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Strict Liability in Tort—Builder-Vendor of Mass Produced House Strictly Liable for Injuries Caused by Construction Defects

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shifting from an attempt to do justice between the parties towards an attempt to formulate rules which (1) provide an incentive to minimize accident-causing conduct on the part of the manufacturer, and (2) to distribute the risk among those who benefit from that conduct which is ultimately accident-causing.[34] Still, the result is not liability without fault. As defined by Dean Prosser, " 'fault' is a failure to live up to an ideal of conduct."[35] When a product causes injury because of a defect, the manufacturer of that product has failed to meet the ideal of conduct because he has allowed the defect to arise and has caused the defective product to be marketed.[36] The impact of the principal case is simply this: while the holding does not broaden the basis of the manufacturer's liability, the decision has enlarged his total liability by introducing a new class of potential plaintiffs—innocent bystanders.

STRICT LIABILITY IN TORT—BUILDER-VENDOR OF MASS PRODUCED HOUSE STRICTLY LIABLE FOR INJURIES CAUSED BY CONSTRUCTION DEFECTS

Defendant, a mass-developer who planned communities and sold homes on the basis of advertised models, installed a water heater in a house without following the manufacturer's recommendations.[1] Plaintiffs leased the house from defendant's vendee, and plaintiffs' minor son was subsequently scalded by excessively hot water drawn

mistake of manufacture was the result of the defendant's negligence. As to the second type, however, plaintiff must prove that the design was unreasonably dangerous, or that a reasonable man would not put it on the market because of the risks associated with it. See Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 13-21 (1965). Though relieved of proving the defendant manufacturer's knowledge of the risks, the plaintiff is little aided by the strict liability standard when his action is based on faulty design because he still has the burden of proving essentially the same elements he would have been required to prove had his action been based on negligence. *Compare* the defect in the principal case *with* the defect in Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d 314 (1965), 41 WASH. L. REV. —.

[34] For analyses of some ramifications of this problem, see Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965).

[35] PROSSER, TORTS 507 (3d ed. 1964).

[36] The manufacturer can still escape liability in implied warranty if plaintiff's injury was not in fact caused by the defective product, as when plaintiff had warning of the offensive condition and failed to heed it. See Barefield v. LaSalle Coca-Cola Bottling Co., 370 Mich. 1, 120 N.W.2d 786 (1963).

[1] The manufacturer of the heating unit had recommended that a mixing valve be installed outside the boiler to avoid delivery of excessively hot water for domestic use. Instead of following the recommendations, defendant relied on combination spigots to mix the water, cautioning purchasers to open the cold top part way before turning on the hot tap.

from the heater. Recovery was sought for negligence and for breach of implied warranty of habitability. The trial court dismissed the action, but the Court of Appeals of New Jersey reversed.[2] *Held:* A builder-vendor of a mass-produced house is liable for breach of an implied warranty of habitability to vendee's lessee injured by a construction defect existing at the time of sale. *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

While caveat emptor has lost its vitality as a defense in actions involving defective products,[3] it may still be asserted in most jurisdictions in actions involving realty.[4] However, a few courts have refused to apply caveat emptor in suits for construction defects when the house was uncompleted at the time of sale,[5] and one court refused to apply caveat emptor when the house was completed at the time of sale.[6] The claim in the principal case, however, was made, not only for a construction defect existing in a house completed at the time of sale, but also against the vendor by a party not in privity of contract.[7]

The court in the principal case repudiated caveat emptor, citing recent cases recognizing the builder-vendor's superior ability to bear losses arising from defective construction as well as the inexperienced vendee's reliance upon the builder's skill to erect houses in a reason-

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[2] Dismissal of complaints against the heating unit manufacturer and an intermediate purchasing agent were affirmed because the heating unit was not defective and the agent exercised no independent discretion in purchasing for defendant.

[3] 7 WILLISTON, CONTRACTS 779 (3d ed. 1963).

[4] *E.g.*, Berger v. Burkoff, 200 Md. 561, 92 A.2d 376 (1952); Kerr v. Parsons, 83 Ohio App. 204, 82 N.E.2d 303 (1948). See Annot., 78 A.L.R.2d 446 (1961); PROSSER, TORTS 408 (3d ed. 1964); 7 WILLISTON, *op. cit. supra* note 3, at 779.

[5] In the leading case, Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113, the purchaser of an uncompleted house sued for damages resulting from structural defects. The court held the vendor liable for a breach of an implied warranty that the house would be built in an efficient and workmanlike manner. While stating that caveat emptor should apply to completed homes because the vendee could inspect and avail himself of an opportunity to discover defective construction, the court reasoned that caveat emptor should not apply if the house is incomplete at the time of sale because the vendee is unable to inspect the house prior to the time of purchase. See Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541, 543 (1961). *Miller* has been followed in several state court decisions. See, *e.g.*, Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Hoye v. Century Builders, Inc., 52 Wn. 2d 830, 329 P.2d 474 (1958).

[6] Carpenter v. Donohoe, 388 P.2d 399, 402 (Colo. 1964): "That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house... is recognizing a distinction without reasonable basis for it."

[7] Previous cases involving suits against builder-vendors had not raised the issue of privity. *E.g.*, Glisan v. Smolenske, 387 P.2d 260 (Colo. 1963); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Hoye v. Century Builders, Inc., 52 Wn. 2d 830, 329 P.2d 474 (1958).

ably workmanlike manner.[8] The court refused to distinguish, on the basis of lack of privity, previous cases allowing recovery for breach of implied warranty of habitability.[9] It looked upon those cases merely as stirrings toward recognition of the need for imposing strict liability upon builder-vendors. The court noted the developing products liability law which has held manufacturers liable notwithstanding an absence of privity,[10] and reasoned that no meaningful distinction can exist between vendors of mass-produced automobiles and mass-produced houses. In recognition of the modern vendee's need for protection,[11] the court decided against "reviving" privity to preclude plaintiffs' recovery.[12]

Products liability law has developed from the formative stages of *MacPherson v. Buick Motor Co.*,[13] in which privity was eliminated as a prerequisite to a negligence action against manufacturers, to more advanced stages in which implied warranties impose strict liability upon manufacturers for injuries sustained by anyone using their

[8] *E.g.*, Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962).

[9] *E.g.*, Glisan v. Smolenske, 387 P.2d 260 (Colo. 1963); Jones v. Gatewood 381 P.2d 158 (Okla. 1963); Hoye v. Century Builders, Inc., 52 Wn. 2d 830, 329 P.2d 474 (1958).

[10] The court cited Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), 75 A.L.R.2d 1 (1961).

[11] See generally, Bearman, *supra* note 5; Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953); Comment, 1 CALIF. WEST. L. REV. 110 (1965); 5 DE PAUL L. REV. 263 (1955); 26 U. PITT. L. REV. 857 (1965).

[12] The court did not treat at great length the issue raised by privity, choosing instead to rely upon cases eliminating privity in products liability, *e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960). *Henningsen* gives detailed treatment to the issue raised by privity, highlights of which are as follows:

> In more recent times a noticeable disposition has appeared in a number of jurisdictions to break through the narrow barrier of privity when dealing with sales of goods in order to give realistic recognition to a universally accepted fact. The fact is that the dealer and the ordinary buyer do not . . . buy goods . . . exclusively for their own consumption or use. . . . The limitations of privity . . . developed their place in the law when marketing conditions were simple, when maker and buyer frequently met face to face and on an equal bargaining plane and when many of the products were relatively uncomplicated and conducive to inspection by a buyer competent to evaluate their quality. . . . With the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media. In such an economy it became obvious that the consumer was the person being cultivated. . . . *He signified such a person who, in the reasonable contemplation of the parties to the sale, might be expected to use the product.* Thus, where the commodities sold are such that if defectively manufactured they will be dangerous to life and limb, then society's interests can only be protected by eliminating the requirement of privity between the maker and his dealers and the reasonably expected ultimate consumer. In that way the burden of losses consequent upon use of defective articles is borne by those who are in the position to either control the danger or make an equitable distribution of the losses when they do occur. [Emphasis added.] 161 A.2d at 80-81.

[13] 217 N.Y. 382, 111 N.E. 1050 (1916).

unreasonably defective products.[14] A parallel development has not taken place in real estate sales.[15] Caveat emptor,[16] the traditional adjunct to sales contracts, persists in most jurisdictions and still serves to bar recovery for injuries due to defective construction unless express warranties are inserted in the deed.[17] Underlying this widespread adherence to caveat emptor in realty sales is an assumption that the vendee by dealing face to face with the vendor is able to inspect the house and discover the defect before purchasing.[18] However, the law of real estate sales is changing. Following England's lead[19] an increasing number of states have imposed upon builder-vendors an implied warranty that the houses which they contract to build will be habitable and fit for use premised upon the inability of a purchaser to inspect an uncompleted house.[20] Then, in *Carpenter v. Donohoe*,[21] the Colorado Supreme Court extended implied warranty

[14] See, *e.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal 2d 57, 377 P.2d 897 (1962); Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963); Long v. Flanigan Warehouse Co., 79 Nev. 241, 382 P.2d 399 (1963); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963). There may be no need to have absolute liability for manufacturers as the plaintiff is probably as likely to succeed in a negligence action. In both negligence and absolute liability, plaintiff's initial burden of proof is the same; he must show the existence of some manufactured defect in the product. In suing for negligence, however, there is the additional burden of proving that the manufacturer was negligent. In proving negligence, the plaintiff is, according to Dean Prosser, unlikely to fail because juries are notoriously plaintiff-minded. On the other hand, the plaintiff suing on absolute liability need not prove negligence, and this would be a crucial difference in cases in which a manufacturer or builder could convince the jury that he exercised scrupulous care. See generally, Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1115 (1960), Wade, *Strict Liability of Manufacturers*, 19 SW. L.J. 5, 113-14 (1965). See also, Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965). Apart from a general discussion pertaining to negligence and absolute liability (*id.* at 1087-92), Professor Cowan points out (at 1092-93) the unique argument that manufacturers might even prefer absolute liability to negligence in order to avoid the havoc that can be raised by liberal pre-trial discovery procedures.

[15] See 7 WILLISTON, *op. cit. supra* note 3, at 926.

[16] For an excellent history of the doctrine of caveat emptor, see Hamilton, *The Ancient Maxim of Caveat Emptor*, 40 YALE L.J. 1133 (1931).

[17] See PROSSER, TORTS 408 (3d ed. 1964).

[18] See, *e.g.*, Steiber v. Palumbo, 219 Ore. 479, 347 P.2d 978, 980 (1959), in which the court pointed out that an element of uncertainty would pervade the entire real estate field if recovery on the basis of implied warranty was allowed. Real estate transactions would become chaotic if vendors were subjected to liability after parting with title because they would never be certain of the limits or termination of their liability. The court concluded that the rule of caveat emptor works no harshness because purchasers of real estate have an opportunity to protect themselves by inspecting the house first, and then extracting express warranties from the seller in the contract of sale and reserving them in the deed.

[19] Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113.

[20] Carpenter v. Donohoe, 388 P.2d 399 (Colo. 1964); Glisan v. Smolenske, 387 P.2d 260 (Colo. 1963); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Hoye v. Century Builders, Inc., 52 Wn. 2d 830, 329 P.2d 474 (1958).

[21] 388 P.2d 399 (Colo. 1964).

of habitability to include sales of completed houses, reasoning that there was no rational distinction between the buyer's inability, through lack of experience, to detect hidden defects in a completed as opposed to an uncompleted house.

Carpenter v. Donohoe was cited in the principal case in support of a finding that an implied warranty did exist, but the court had to turn to products liability cases for authority to extend the warranty to a party not in privity. There has been a recent tendency in the products field for courts to impose strict liability upon manufacturers even though litigants lack privity and contractual defenses are asserted.[22] Courts have found ingenious ways to circumvent the contractual defenses,[23] and there has been a recent movement to recognize this type of action as sounding in tort rather than in contract.[24] In the principal case, the court recognized an implied warranty of habitability without clearly establishing whether the basis for its decision lay in tort or in contract. Although this omission seriously detracts from the usefulness of the case in determining what validity contractual defenses,[25] such as disclaimer, will have when asserted in sim-

[22] See, *e.g.*, Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168 (1964); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[23] One author has counted twenty-nine techniques used by courts to avoid privity. Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1957).

[24] In evolving to its present state, the law governing implied warranties in the absence of privity of contract has moved from cases concerning food to a case which imposed absolute liability upon the lessor of a truck. Some courts have held that absolute liability is necessary to protect the public interest, while others have justified it by use of ingenious theories of fictitious agency or third-party beneficiary. See generally, Prosser, *supra* note 14, at 1106. In 1927, Mississippi adopted a theory of "warranty" running with the goods from the manufacturer to the consumer. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927). According to Prosser, this theory found general acceptance in nearly all of the later cases. *E.g.*, Klein v. Duchess Sandwich Co., 14 Cal. 2d 272, 93 P.2d 799 (1939); Heimsoth v. Falstaff Brewing Corp., 1 Ill. App. 2d 28, N.E.2d 193 (1953). *Contra,* Duncan v. Juman, 25 N.J. Super. 330, 96 A.2d 415 (App. Div. 1953); Bourcheix v. Willow Brook Dairy, Inc., 268 N.Y. 1, 196 N.E. 617 (1935).

Most courts which accept strict liability as to food still refuse to apply it to other products. Prosser, *supra* at 1111. Exceptions have been made, however, for products intended for intimate bodily use, such as soap or hair dye. See Graham v. Bottenfield's, Inc., 176 Kan. 68, 269 P.2d 413 (1954); Kruper v. Procter & Gamble Co., 113 N.E.2d 605 (Ohio App. 1953), *rev'd on other grounds*, 160 Ohio St. 489, 117 N.E.2d 7 (1954).

It was not until the nineteen-fifties that absolute liability involving an ordinary product received judicial sanction. The leading case involved a sale of defective bricks to the plaintiff. Despite the conduit of a dealer, the manufacturer was held liable for breach of an implied warranty. Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958). Many subsequent cases, like the principal case, have imposed absolute liability upon the manufacturer. The most recent innovation in this field places strict liability in tort upon the lessor of trucks. Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965).

[25] Lack of privity is not the only defense that has been asserted in warranty actions and avoided by courts. See discussion in note 24, *supra*. In some courts, attempts by manufacturers to disclaim liability have been disallowed on the basis of public policy.

ilar actions, it appears from the opinion that the court oriented its thought toward tort. Not only did it use language which implied a tort basis,[26] but it also cited with approval the California case which initiated the tort concept[27] as well as its own opinion in *Santor v. A & M Karagheusian, Inc.*,[28] which expressly adopted the tortious theory.

The implications of the *Schipper* opinion will create repercussions and problems due to conflict with existing law. One area of conflict centers upon the existing law governing relationships between landlord and tenant. Up to now, a lessor has not generally been subject to liability for harm caused to a lessee unless the lessor knew of a dangerous condition existing at the time of transfer and failed to alert the lessee.[29] The doctrine of caveat emptor has been applied to the lessee, and his landlord has been under no duty to inspect the premises in order to discover hidden defects.[30] But it would seem that this protection afforded a lessor is no longer valid in light

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E.g., Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 97 (1960). Other courts have entirely avoided complications created by lack of privity recognizing warranty as sounding in tort rather than contract. *E.g.*, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897 (1962).

Since UNIFORM COMMERCIAL CODE § 2-316 permits disclaimers of any warranty, many jurisdictions may be forced into allowing manufacturers to disclaim when faced with this type of problem, if they recognize the action as contractual. However, the effect of the Code can be avoided in two ways. First, courts could adopt an approach which distinguishes between the type of warranty contained in a contract of sale, and the type of implied warranty sued upon in the principal case. In *Greenman* the court stated, "such warranties are not imposed by the sales act, but are a product of common-law decisions that have recognized them in a variety of situations." 377 P.2d at 899. The second way to avoid the effect of UCC § 2-316 is by adoption of the "strict liability in tort" approach. This approach, according to Wade, *supra* note 14, at 11:

> eliminates completely the requirement of privity of contract. Neither the Uniform Commercial Code nor the Uniform Sales Act will be applicable. . . . Contractual aspects of disclaimer and rescission are avoided. Reliance on the warranty or the seller's ability need not be proved, and no express representation is required.

[26] "[T]he warranty or strict liability principles of Henningsen and Santor should be carried over to the realty field...." 207 A.2d at 325. "[T]hough the imposition of warranty or strict liability principles . . . would render unnecessary any allegation of negligence...." *Id.* at 326. "Levitt contends that imposition of warranty or strict liability principles on developers would make them 'virtual insurers...' That is not at all so..." *Ibid.* "Even under implied warranty or strict liability principles, the plaintiffs' burden still...." *Id.* at 328.

[27] Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 901 (1962):

> Although in these cases strict liability has usually been based on the theory of an expressed or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

[28] 44 N.J. 52, 207 A.2d 305 (1965).

[29] See PROSSER, TORTS 465-67 (2d ed. 1955).

[30] *Ibid.*

of the principal case. Since the underlying policy of the principal case is to place the loss on the party best able to bear it, it is doubtful whether this court in the future will draw a distinction between the loss-bearing ability of a mass-producer of houses and that of a mass-renter of houses. Similar developments in the analogous products field have already opened the way to imposition of strict liability upon mass-renters. In *Cintrone v. Hertz Truck Leasing and Rental Serv.*,[31] the defendant was held strictly liable in tort for breach of an implied warranty of fitness[32] running to the driver of a truck leased by his employer. The court stated that no good reason existed for restricting warranty to sales since the lessor was in a better position to control the condition of the truck as well as to distribute the losses which might occur because of dangerous defects.[33]

The principal case also raises a problem as to what type of defendant may be included within the ambit of strict liability. Liability was premised upon the inexperience of the average vendee, the ability of the builder, lessor or manufacturer to bear the financial loss occasioned by defects, and the defendant's skill in locating and remedying defects. Since the defendant in the principal case is the largest manufacturer of houses in the United States, the last two reasons would be inapplicable to an individual contractor. In deciding at what point between the individual builder and the mass-producer to impose strict liability courts should look at factors other than the builder-vendor's size: the skill of the vendee to uncover defects, the economic impact of putting the added burden upon the builder,[34] the degree of precision with which the builder can estimate his probable losses and offset them by purchasing insurance,[35] the effect of

[31] 45 N.J. 434, 212 A.2d 769 (1965).

[32] The brakes of the truck failed, causing it to slam into an overpass.

[33] 212 A.2d at 775. *Cintrone* effectively increases the protection afforded an individual. In that case, he would not have had a cause of action based upon a defect of manufacture because the brakes were presumably in order when the truck was originally delivered to Hertz. Thus, the lessee recovered upon a defect that occurred after delivery. Application of the same principles to rented buildings would result in similar protection to tenants injured while renting older buildings which had been allowed to deteriorate.

[34] It is a common failing to overlook the problem of the small manufacturer . . . . Large organizations . . . can absorb or distribute an item of increased cost such as that which would result from the imposition of strict liability. But many manufacturers are in a totally different situation. Their position in the industry is vulnerable and their competitive situation delicate. It is these comparatively small manufacturers who suffer when additional costs are added without regard to their situation. Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 947 (1957).

[35] For an excellent discussion of risk distribution, see Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

statutes of limitation,[36] the possibility of restricting the class of potential plaintiffs,[37] and the differences between houses and chattels.

Another problem posed by the principal case is plaintiff's burden of proof. To recover for a breach of warranty of habitability the plaintiff must show that a defect of construction existed at the time of sale. The problem lies in deciding what is a defect. The court in the principal case stated that, "in determining whether the house was defective, the test admittedly would be reasonableness rather than perfection."[38] A recent tentative draft of the Restatement of Torts, Second, would set forth two requirements for strict liability, "that the product be in a defective condition" and that it be "unreasonably dangerous."[39] On the other hand, Chief Justice Traynor defined a defective product as "one that fails to match the average quality of like products."[40] However, in writing the opinion in *Greenman v. Yuba Power Prods., Inc.*, the Chief Justice stated that plaintiff need only show that he used the appliance in the manner intended and that the injury resulted from "a defect of design and manufacture of which he was not aware that made the product unsafe for its intended use."[41]

The conflicting and vague definitions given above are representative of the divergence encountered in defining a defect. As Chief

[36] The problem often faced in this type of case is to determine when the statute of limitations begins to run. In the majority of jurisdictions an implied warranty is breached at the time of sale or delivery, and the limitation begins to run from that date. 1 WILLISTON, SALES § 212a (rev. ed. 1948). *But see* Puretex Lemon Juice, Inc. v. S. Riekes & Sons of Dallas, Inc., 351 S.W.2d 119 (Tex. Civ. App. 1961), 41 TEXAS L. REV. 321 (1962), in which plaintiff brought an action two years and eight months after the sale of deteriorated juice. The cause of action was held not to arise until the date plaintiff discovered, or should have discovered, the defect. See also, Firth v. Richter, 49 Cal. App. 545, 196 Pac. 277 (Dist. Ct. App. 1920); Ingalls v. Angell, 76 Wash. 692, 137 Pac. 309 (1913).

[37] *E.g.*, UCC § 2-318:

> A seller's warranty whether express or implied extends to *any natural person who is in the family or household of his buyer or who is a guest in his home* if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. [Emphasis added.]

But see 41 WASH. L. REV. 161 (1966), noting Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965), in which an innocent bystander recovered on an implied warranty of fitness for intended use when he was injured by a defectively manufactured shotgun cartridge.

[38] 207 A.2d at 326.

[39] RESTATEMENT (SECOND), TORTS § 402A(1) (Tent. Draft No. 10, 1964). This is consistent with the view adopted in the principal case, 207 A.2d at 328:

> [E]ven under implied warranty or strict liability principles, the plaintiffs' burden still remains of establishing to the jury's satisfaction from all the circumstances that the design was unreasonably dangerous and proximately caused the injury.

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

[41] 59 Cal. 2d 57, 377 P.2d 897, 901 (1962).

Justice Traynor indicated, a "defect may be variously defined; as yet no definition has been formulated which will resolve all cases."[42] Future cases dealing with defective houses will be faced with establishing criteria for defining a defect. These criteria will probably vary with different fact situations. The only criterion that can be relied upon from the opinion in the principal case is that the builder will not be held to a requirement of perfection. Although it is not yet certain what will be the basis for strict liability, there can be little doubt that strict liability will soon permeate realty as well as products liability.

PRIVATE ACTION FOR TREBLE DAMAGES UNDER CLAYTON ACT SECTION 7

Plaintiffs, corporate distributors, sought treble damages under section 4 of the Clayton Act,[1] alleging that defendant's acquisition of a manufacturer for which plaintiffs were distributors violated section 7 of the Clayton Act[2] and that plaintiffs were damaged by defendant's termination of plaintiffs' distributorship contracts pursuant to the acquisition. Defendant moved to dismiss, contending that there could be no action for damages under section 4 based upon a section 7 violation, as a section 4 recovery is predicated upon an *existing* illegal monopoly, which is not prohibited by section 7.[3] The United States District Court for the Southern District of New York denied defendant's

[42] Traynor, *supra* note 40, at 367.

[1] 38 Stat. 730 (1914), 15 U.S.C. § 15 (1964):
[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[2] 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964):
[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

[3] The original § 7 made corporate stock acquisitions illegal when the effect would be to substantially lessen competition "between" the acquired and the acquiring corporations, or to "create a monopoly in any line of commerce." 38 Stat. 730 (1914). Despite the hopes of its designers, the United States Supreme Court quickly rendered it nugatory. This was largely due to Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934) (holding that § 7 applied only to stock, and not to asset, acquisitions), and International Shoe Co. v. FTC, 280 U.S. 291 (1930) (holding that a charge of substantial lessening of competition must be based upon a showing that the acquired and the acquiring corporation substantially competed *with one another* prior to the merger). Several unsucessful attempts were made to eliminate these restrictions, *e.g.*, Temporary National Economic Comm., *Final Report and Recommendations*, S. Doc. No. 35, 77th Cong., 1st Sess. 38-40 (1941); Note, 57 YALE L.J. 613, 621-27 (1948). The Celler-