a ladder when one of the casement's crossbars failed. The court stated:

> A manufacturer may assume that his product will be devoted to its normal use. And if it is safe when devoted to the normal use for which it was manufactured, he is not liable in damages for injury resulting from an abnormal or unusual use not reasonably anticipated. Appellee manufactured the casements for use as window frames . . . . And it is not suggested that they were unsafe when devoted to that purpose.[151]

The former narrowness with which the concept of "intended use" was judicially viewed has been injected with a foreseeability factor which renders the misuse/abuse defense of little value to product defendants. The manufacturer's existing duty is aptly reflected in this illustration: A screwdriver maker must anticipate that its product will not only be used to turn screws — the intended use — but also used to pry open lids of paint cans — the foreseeable use — and must therefore make the shank strong enough for both purposes.

D. Alteration

Alteration is a defense which indicates lack of causation in some cases; in other cases, there is no defect in the original product, the defect being caused by subsequent alterations. Alteration can serve as a defense regardless of the plaintiff's theory.

Section 402A's statement of responsibility under the strict liability theory well illustrates the alteration defense. A prerequisite to recovery is that the product "reach the user or consumer without substantial change in the condition in which it was sold."[152] The

150. 272 F.2d 700 (10th Cir. 1959).
151. *Id.* at 703 (citations omitted).
152. RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965).

substantial change concept is particularly important since products today rarely reach ultimate consumers without passing through several processing stages. As a result, courts often are asked to determine whether alterations made after a product left its manufacturer's control were substantial enough to relieve the manufacturer of responsibility for injury caused by the product. Before such a determination can be made, a court must examine the cause of an injury, since an alteration with no effect on the occurrence of an injury will be regarded as insubstantial. For example, in *Ward v. Hobart Mfg., Co.*,[153] a manufacturer of a meat grinder was relieved from liability for injuries sustained through the use of his product because a guard that would have prevented the accident was removed. The result, the court noted, would have been different if the guard's presence would not have prevented the harm. Of course, it should be recognized that a manufacturer must design a product so that foreseeable modifications will not cause product failure. Anticipated change will not relieve a manufacturer from liability.[154]

VI. INDEMNITY AND CONTRIBUTION

An issue common to all product liability suits involves the ultimate distribution of the judgment burden. In many cases a product plaintiff sues not only his immediate seller but also the distributor, the manufacturer, and all other parties in the distributive chain. In other cases the plaintiff elects to sue only one member of the distributive chain, but others are brought in under the liberal rules of third party practice.[155] In yet other cases, a defendant institutes a separate action against a co-member of the distributive chain after settling the claim or satisfying a judgment of a product plaintiff.[156] In all of these situations, a judgment in favor of the plaintiff yields a new battle to determine whether one, several, or all of the defendants will be forced to bear the judgment burden.[157]

153. 317 F. Supp. 841 (S.D. Miss. 1970), *aff'd* 450 F.2d 1176 (5th Cir. 1970).

154. Comment j of § 402A of the RESTATEMENT (SECOND) OF TORTS discusses a manufacturer's liability when his product is expected to, and does, undergo further processing or other substantial change after it leaves his hands, and before it reaches those of the ultimate user or consumer. No mention is made of where liability rests in those situations in which the expected change does not occur. *Compare* Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965) *with* Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972).

155. FED. R. CIV. P. 14; MD. R. CIV. P. 315.

156. The statute of limitations in indemnity and contribution cases premised in tort, runs from the time that payment is made to the injured party and not from the date of injury. Southern Maryland Oil Co. v. Texas Co., 203 F. Supp. 449 (D. Md. 1962).

157. In this new battle, the defenses applicable in the original action, such as misuse, alteration, or in some cases, contributory negligence, are available to the party resisting indemnity or contribution. *E.g.*, Fargo Machine & Tool Co. v. Kearney

Indemnity and contribution are the two legal mechanisms commonly employed by defendants seeking to shift the brunt of a judgment. Although both involve attempts to shift legal responsibility, each rests on a different legal theory and provides a different result. Indemnity is based on principles of contract, express or implied in law,[158] while contribution is a statutory remedy premised on the equitable principle that liability should be apportioned among all those persons whose tortious conduct contributes to the plaintiff's injury.[159] When indemnity is successfully employed, one defendant is entirely relieved of the judgment burden, while the others are required to bear the whole expense.[160] On the other hand, the contribution mechanism merely operates to spread the judgment burden among all defendants and to require each to pay his proportionate share.[161]

A. Indemnity

A product liability case may be ripe for use of the indemnification mechanism under any of the following circumstances: (1) when there is an express contract of indemnity involved; (2) when there is an implied contract of indemnity under which the primary wrongdoer is obliged to respond to all damages; (3) when there is a single warranty running through the distributive chain linking all defendants; and (4) when the underlying theory of liability is strict liability in tort, and the potential indemnitor was initially responsible for placing the defective product in the stream of commerce.

A buyer is free to obtain an express agreement from his seller, obligating the seller to indemnify the buyer against any damages he may suffer as a result of liability to a third party arising from subsequent resale of the product or other use. In *Eaton Corporation v. Wright,*[162] for example, the Maryland Court of Appeals granted indemnity to the distributor of a defective fuel cannister against the manufacturer, under a contract which obligated the latter to pay the amount of any judgment entered against the distributor.[163] A seller is likewise free to exact from his buyer an agreement to indemnify

---

& Trecker Corp., 428 F. Supp. 364 (E.D. Mich. 1977) (supplier of component part not liable to seller in indemnity when evidence showed component part had been altered after it left supplier's control).

158. Southern Maryland Oil Co. v. Texas Co., 203 F. Supp. 449, 452 (D. Md. 1962).

159. *Id.*; MD. ANN. CODE art. 50, § 17 (1972).

160. Bohlen, *Contribution and Indemnity Between Tortfeasors,* 21 CORNELL L.Q. 552, 552-53 (1936); Note, *Another Look at Strict Liability: The Effect on Contribution Among Tortfeasors,* 79 DICK. L. REV. 125, 127 (1974).

161. Uniform Contribution Among Tortfeasors Act, MD. ANN. CODE art. 50, §§ 16-222 (1972).

162. 281 Md. 80, 375 A.2d 1122 (1977).

163. *Id.* at 88 n.2 375 A.2d at 1123, 1126 n.2.

the seller against the claims of third persons injured by the product. *Cyr v. B. Offen & Co.*,[164] involved a situation in which a manufacturer/seller of a printing press and drying oven were held liable in strict liability and negligence to the buyer's two employees, who were seriously injured due to a defect in the oven. The manufacturer/seller filed a third party claim for indemnity against the buyer, based on an express agreement in the contract of sale which provided:

> Buyer agrees to indemnify Hoe [manufacturer] and save it harmless from any and all liability for injury to persons (other than Hoe's employees) or property, which may result from any cause whatsoever after the machinery herein is delivered to Buyer.[165]

Two documents comprised the contract of sale, the first including the quoted indemnity clause covering the "machinery herein delivered" and setting forth the items so described. The defective ovens were not included in the list, but were instead covered by a separate document which included no indemnification agreement.[166] The court refused to enforce the indemnity provision, since "indemnification contracts are to be narrowly construed and all ambiguity is to be resolved against indemnity."[167] The general rule requiring strict construction of indemnity agreements is rigorously enforced when the potential indemnitee is himself guilty of negligence; contracts of indemnity will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in unequivocal terms.[168] The party seeking to escape liability for his negligent conduct may generally not rely on an express contract of indemnity, but must seek alternative means of shifting responsibility.

The second set of circumstances giving rise to indemnity occurs when two persons are jointly liable in tort, one being the principal or primary wrongdoer and the other being only passively negligent. In such a situation the law implies a contract of indemnity under which the primary wrongdoer must bear full responsibility for the joint wrong.[169] There is a dearth of Maryland case law on the duty of an

164. 501 F.2d 1145 (1st Cir. 1974).
165. *Id.* at 1156.
166. *Id.*
167. *Id.*
168. Blockston v. United States, 278 F. Supp. 576 (D. Md. 1968); Crockett v. Crothers, 264 Md. 222, 285 A.2d 612 (1972).
169. A situation in which no such contract will be implied is when an employee's injury is the result of the joint wrongdoing of his employer and a third party. In such a case, there is a split of authority as to whether the third party may seek indemnity or contribution from the employer based on his active wrong, since the

actively negligent tortfeasor to indemnify one who is only passively negligent; however, several cases have recognized the principle. The early case of *C & O Canal Co. v. County Commissioners,*[170] was a suit for indemnification by Allegany County to recover damages paid by the county to a person injured while crossing a defectively constructed bridge. The bridge had originally been constructed by the C & O Canal Company to replace a portion of the road it had removed, and the company was under a duty to keep the bridge in repair. The county had been held liable to the injured pedestrian for breach of its common law duty to maintain public roads. In the indemnity action by the county, the court found that both parties had breached a duty owed to the injured party but that the county and C & O were not in pari delicto. The court held that where two parties are not equally responsible for injury caused to a third, the principal delinquent may be held solely liable for the joint offense. In a later case[171] the court clarified the active-passive negligence dichotomy:

> The rule to be applied to the many conditions of fact arising in such cases is stated as follows, with accuracy and clearness, in *Gray v. Boston Gas Light Company,* 114 Mass. 152, 19 Am. Rep. 324: "When two parties acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or *participes criminis,* and the damage results from their joint offense. This rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not in

---

employee may not sue the employer under the exclusive liability provisions of the workmen's compensation act. *Compare* White v. Texas Eastern Transmission Corp., 512 F.2d 486 (5th Cir. 1975) *and* Myers v. McCarthy, 428 F. Supp. 656 (E.D. Pa. 1977) (both cases holding that since employer statutorily immune from action in tort by employee, no basis for contribution or indemnity in tort) *with* Cargill v. United States, 1977 A.M.C. 50 (E.D. Va. 1976); Brkaric v. Star Iran & Steel Co., 1976 A.M.C. 1572 (E.D.N.Y. 1976) *and* cases cited in Note, *Workman's Compensation Third Party Tort-Feasor Actions,* 16 DRAKE L. REV. 93 (1967) (cases holding employer may be held liable for contribution or indemnity despite fact that employee cannot maintain action against employer).

The Maryland Court of Appeals has not yet considered this point. A recent Florida case interpreted a workmen's compensation act similar to Maryland's. The Florida statute had been construed to bar a manufacturer's third party action against an employer. The Supreme Court of Florida found the statute so construed to be unconstitutional as applied, and held that the statute denied equal protection of the laws and access to the courts. Sunspan Eng'r & Constr. Co. v. Spring-Lock Scaffolding Co., 310 So. 2d 4 (Fla. 1975).

170. 57 Md. 201 (1881).

171. Baltimore & Ohio R.R. v. County Comm'rs, 113 Md. 404, 77 A. 930 (1910).

> *pari delicto* as to each other, though as to third persons either may be held liable."[172]

There is a great deal of difficulty in applying the active-passive negligence distinction for purposes of determining indemnity, since the courts are not clear on what is "active" and what is "passive" negligence. The Pennsylvania case of *Builders Supply Co. v. McCabe,*[173] neatly categorized the situations giving rise to passive negligence as follows:

> [T]he important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of one primarily responsible.[174]

Another court has defined passive negligence in the following manner:

> [I]f the tortious conduct of the wrongdoer, regardless of the underlying theory of liability, doe nothing more than furnish a condition to which a subsequent independent 'act' of a co-wrongdoer occurs, the tort feasors are not in *pari delicto* and indemnity may be allowed.[175]

No Maryland case has expressly considered the active-passive negligence distinction in a product liability context; however, in *Southern Maryland Oil Co. v. Texas Co.,*[176] the court confronted a

172. *Id.* at 415, 77 A. at 993.
173. 366 Pa. 322, 77 A.2d 368 (1951).
174. *Id.* at 326, 77 A.2d at 371. Liability for passive negligence based on a legal relation between the parties is illustrated by the situation in which a general contractor is held liable to the employee of a sub-contractor injured on the jobsite because of his duty to provide a safe working site, even though the sub-contractor caused the dangerous condition. Employers' Liab. Assur. Corp. v. Empire City Iron Works, 7 App. Div. 2d 1012, 184 N.Y.S.2d 728 (1959). Indemnity is allowed when liability is based on a rule of statutory law. Adler's Quality Bakery, Inc. v. Gaseteria, Inc., 32 N.J. 55, 159 A.2d 97 (1960) (statute made aircraft owners absolutely liable for ground damage caused by aircraft; court authorized indemnity from one allegedly solely responsible for losses). In Smith Radio Communications, Inc. v. Challenger Equip., Ltd., 270 Or. 322, 527 P.2d 711 (1974), the Oregon Supreme Court held that a retailer who receives goods from the manufacturer, does not cause any defect in the goods, and then delivers the goods to a customer is merely passively negligent and, thus, entitled to indemnity from the manufacturer.
175. Automobile Club Ins. Co. v. Toyota Motor Sales, 166 Mont. 221, 226, 531 P.2d 1337, 1340 (1975).
176. 203 F. Supp. 449 (D. Md. 1962).

situation where the retailer of contaminated kerosene brought an action for indemnity against his seller, seeking to recover damages the retailer suffered as a result of liability to third parties. The retailer had settled personal injury and death claims arising out of explosions of the contaminated kerosene upon resale and use by its customers. While the disposition of *Southern Maryland* turned on a limitations problem,[177] the court impliedly recognized the right of the retailer to proceed against his seller for indemnity, where the retailer's only breach of duty to the injured party was a failure to discover a defect in the product supplied by his seller. In *Jennings v. United States,*[178] a case not involving product liability, the court made the following statement to illustrate the right to indemnity existing between an actively and passively negligent tortfeasor:

> A right to indemnity is commonly recognized where, although both parties are negligent, the negligence of the indemnitee is considered not as serious as that of the indemnitor; *for example, where the indemnitee's negligence is based upon a failure to inspect and thereby discover a defect in an article manufactured by the indemnitor.*[179]

Extra-jurisdictional law illustrating the active-passive negligence theory of indemnity in product liability suits is abundant, and several uniform principles can be distilled from the cases. One general rule is that a seller who delivers defective goods to his customer, without changing or altering them in any way, is only passively negligent or secondarily liable for his failure to inspect, and is entitled to indemnity from his supplier for any damage caused by the defective product.[180] When, however, the failure to inspect is combined with more culpable conduct such as actual knowledge of a problem or failure to inspect and repair prior to the injury, the seller may be found actively negligent and denied indemnity from his supplier.[181] A consumer or user of a dangerously defective product

177. *See* note 156 *supra.*
178. 374 F.2d 983 (4th Cir. 1967).
179. *Id.* at 987 n.7 (emphasis added).
180. Woods v. Juvenile Shoe Corp., 361 S.W.2d 694 (Mo. 1962); Ruping v. Great Atl. & Pac. Tea Co., 283 App. Div. 204, 126 N.Y.S.2d 687 (1953); Amantia v. General Motors Corp., 155 N.Y.S.2d 294 (Sup. Ct. 1956); Smith Radio Communications, Inc. v. Challenger Equip., Ltd., 270 Or. 322, 527 P.2d 711 (1974).
181. Duckworth v. Ford Motor Co., 320 F.2d 130 (3d Cir. 1963). In *Duckworth,* a car dealer sought indemnity from the auto manufacturer for liability to a buyer because of personal injuries caused by a defective steering assembly. The purchaser had directed the dealer's attention to the failure of the steering mechanism to operate properly. The dealer examined it and advised the purchaser that the car was safe. *Accord,* Dura Corp. v. Wallace, 297 So. 2d 619 (Fla. App. 1974).

that causes injury to a third person is entitled to indemnity from his supplier unless the user was himself guilty of an active wrong.[182] Thus a user of a negligently loaded rifle that injured a third party could not recover from the rifle manufacturer even though the firearm was negligently manufactured.[183] The defect in the weapon and the improper handling by the user were joint causes of the injury, and the user was not blameless as compared to the manufacturer. When both parties are guilty of active negligence, indemnity will be denied, and contribution, the second burden-shifting device, is the proper avenue of relief.

The third situation in which indemnity may be employed occurs when there is a single warranty running through the distributive chain linking all defendants; under such circumstances, liability may generally be "bumped up" the chain until it comes to rest with the initial distributor.[184] In any sale of goods, whether the sale be from manufacturer to distributor, distributor to retailer, or retailer to consumer, there is an implied warranty that the goods are merchantable.[185] A breach of warranty by the manufacturer in its initial sale to its distributor will result in a similar breach by each party in the distributive chain as it passes along the unmerchantable product. A party at the far end of the distributive chain, while liable to its immediate purchaser for breach of warranty, may pass the liability back up the chain to the seller initially responsible for rendering the goods unmerchantable. The general rule was well stated in *Williams v. Stewart Motor Co.*,[186] in which both the manufacturer of a car and the seller breached implied warranties of merchantability, but the dealer was given indemnity on its cross claim against the manufacturer:

182. Gray Line Co. v. Goodyear Tire & Rubber Co., 280 F.2d 294 (9th Cir. 1960); Allied Mut. Cas. Corp. v. General Motors Corp., 279 F.2d 455 (10th Cir. 1960); J.C. Penney Co. v. Westinghouse Elec. Co., 217 Cal. App. 2d 834, 32 Cal. Rptr. 172 (1963); Otis Elevator Co. v. Cameron, 205 S.W. 852 (Tex. Civ. App. 1918).

183. Schuster v. Steedley, 406 S.W.2d 387 (Ky. 1966).

184. 3A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 44.03[1] (1976). Section 2-607(3)(a) of the Maryland Commercial Code and the U.C.C. requires that a buyer give notice to his seller of breach of warranty within a reasonable time in order to hold the seller liable for breach of warranty. In Frericks v. General Motors Corp., 278 Md. 304, 315-16, 363 A.2d 460, 466 (1976), however, the Maryland Court of Appeals held that the notice requirement need not be complied with by third party beneficiaries of the warranty. In Eaton Corp. v. Wright, 281 Md. 80, 375 A.2d 1122 (1977), the court expressly left open the question of whether an intermediate seller who is sued for breach of warranty in a personal injury indemnity action is required to notify his seller of the alleged breach of warranty prior to bringing suit.

185. MD. COM. LAW CODE ANN. § 2-314 (1975). A warranty will be implied only when the seller is a merchant with respect to goods of the kind sold. As a practical matter, this requirement will always be met by members of the initial distributive chain.

186. 494 F.2d 1074 (D.C. Cir. 1974).

> "Ordinarily a dealer may recover from the manufacturer losses occasioned by the latter's breach of warranty, and the present case poses no exception. Clearly [the dealer's] breach of warranty to plaintiff rested on [the manufacturer's] breach of warranty to [the dealer]."[187]

In *Klages v. General Ordinance Corp.*,[188] the manufacturer of a mace pen distributed leaflets containing false representations about its product to a retailer, who in turn supplied the same leaflets to a consumer. The consumer sued both the manufacturer and the retailer for breach of express warranties contained in the promotional literature and recovered a judgment against each. The court allowed the retailer indemnity over against the manufacturer, reasoning as follows:

> [W]hen the retailer does not give the consumer a separate and independent express warranty, and when the manufacturer gives an identical express warranty to both the retailer and consumer, the liability of the manufacturer and retailer is identical. If the consumer is successful in asserting breach of express warranty against the retailer, therefore, the retailer would likewise be successful against the manufacturer. In such cases, an instruction as to "liability over" is proper.[189]

The seller entitled to indemnity arising out of breach of warranty may himself be a manufacturer in cases where a component part supplier has delivered a defective product.[190] For example, in *Herman v. General Irrigation Co.*,[191] the manufacturer of a central irrigation system, and the manufacturer of a diesel engine incorporated as a component part of the system, were joined as defendants in an action for breach of warranty. Both were held liable to the plaintiff for passing along the defective product, which eventually caused the injury. The manufacturer, however, of the system was granted indemnity against the component part manufacturer upon proof that the defect was present in the component part upon delivery to the system manufacturer, and that the seller had not altered the product before delivery to the plaintiff. *Eaton Corp. v. Wright*[192] involved an attempt by a manufacturer to recover

187. *Id.* at 1084.
188. 240 Pa. Super. Ct. 356, 367 A.2d 304 (1976).
189. *Id.* at 368-69, 367 A.2d at 314.
190. Fargo Machine & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364 (E.D. Mich. 1977); Eaton Corp. v. Wright, 281 Md. 80, 375 A.2d 1122 (1977); Herman v. General Irrigation Co., 247 N.W.2d 472 (N.D. 1976).
191. 247 N.W.2d 472 (N.D. 1976).
192. 281 Md. 80, 375 A.2d 1122 (1977).

indemnity from the supplier of a component part for damages suffered as a result of liability to a party injured by a defective fuel cannister. The manufacturer attempted to shift responsibility to the component part supplier by alleging that the supplier had breached its implied warranty of merchantability with respect to the component part. The Maryland Court of Appeals denied indemnity, noting that the manufacturer had failed to show that the component part had a causative link with the product's malfunctions.

The active negligence of one seeking indemnity which contributes as a proximate cause of the injury will bar recovery.[193] In *Automobile Club Co. v. Toyota Motor Sales,*[194] a driver's insurance company brought an action for indemnity against the manufacturer of an automobile after the driver, as well as the manufacturer, had been held liable for the wrongful death of a third party. The court held that a claim for indemnity based upon warranty was barred by the finding of the driver's active negligence, which was a proximate cause of the injuries.

The Uniform Commercial Code provides that a buyer who is sued for breach of warranty by his sub-purchaser may give his seller written notice of the litigation and request him to come in and defend.[195] This practice is termed "vouching in." Failure to defend will result in the seller being bound by the facts developed in the litigation between buyer and sub-purchaser, if the notice to defend contains a statement of the consequences of such failure.[196] This procedure does not establish a right to indemnity or contribution, in and of itself, and a separate action must be brought to secure such a remedy. Therefore, a buyer sued by a third party in a breach of warranty action should always attempt to join his seller as a party to the litigation, and thus settle any right to indemnity or contribution in the primary suit, without need for further litigation.

The final situation in which indemnity might be applicable is when the underlying theory of indemnification is strict liability in tort, and the potential indemnitor is initially responsible for placing the defective product in the stream of commerce. There is little difficulty in granting indemnity in situations in which the indemnitee is himself strictly liable in tort and guilty of no wrong except passing along an unreasonably dangerous product to a

193. O.S. Stapley Co. v. Miller, 6 Ariz. App. 122, 430 P.2d 701 (1967) (judgment against manufacturer in favor of both seller and installer of steering mechanism for boat reversed because of evidence that installer actively negligent, thereby creating question for jury); Gengler v. Hendrick, 112 Ill. App. 2d 245, 251 N.E.2d 69 (1969) (judgment for plaintiff against owner/operator and in favor of truck manufacturer and brake manufacturer affirmed when truck owner/operator actively negligent in repairing truck's brakes).

194. 166 Mont. 221, 531 P.2d 1337 (1975).

195. MD. COM. LAW CODE ANN. § 2-607(5)(a) (1975).

196. *Id.*

subsequent link in the distributive chain.[197] Each party has an action over against his immediate seller until the ultimate loss has been shifted back to the manufacturer or the party initially responsible for putting the defective product in the stream of trade. The proposed *Restatement* rule[198] would allow indemnity under such circumstances, and a comment to the rule provides as follows:

> (g) The supplier of a defective chattel is required to indemnify a retailer regardless of whether his tort liability is based on negligence or strict liability, so long as the retailer has failed to discover the defect before selling the product. If he has discovered the defect and sold the product anyway, he is not entitled to indemnity.[199]

A problem develops with granting indemnification on a strict liability theory when the potential indemnitee is himself actively negligent and such negligence is a proximate cause of the injury. There is a split of authority on this question, Maryland being among the vast majority of jurisdictions which have not yet considered the question.[200]

Only one jurisdiction, Illinois, has allowed an actively negligent tortfeasor to recover indemnity from one strictly liable in tort. In *Suvada v. White Motor Co.*,[201] the owners of a tractor brought suit against the manufacturer of the tractor and against the manufacturer of the braking system to recover the costs of settling injury claims with bus passengers injured in a collision with the tractor, caused by a defect in the braking system of the tractor. The court as a matter of law, prevented him from seeking indemnity from one

---

197. *See, e.g.*, Hales v. Green Colonial, Inc., 402 F. Supp. 738 (W.D. Mo. 1975), *aff'd sub nom.*, Hales v. Monroe, 544 F.2d 331 (8th Cir. 1976); Frisch v. Int'l Harvester Co., 33 Ill. App. 3d 507, 338 N.E.2d 90 (1975); Tweedy v. Wright Ford Sales, Inc., 31 Ill. App. 3d 72, 334 N.E.2d 417 (1975); Texaco, Inc. v. McGrew Lumber Co., 117 Ill. App. 2d 351, 254 N.E.2d 584 (1969).

198. RESTATEMENT (SECOND) OF TORTS § 886(B) (Tent. Draft No. 18, 1972) provides as follows:

> (1) If two persons are liable in tort to a third person for the same harm, and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of liability.
> (2) Instances in which indemnity is granted under this principal include the following:
> . . . .
> (d) The indemnitor supplied a defective chattel or performed defective work upon land or buildings as a result of which both were liable to the third person and the indemnitee innocently or negligently failed to discover the defect.

199. *Id.*, Explanatory Notes § 886(B)(2)(d), comment g.

200. *See also* Note, *Another Look at Strict Liability: The Effect on Contribution Among Tortfeasors*, 79 DICK. L. REV. 125 (1974).

201. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

strictly liable in tort.[202] In several later cases the Illinois courts applied and refined the *Suvada* doctrine.

In *Texaco, Inc. v. McGrew Lumber Co.*,[203] the court was faced with a situation very similar to that presented in *Suvada*. A party who had erected a scaffold had settled a suit brought by a workman who was injured when he fell from the scaffold as a result of a plank breaking. The negligent parties were successful in obtaining indemnity from the supplier of the plank based on strict liability. The court noted that strict liability in tort is "intended to eliminate the fault weighing process of active-passive negligence in determining any grant of indemnity relief,"[204] and that there is "a strong public policy that insists upon the distribution of the economic burden in the most socially desirable manner, even to the extent of ignoring the indemnitee's fault."[205]

In *Liberty Mutual Insurance Co. v. Williams Machine & Tool Co.*,[206] a manufacturer's insurer brought an action in strict liability against the manufacturer of a defective component part, seeking reimbursement of money paid to third parties who had been injured when the product malfunctioned. The defendant argued that the plaintiff was guilty of active negligence, which was a concurrent cause of the accident, and, therefore, barred from indemnity in a strict liability action just as it would have been in a negligence action. In denying the defendant's contention, the Illinois Supreme Court stated:

> The major purpose of strict liability is to place the loss caused by defective products on those who create the risk and reap the profit by placing a defective product in the stream of commerce, regardless of whether the defect resulted from the "negligence" of the manufacturer. We believe that this purpose is best accomplished by eliminating negligence as an element of any strict liability action, including indemnity actions in which the parties are all manufacturers or sellers of the product. As one authority has observed: "In many jurisdictions, the right of contribution between joint tortfeasors is denied if they are at equal fault, but not denied if the tortfeasor seeking contribution was only passively negligent. The difficulty of applying this test to strict liability cases is that negligence is irrelevant for determining liability. It is a liability based upon the placing into commerce of a product which if defective, is likely to be unreasonably dangerous under normal use. There is there-

202. *Id.* at 624, 210 N.E.2d at 188.
203. 117 Ill. App. 2d 351, 254 N.E.2d 584 (1969).
204. *Id.* at 357, 254 N.E.2d at 588.
205. *Id.*
206. 62 Ill. 2d 77, 338 N.E.2d 857 (1975).

> fore no reason why the responsibility should not trace back to the originally responsible party . . . ."[207]

While holding that active negligence would not bar a plaintiff from recovering indemnity on a strict liability in tort theory, the court did hold that misuse or assumption of risk would act as such a bar.[208]

In *Stevens v. Silver Manufacturing Co.*,[209] a 1976 case, an injured employee brought a strict liability suit against the manufacturer of a shredding machine, alleging that the product was in an unreasonably dangerous condition when it left the manufacturer's control. The manufacturer filed a third party claim against the employer seeking indemnification, on the grounds that the employer negligently or recklessly failed to instruct as to proper use, failed to supervise the work properly, and allowed certain hazardous work practices. The court denied indemnity to the strictly liable manufacturer "since actions founded on strict liability for defective and unreasonably dangerous products are outside the active-passive theory of indemnity,"[210] and held that "third party actions for indemnity against a subsequent user are not maintainable by the manufacturer or seller of the defective product."[211]

The other jurisdictions which have considered the question have taken a position opposite to that of the Illinois courts, and have refused indemnity to one actively negligent.[212] The leading case is *Northwestern Mutual Insurance Co. v. Stromme*,[213] which involved a strict liability indemnity claim against an auto manufacturer by the operator of the auto, who had struck and killed a construction laborer and had been found negligent in an earlier action. The Washington Court of Appeals denied indemnity on the following rationale:

> Washington's recent adoption of strict liability as a basis for tort action against a manufacturer does not, of itself, raise the tort feasor's liability thereunder to a higher plateau or degree than the user's liability which stems from the use of the product causing the injury; nor does it change our indemnity laws pertaining to joint tort feasors. *The facts surrounding the incident giving rise to the initial cause of action and the duties breached by the tort feasors determine*

207. *Id.* at 82, 338 N.E.2d at 860 (citations omitted).
208. *Id.*
209. 41 Ill. App. 3d 483, 355 N.E.2d 145 (1976).
210. *Id.* at 487, 355 N.E.2d at 150.
211. *Id.* at 487-88, 355 N.E.2d at 150.
212. *See, e.g.*, Aetna Life & Cas. Co. v. Ford Motor Co., 50 Cal. App. 2d 49, 122 Cal. Rptr. 852 (1975). Courts in Washington and Louisiana have also adopted a view opposite to that of the Illinois courts.
213. 4 Wash. App. 85, 479 P.2d 554 (1971).

> *whether indemnity will be permitted, not the theory upon which their liability may be based.*[214]

The *Northwestern* court found that the test to be applied in indemnity actions, even those sounding in strict liability in tort, is the old active-passive negligence theory. Thus, one strictly liable in tort does not become obligated to indemnify a subsequent user or seller of the product, who is himself guilty of an active wrong.

A Louisiana decision, *Trahan v. Highlands Insurance Co.*,[215] likewise refused to follow the Illinois cases. In *Trahan,* the widow of a derrick man, fatally injured in a fall from a derrick, brought an action against his employer and the manufacturer of the derrick. A verdict for the plaintiff was returned on a finding that the accident occurred as a result of the joint negligence of the employer and the derrick manufacturer, a cross claim for indemnity by the employer against the manufacturer was denied. The court reasoned that the employer was found responsbile in damages to the employee's widow because of its own independent acts of negligence, and not because of a defect in the derrick created by the manufacturer. This being so, the damages which the employer sought to obtain by way of indemnification from the manufacturer did not arise as a result of the defect, and therefore, there was no right to indemnity.

In two interesting cases, *Bristol-Meyers Co. v. Gonzales*[216] and *Mixter v. Mack Trucks, Inc.*,[217] a strictly liable defendant attempted to collect indemnity from one actively negligent. In *Gonzales,* a drug manufacturer was held strictly liable in tort for injuries suffered by a patient when one of the company's drugs was administered in large doses. The attending physician was found negligent in his treatment of the patient. The manufacturer contended that it was entitled to indemnity from the physician, arguing that the physician's negligence was active, while its fault was merely passive. The court rejected the characterization of the strictly liable manufacturer's conduct as passively negligent, but appeared to apply the active-passive fault test for purposes of determining the right to indemnity. The court found both the strictly liable manufacturer and the physician to be guilty of active wrongs and in pari delicto and thus denied all right to indemnity. In *Mixter,* a judgment was entered against the seller of a tractor on a strict liability theory and against the installer of tubes and tires on a negligence theory, in favor of a buyer injured when the tire exploded. On a cross claim, the court granted indemnification in favor of the tractor seller and against the installer on the theory that the latter had engaged in active negligence in improperly installing the tires, and that the former

214. *Id.* at 88, 479 P.2d at 556 (emphasis added and footnotes omitted).
215. 343 So. 2d 1163 (La. App. 1977).
216. 548 S.W.2d 416 (Tex. Civ. App. 1976).
217. 224 Pa. Super. Ct. 313, 308 A.2d 139 (1973).

had been merely passively negligent in failing to discover the defective installation. Both cases are interesting because they appear to follow the *Northwestern* case and apply the active-passive negligence test, even when the liability of one party or the other rests on strict liability in tort.

The stronger position denies indemnity to one actively negligent from one strictly liable. Although the major purpose of strict liability may be "to place the loss caused by defective products on those who create the risk and reap the profit by placing a defective product in the stream of commerce,"[218] such purpose is not served by placing losses attributable to independent, negligent acts of third parties upon the product sponsor. An alternative to indemnity exists that would allow preservation of the purpose of strict liability, and yet avoid the inequitable result of a manufacturer bearing responsibility for another man's negligence. That alternative is to apply the traditional active-passive negligence test, and to grant indemnity only in situations where the parties are not in pari delicto. In other situations, contribution between the parties may be granted.

B. Contribution

The Uniform Contribution Among Tort-Feasors Act[219] establishes the right to contribution among joint tort-feasors. The act defines the term "joint tort-feasors" as "two or more persons jointly or severally liable in tort for the same injury to person or property."[220] As noted before, the distinction between contribution and indemnity as fault shifting mechanisms is that the former operates to apportion the loss among all responsible parties, while the latter operates to shift the entire burden from the shoulders of one to another. It is obvious that indemnity is the preferable tool to distribute loss, but in many situations indemnity will not be available and contribution may be a helpful tool. Product liability cases do not lend themselves to easy application of the contribution mechanism because most cases involve a product defect created by a manufacturer and undiscovered by subsequent distributors until the time of injury. Those distributors who merely pass along a product without altering it and without discovering the defect, although liable for the injury, are entitled to indemnity against the party who initially created the defect.

But what of the situation where the defective product alone would not have caused the injury but did so only in combination with the negligent conduct of a second member of the distributive chain? In such a situation, a claim for contribution by one member

218. Liberty Mut. Ins. Co. v. Williams Machine & Tool Co., 62 Ill. 2d 77, 82, 338 N.E.2d 857, 860 (1975).
219. MD. ANN. CODE art. 50, §§ 16-22 (1972).
220. *Id.* § 16.

of the chain against another will operate to reduce, but not eliminate, the judgment burden. For example, in *Bristol-Myers Co. v. Gonzales*,[221] the court disallowed a claim for indemnity by one strictly liable for production of defective goods against one actively negligent in the use of the product causing injury to a third person. While the court found the parties at equal fault, the strictly liable manufacturer was not denied all relief, but instead was granted contribution. The lesson to be learned from the foregoing discussion is that defendants seeking to shift the judgment burden should always plead in the alternative both indemnity and contribution.

VII. CONCLUSION

The product litigation explosion in recent years demanded that alternate theories of recovery be developed in order adequately to protect the rights of the consuming public. The original product theory of negligence, which focused on the defendant's culpable conduct, did not provide the requisite degree of protection, since nonculpable injury-causing conduct could not be made the basis of a recovery. Causes of action premised on strict liability and warranty developed to fill this gap, the focus under these theories being on the condition of the product, and not the conduct of the defendant. Practically speaking, plaintiff gains nothing under a negligence theory that is not also provided for by a cause of action sounding in warranty or strict liability, and warranty and strict liability are themselves virtually coextensive theories of recovery. In view of these factors, judicial merger of the presently available causes of action into a single basic product cause of action might be procedurally beneficial, and might be of great assistance in rendering a product action more understandable to a jury at the instruction stage.[222]

Efforts to protect the consumer have also resulted in a stripping of technical defenses from a product lawsuit. The distributive chain now must defend by marshalling evidence that either directly supports the integrity of the product on trial, or attacks the plaintiff's right to recovery because of injury-causing conduct attributable to the plaintiff or another defendant. The stripping of technical defenses in product litigation and the pro-consumer stance of today's courts yields a greater potential liability for product defendants. The high degree of exposure to potential liability makes it imperative that product defendants attempt to shift the judgment burden by employing either the indemnification or contribution mechanism.

---

221. 548 S.W.2d 416 (Tex. Civ. App. 1976).

222. *See, e.g.*, Scheller v. Wilson Certified Foods, Inc., 114 Ariz. 159, 559 P.2d 1074 (case law in Arizona has merged implied warranty theory of liability into doctrine of strict liability).