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Torts—Strict Products Liability for Retailers?—Ulmer v. Ford Motor Co., 75 Wash. Dec. 2d 537, 452, P.2d 729 (1969)

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TORTS—STRICT PRODUCTS LIABILITY FOR RETAILERS?—*Ulmer v. Ford Motor Co.*, 75 Wash. Dec. 2d 537, 452 P.2d 729 (1969).

In the field of products liability the Citadel of Privity[1] has been the bulwark that has shielded the manufacturer from the claims of those injured by defective products. Early in this century an attack was launched upon the Citadel, its walls first being breached in the areas of negligence[2] and implied warranty on food products.[3] The attack continued to gain momentum, especially in the field of implied warranty, until there had been a complete rout of the privity requirement in all product areas,[4] and the fall of the Citadel could be proclaimed.[5] In its ruins the fortress of strict liability[6] is being constructed by a growing number of courts[7] which have adopted this rule as ex-

1. The term was coined by Chief Justice Cardozo in Ultramares Corp. v. Touche, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931) and was popularized by Dean Prosser in Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960) [hereinafter cited as Prosser, *The Assault Upon the Citadel*] and its sequel, Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1965) [hereinafter cited as Prosser, *The Fall of the Citadel*].

2. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

3. *E.g.*, Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913).

4. *E.g.*, Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965) (shotgun); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (fabrics); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (automobile).

The expansion of implied warranty protection to product areas other than food has been accompanied by the rise of the UNIFORM COMMERCIAL CODE in all states, save Louisiana. *See* notes 30-31 and accompanying text *infra*.

5. Prosser, *The Fall of the Citadel*, *supra* note 1.

6. The concept of implied warranty is often used interchangeably with strict liability in the products liability field. Prosser suggested that the courts discard the theory of warranty, with its contract implications, in favor of strict liability in tort. He included among the jurisdictions which had adopted the rule of strict liability those jurisdictions, including Washington, which applied the concept of breach of implied warranty. Prosser, *The Fall of the Citadel*, *supra* note 1, at 794-95. This note will use the words "strict liability" to refer to only those jurisdictions which have adopted the language of strict liability in tort.

7. The following are states in which the highest court has adopted strict liability: Alaska (Clary v. Fifth Avenue Chrysler Center, 454 P.2d 244 (Alas. 1969)); Arizona (O. S. Stapley Co. v. Miller, 103 Ariz. 556, 447 P.2d 248 (1968)); California (Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963)); Connecticut (Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 227 A.2d 418 (1967)); Florida (McLeod v. W. S. Merrell Co. 174 So. 2d 736 (Fla. 1965) (dictum)); Illinois (Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965)); Minnesota (McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967)); Mississippi (State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966)); Nevada (Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 420 P.2d 855 (1966)); New Hampshire (Elliot v. Lachance, — N.H. —, 256 A.2d 153 (1969)); New Jersey (Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965)); New York (Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963)); Oklahoma (Marathon Battery Co. v. Kilpatrick, 418 P.2d 900

pressed by either Section 402A of the *Restatement (Second) of Torts (1965)*[8] or *Greenman v. Yuba Power Products*.[9]

In *Ulmer v. Ford Motor Co.*[10] the Washington plaintiff brought suit against the manufacturer of an automobile which had gone out of control and crashed into a cement abutment due to a defectively installed "A frame" pivot bolt. Plaintiff, whose theory of recovery was based on strict liability, was denied relief in the trial court. The Supreme Court of Washington reversed and remanded, adopting the *Restatement (Second)* position and holding that plaintiff's theory reflected the import of cases previously decided by the court under the theory of breach of implied warranty.[11] The court abandoned the implied warranty theory of recovery, concluding that it would be incon-

(Okla. 1965)); Oregon (Heaton v. Ford Motor Co., 248 Ore. 467, 435 P.2d 806 (1967)); Pennsylvania (Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966)); Tennessee (Olney v. Beaman Bottling Co., 220 Tenn. 459, 418 S.W.2d 430 (1967)); Texas (McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967)); Washington (Ulmer v. Ford Motor Co., 75 Wash. Dec. 2d 537, 452 P.2d 729 (1969)); Wisconsin (Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967)).

In the following states an intermediate appellate court has adopted strict liability: Kentucky (Dealers Transport Co. v. Battery Distributing Co., 402 S.W.2d 441 (Ky. Ct. App. 1966)); Missouri (Williams v. Ford Motor Co., 411 S.W.2d 443 (Mo. Ct. App. 1966)); Ohio (Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965) *aff'd* 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966) (warranty theory)).

In the following states the federal courts have construed strict liability to be the rule of the state: Colorado (Schenfeld v. Norton Company, 391 F.2d 420 (10th Cir. 1968)); Indiana (Greeno v. Clark Equipment Co. 237 F. Supp. 427 (N.D. Ind. 1965)); Montana (Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968)); Rhode Island (Klimas v. International Tel. & Tel. Corp., 297 F. Supp. 937 (D.R.I. 1969)); South Dakota (Sterling Drug, Inc. v. Yarrow, 263 F. Supp. 159 (D.S.D. 1967) *aff'd* 408 F.2d 978 (8th Cir. 1969)).

8. RESTATEMENT (SECOND) OF TORTS § 402A (1965):

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to 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.

9. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). The rule of the case was: A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.
377 P.2d at 900, 27 Cal. Rptr. at 700.

10. 75 Wash. Dec. 2d 537, 452 P.2d 729 (1969).

11. *Id.* at 546-47, 452 P.2d at 734.

sistent to continue deciding cases on a warranty theory without attaching the customary incidents of warranty.[12]

Most jurisdictions which follow the rule of strict liability against manufacturers have extended it to retailers,[13] and Washington will very likely follow suit. The *Ulmer* court declined to pass upon the applicability of the rule to sellers other than manufacturers,[14] reserving these questions until they are properly before the court;[15] but it indicated[16] that it will not necessarily apply strict liability across the board to retailers as it did to manufacturers. Anticipating extension of the *Ulmer* rule to retailers, this Note will suggest to what extent and in what fashion the rule of strict liability should be applied to retailers in Washington. Consideration will first be directed to the general arguments in support of extension of the rule to retailers. Then attention will be devoted to whether the extension should be to all retailers, and, if not, to which ones.

I. THE ARGUMENTS

A. Introduction

The leading authorities for the extension of strict liability to re-

12. *Id.* at 544, 452 P.2d at 733. The customary incidents of warranty are privity, reliance, timely notice of breach, and disclaimer. *See* UNIFORM COMMERCIAL CODE §§ 2-318, 2-315, 2-607(3), 2-316.

13. The following states have extended strict liability to retailers: Alaska (Clary v. Fifth Avenue Chrysler Center, 454 P.2d 244 (Alas. 1969)); Arizona (Bailey v. Montgomery Ward & Co., 6 Ariz. App. 213, 431 P.2d 108 (1967)); California (Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964)); Colorado (Newton v. Admiral Corp., 280 F. Supp. 202 (D. Colo. 1967) (*dictum*; applying Colo. law)); Illinois (Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1966)); Indiana (Illnicki v. Montgomery Ward & Co., 371 F.2d 195 (7th Cir. 1966) (applying Ind. law)); Kentucky (Rogers v. Karem, 405 S.W.2d 741 (Ky. Ct. App. 1966)); Mississippi (State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966)); Missouri (Williams v. Ford Motor Co., 411 S.W. 443 (Mo. Ct. App. 1966)); New Jersey (Citrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965) (retail lessor)); Pennsylvania (Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966) (distributor)); Texas (Coca-Cola Bottling Co. v. Hobart, 423 S.W.2d 118 (Tex. Civ. App. 1968)); Wisconsin (Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (distributor)). *Cf.* Florida (McLeod v. W. S. Merrell Co., 174 So. 2d 736 (Fla. 1966)). (Strict liability to retailers recognized but with Sealed Container Doctrine exception) (*See* note 83 and accompanying text *infra*.).

14. For a discussion of the application of strict liability to wholesalers see 19 MAINE L. REV. 92 (1967).

15. 75 Wash. Dec. 2d 537, 547, 452 P.2d 729, 735 (1969). Suit here was brought only against the manufacturer.

16. *Id.* at 547 n.5, 452 P.2d at 734-35 n.5.

tailers are the *Restatement (Second) of Torts*[17] and *Vandermark v. Ford Motor Co.*[18] The *Restatement (Second)* rule is premised on a concern for the safety of the public[19] and on the fact of consumer reliance.[20]

In *Vandermark*[21] the California court applied the *Greenman* rule to retailers, stating:[22]

> Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products. [Citing *Greenman*] In some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring

17. RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965):
The rule stated in this Section applies to any person engaged in the business of selling products for use and consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.
The rule does not, however, apply to the occasional seller of food or other products who is not engaged in that activity as part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar.

18. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

19. RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965):
. . . The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.

20. *Id.* *See* notes 29-33 and accompanying text *infra.*

21. 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964). Defendant was an automobile dealer, against whom courts have more often imposed the rule of strict liability than against other types of retailers. *See* R. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 5A:24 (Cum. Supp. 1969) [hereinafter cited as HURSH]; Annot., 13 A.L.R.3d 1057, 1099-1100 (1967). Hursh suggests that the reason may be that automobile dealers have significant responsibilities in readying a product for delivery to the purchaser. In *Vandermark* Justice Traynor took special note of these responsibilities, but for the purpose of extending Ford's liability to defects which may occur during dealer preparation. 391 P.2d at 171, 37 Cal. Rptr. at 899. The distinction drawn by Hursh is not the basis of the rule applied in *Vandermark*, and other courts have extended strict liability to retailers of other types of products. *See e.g.*, Illnicki v. Montgomery Ward & Co., 371 F.2d 195 (7th Cir. 1966) (power mower); McKee v. Brunswick Corp., 354 F.2d 577 (7th Cir. 1965) (boat); Bailey v. Montgomery Ward & Co., 6 Ariz. App. 213, 431 P.2d 108 (1967) (pogo sticks); Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 347 (1966) (nails); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966) (water heater); Coca-Cola Bottling Co. v. Hobart, 423 S.W.2d 118 (Tex. Civ. App. 1968) (bottled drink).

22. 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964).

> that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.

This view has found approval among legal scholars,[23] and its reasoning has been adopted by courts in other jurisdictions which have applied strict liability to retailers.[24]

The various reasons given by the *Restatement* (*Second*) and *Vandermark* to support extension of the doctrine of strict liability to retailers may conveniently be classified for purposes of discussion under six headings: (1) the safer product rationale, (2) the consumer reliance argument, (3) the insurance argument, (4) the in personam jurisdiction argument, (5) the conduit theory, and (6) the burden of proof argument.

B. The Safer Product Rationale

The argument[25] that the imposition of strict liability on the retailer will cause him to pressure the manufacturer to produce a safer product has been rejected by some legal scholars.[26] While it can be argued that the safer product rationale does not by itself justify the imposition of strict liability on those retailers who have no opportunity to discover the defects that produce the harmful results,[27] this objection does not overcome the main advantage of strict liability—the fair allocation of

23. 2 F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 28.30 (1956) [hereinafter cited as HARPER & JAMES]; W. PROSSER, LAW OF TORTS § 97 (3rd ed. 1964) [hereinafter cited as PROSSER ON TORTS]; S. SCHREIBER & P. RHEINGOLD, PRODUCTS LIABILITY 2:28 (1967) [hereinafter cited as SCHREIBER & RHEINGOLD]; Lascher, *Strict Liability in Tort For Defective Products: The Road To and Past Vandermark*, 38 SO. CAL. L. REV. 30, 45 (1965); Prosser, *The Fall of the Citadel*, *supra* note 1, at 816; Comment, *Products Liability—The Expansion of Fraud, Negligence and Strict Tort Liability*, 64 MICH. L. REV. 1350, 1371 (1966).

24. Clary v. Fifth Avenue Chrysler Center, 454 P.2d 244, 247 (Alas. 1969); Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439, 442 (1966); Williams v. Ford Motor Co., 411 S.W.2d 443, 449 (Mo. Ct. App. 1966).

25. *See* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899-900 (1964); RESTATEMENT (SECOND) OF TORTS § 402A, Comment f (1965).

26. Keeton, *Products Liability—Some Observations About Allocation of Risks*, 64 MICH. L. REV. 1329, 1333 (1969) [hereinafter cited as Keeton]; Prosser, *The Assault Upon the Citadel*, *supra* note 1, at 1122.

27. Keeton, *supra* note 26, at 1333.

risk. A stronger argument against the safer product rationale is that if the existing liability under warranty and negligence has not created the necessary pressure, it is unlikely that a move to strict liability will have any greater effect.[28] This argument is also criticizable, however, for if one assumes that liability for negligence has created at least some pressure for safety, it follows that an increased risk of liability will result in a corresponding increase in pressure.

C. The Consumer Reliance Argument

The consumer reliance argument[29] is two-fold: first, the retailer is in a better position to know and ascertain the reliability and responsibility of the manufacturer than is the purchaser,[30] and secondly, the customer is forced to rely upon the retailer's selection.[31] Both aspects of the argument ignore the impact of advertising on the retailer's position.[32] Except in cases of very large retail outlets, the demand for the products a merchant sells is created by manufacturers through nationwide advertising. The retailer often has little choice over the brand he carries if he wishes to maintain his competitive position. The customer's reliance is more likely to be on the brand name than on the retailer.

Even in product areas where advertising does not create reliance on brand names, reliance may often be found elsewhere than on the retailer. For instance, a retail druggist was held not liable under strict

28. Prosser, *The Assault Upon the Citadel, supra* note 1, at 1122.

29. The consumer reliance argument is closely related to the Sealed Container Doctrine, available as a defense to a retailer in a minority of jurisdictions to an action in implied warranty by a purchaser of a product which passes through the retailer's hands in the same unopened packaging as when it leaves the manufacturer. The theory is that there is no reliance on the skill and judgment of the retailer because the purchaser knows that the retailer has not inspected it. For an excellent discussion of the doctrine and the early decisions see Griggs Canning Co. v. Josey, 139 Tex. 623, 164 S.W.2d 835 (1942). *See also* 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 19.03(4)(c) (1968); PROSSER ON TORTS, *supra* note 23, at 654. For a discussion of the Sealed Container Doctrine in Washington see notes 77-84 and accompanying text *infra*. For a more recent treatment of the doctrine in actions based on strict liability, see McLeod v. W. S. Merrell Co., 174 So. 2d 736 (Fla. 1966); R. HURSH, *supra* note 21, at 232 n.16; 1 CCH PRODUCTS LIABILITY REP. 4160 (1968); Annot., 13 A.L.R.3d 1057, 1099 (1967).

30. *See* Ward v. Great Atl. & Pac. Tea Co., 231 Mass. 90, 120 N.E. 225 (1918).

31. RESTATEMENT (SECOND) OF TORTS § 402A, comment f (1965) and cases cited in the Appendix (1966) thereto.

32. *See* Esborg v. Bailey Drug Co., 61 Wn. 2d 347, 354, 378 P.2d 298, 302 (1963); Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294, 297-98 (1961).

liability for sale of a prescription that plaintiff received in the manufacturer's original sealed packets because the plaintiff's confidence had been placed in her doctor, who in turn had relied on the representations of the manufacturer.[33]

D. The Insurance Argument

The argument[34] that the retailer is able to obtain products liability insurance and thereby protect himself from the consequences of strict liability has been criticized[35] as evading the issue of whether strict liability should be imposed on him in the first place. It is contended[36] that the added insurance costs may force marginal operators out of business. Although insurance is not "the answer," and strict product liability cannot justifiably be premised on it alone, insurance would at least reallocate the risk of loss, the major purpose of the rule. Furthermore, the burden of added insurance costs on the small retailer is often relieved by suppliers whose products liability insurance is written with an agreement to cover dealers as well.[37]

E. The In Personam Jurisdiction Argument

Another reason advanced for extending strict liability to retailers is that the rule would help reduce the difficulty that injured parties face when they attempt to obtain in personam jurisdiction over out-of-state manufacturers. Two problems are encountered by such plaintiffs: constitutional limitations and statutory construction of long-arm statutes.[38]

Following the elevation of the minimum contacts formula to a constitutional level by the Supreme Court,[39] state courts have been willing to uphold statutory extension of in personam jurisdiction to a manufacturer who has no other contact with the forum state than the filling of purchase or mail orders of its residents.[40] Another type of minimum

33. McLeod v. W. S. Merrell Co., 174 So. 2d 736 (Fla. 1965).
34. *See* F. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 265-69 (1951).
35. *See* PROSSER, *The Assault Upon the Citadel*, *supra* note 1, at 1121.
36. *Id.*
37. 2 HARPER & JAMES, *supra* note 23, at 1601.
38. Comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Products Liability Actions*, 63 MICH. L. REV. 1028 (1965).
39. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
40. Tice v. Wilmington Chemical Corp., 259 Iowa 27, 141 N.W.2d 616 (1966); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965).

contact, usually included in state long-arm statutes, is the "tortious act."[41] But even if a "tortious act" is established,[42] there may remain the question as to whether the tort was committed outside the state at the time of manufacture or within the state[43] at the time of plaintiff's injury. In those states, including Washington,[44] which hold that the place of wrong is where the last event necessary for liability occurs, the plaintiff will experience no difficulty in obtaining service of process over a nonresident manufacturer,[45] when, for example, the manufacturer produces and sells his product outside the forum state for use in the forum state.[46]

41. *E.g.*, WASH. REV. CODE § 4.28.185 (1959) provides as follows:

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

(b) *The commission of a tortious act within this state*;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based on this section . . . (emphasis supplied).

42. *See* comment, *In Personam Jurisdiction Over Nonresident Manufacturers in Products Liability Actions*, 63 MICH. L. REV. 1028, 1036 (1965).

43. Under the typical long-arm statute the "tortious act" must be one committed "within this state." *See* note 41 *supra*.

44. Nixon v. Cohn, 62 Wn. 2d 987, 385 P.2d 305 (1963), *Noted in* 39 WASH. L. REV. 24 (1964). *But cf.* Oliver v. American Motors Corp., 70 Wn. 2d 875, 425 P.2d 647 (1967). In *Oliver* service of process on an out-of-state retailer was quashed even though there was a tortious act committed within the state. It was held that to extend long-arm jurisdiction to an Oregon automobile dealer who sold a car to Oregon residents in Oregon violated due process requirements because the retailer could not be held to have constructive knowledge of out-of-state consequences. In this respect the court distinguished a retailer from a manufacturer who would be held to have such constructive knowledge. *See* 44 WASH. L. REV. 490 (1969). In Oliver jurisdiction over the nonresident manufacturer was not contested, and the decision does not limit *Nixon vis a vis* manufacturers.

45. *But see* Dimeo v. Minster Mach. Co., 225 F. Supp. 569 (D. Conn. 1963 (the tort is committed only at the place of negligent manufacture).

46. Nixon v. Cohn, 62 Wn. 2d 987, 385 P.2d 305 (1963) (amusement park ride manufactured and sold in Oregon for use in Washington where manufacturer retained security interest and serviced ride in Washington); State *ex rel.* Western Seed Production Co. v. Campbell, 250 Ore. 262, 442 P.2d 215 (1968) *cert. denied* 393 U.S. 1093 (1969) (seed grown and sold in Arizona to Oregon dealer and thence to Oregon farmer). *Cf.* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). (Nonresident manufacturer of component part, assembled in third state before being sold and causing injury in the forum state held to have minimum contracts.)

It would appear, therefore, that in those jurisdictions which have long-arm statutes capable of a broad interpretation under the minimum contacts formula, inaccessibility of the nonresident manufacturer to process is not a valid reason to impose strict liability on retailers.

F. The Conduit Theory

More persuasive is the argument that the retailer is a convenient conduit through which to pass the burden of the risk of loss back to the manufacturer where it really belongs. It is generally held that a retailer may recover over from his seller the amount he has been required to pay a consumer in damages, plus attorney's fees and the reasonable costs of conducting a defense.[47] The imposition of strict liability in tort[48] will not, therefore, impose an unfair burden on a retailer since he may implead the manufacturer.[49] But potential recovery against the manufacturer may give retailers a false sense of security, for injured consumers need only show that the product was defective when it left the hands of the retailer; the retailer must show that the product was defective when it left the hands of his seller. Judgment against the retailer thus does not ensure judgment against the manufacturer.[50]

Nevertheless, it would seem fair to hold the retailer strictly liable to the consumer. The ultimate purpose of strict products liability is to relieve consumers of the burden of losses resulting from defective products; the imposition of strict liability on retailers would further that goal by ensuring that the burden of proof which plaintiffs carry is just.

G. The Burden of Proof Argument

The greatest difficulty[51] in establishing a strict products liability

47. Comment, *The Right To Indemnity In Products Liability Cases*, 1964 U. ILL. L.F. 614, 626 (1964).

48. The practice of recovery over by a retailer against a manufacturer is currently operative by the vouching procedure under warranty principles in the UNIFORM COMMERCIAL CODE § 2-607(5)(a).

49. *See, e.g.*, Kroger Co. v. Bowman, 405 S.W.2d 339 (Ky. Ct. App. 1967); Wash. Court R., CR 14; 2 HARPER & JAMES, *supra* note 23, at 1601; Comment, *The Right to Indemnity in Products Liability Cases*, 1964 U. ILL. L.F. 614, 621-22 (1964).

50. *E.g.*, Coca-Cola Bottling Co. of Houston v. Hobart, 423 S.W.2d 118. (Tex. Civ. App. 1968) (Retailer denied indemnity. Held not allowed to rely on injured consumer's offer of proof.)

51. *See* Prosser, *The Assault Upon the Citadel, supra* note 1, at 1114-16; Comment, *Products Liability and the Problem of Proof*, 21 STAN. L. REV. 1777 (1969); 26 WASH. & LEE L. REV. 143 (1969).

case is proving that the defect existed at the time the product left the hands of the seller.[52] This burden of proof requirement is onerous where it is applied without extending strict liability to the retailer and wholesaler because it requires a plaintiff to account for the product during the time prior to his purchase.

The burden of proof which an injured party bears[53] can be made more just in one of two ways: (1) by adopting a lesser standard,[54] or (2) by maintaining the same standard but broadening the class of persons subject to the strict liability rule, so that a consumer-plaintiff would bear the burden of proving a defect only as against his immediate seller.[55] The first alternative would increase the opportunity for fraud on the part of plaintiffs;[56] the second alternative would thus seem to be a better approach. If an injured consumer were only required to prove a defect in the product at the time he bought it, he would need show only that the defect could not have occurred after his purchase, thus raising a presumption that the defect occurred while the retailer or manufacturer had control of the product.[57] Such a burden of proof would be manifestly fair to all parties concerned. The

52. RESTATEMENT SECOND OF TORTS § 402A, comment g (1965).

53. The majority in *Ulmer* did not state what burden of proof an injured plaintiff carries under its newly adopted rule, other than to note that plaintiff produced sufficient evidence to get to the jury. The issue was clearly before the court, being raised by the jury's consideration of the age (5 years) and mileage (in excess of 73,000 miles) of the car. The majority interpreted the jury instruction, allowing them to make such a consideration, as a comment on the evidence, thus avoiding the issue of plaintiff's burden of proof. A concurring opinion felt the majority went beyond the RESTATEMENT (SECOND) burden of proof, and, therefore, wanted it clearly understood that a malfunction of a product by itself is not sufficient to create an inference that the elements of strict liability are present.

54. Some jurisdictions do require a lesser burden of proof than the RESTATEMENT (SECOND). *See* Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965) *aff'd* 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

55. The approach of the RESTATEMENT (SECOND) is to apply strict liability to the manufacturer, wholesaler, and retailer. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965); thus alleviating the consumer's burden of proof by broadening the class of persons subject to the strict liability rule.

56. *See* Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 949 (1957). A lesser burden of proof may encourage people to assert spurious claims.

Fraud may have been the motivating concern of the concurring opinion in *Ulmer*. *See* note 53 *supra*.

57. *See* Jakubowski v. Minnesota Mining and Manufacturing, 42 N.J. 177, 199 A.2d 826 (1964); Comment, *Products Liability and the Problem of Proof*, 21 STAN. L. REV. 1777 (1969); 26 WASH. & LEE L. REV. 143 (1969).

consumer, the retailer, the wholesaler, and the manufacturer would each bear a burden of proof corresponding to his control over the product. A retailer will not be unduly burdened by such a result since he can usually pass the loss on to the manufacturer. What hardship he does experience will "generally boil down in practice to the inconvenience of acting as a conduit for spreading losses which are engendered by the enterprise in which he plays a part."[58]

Six reasons have been suggested to justify the extension of strict liability to retailers. The safer product rationale, the consumer reliance, the insurance, and the in personam jurisdiction arguments are not especially persuasive. However, the conduit theory and the burden of proof argument are convincing and amply justify extending strict liability to retailers.

II. WHICH RETAILERS

A. Introduction

Having examined the policy considerations and the rationale suggested for the extension of strict liability to retailers generally, the questions remain as to whether the rule should be imposed on all retailers and, if not, on which retailers should it be imposed. The need for full and careful consideration of these questions was most likely the reason why the Washington court in *Ulmer* declined to announce a rule of strict liability as to retailers as well as to manufacturers. If strict liability is not to be applied across the board to retailers, two considerations should be explored: (1) whether in applying the rule a distinction should be made relative to the size of retailers, and (2) whether retailers dealing in goods that come to them from manufacturers for resale in sealed containers should be subject to strict liability for defects.

B. The Retailer Size Question

The reasons generally given to support the extension of the doctrine of strict liability to retailers may not apply with equal force to every size of retailer. Retailers are an integral part of the total enterprise

58. 2 HARPER & JAMES, *supra* note 23, at 160.

system, but their relationships to manufacturers vary to a considerable degree. There has been no hesitation in the courts to impose strict liability on the large chain retail store that offers goods manufactured by other firms under its own brand name,[59] but concern has been expressed that the same burden on the small independent retailer is "heavy-handed to the point of injustice."[60] Even the most vociferous advocate of strict product liability recognizes the potentially disastrous impact of the doctrine on the small businessman.[61]

Perhaps one reason that courts in general have not shied from extending the doctrine of strict liability to all retailers is that the small independent retailer is being replaced by the large nationwide chain store, which is often better able to absorb loss from such liability than the small manufacturer who may supply it.[62] On the other hand, it has been argued that imposition of liability without fault will only hasten this trend, squeezing the small entrepreneur into oblivion.[63] Although the Washington court should be aware of this possibility, it should also remember that the small retailer is already subject to a heavy burden of liability under the *Uniform Commercial Code's* implied warranty provisions,[64] and that the imposition of strict liability in tort will not significantly expand this vulnerability.[65]

59. Bailey v. Montgomery Ward & Co., 6 Ariz. App. 213, 431 P.2d 108 (1967); Illnicki v. Montgomery Ward & Co., 371 F.2d 195 (7th Cir. 1966). *See* RESTATEMENT (SECOND) OF TORTS § 400 (1965) (Such retailers are given the status of a manufacturer and subject to the same liability.); 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 18.01 (1968); 2 HARPER & JAMES *supra* note 23, § 28.28; PROSSER ON TORTS, *supra* note 23, at 664; SCHREIBER & RHEINGOLD, *supra* note 23, at 1:88; Noel, *Products Liability of Retailers and Manufacturers in Tennessee*, 32 TENN. L. REV. 207, 211-12 (1965).

60. Bailey v. Montgomery Ward & Co., 6 Ariz. App. 213, 431 P.2d 108, 117 (1967) (Molloy, J. dissenting). *Cf.* Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 947 (1957).

61. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1121-22 n.147, *quoting* Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938, 947 (1957).

> It is a common failing to overlook the problem of the small manufacturer . . . . 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. (The argument applies with equal force to small retailers.)

62. PROSSER ON TORTS, *supra* note 23, at 682; Prosser, *The Fall of the Citadel*, *supra* note 1, at 816.

63. Bailey v. Montgomery Ward & Co., 6 Ariz. App. 213, 431 P.2d 108, 117 (1967) (Molloy, J., dissenting).

64. UNIFORM COMMERCIAL CODE §§ 2-314, 2-315.

65. *See* Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code*, 17 WESTERN RESERVE L. REV. 5 (1965). Shanker argues that the move to strict liability in tort is not necessary because the implied warranty provisions under

C. *The Packaged Container Question*

In *Ulmer* the court noted[66] that it has not always allowed recovery against a retailer under the theory of breach of implied warranty. Such recovery has been allowed against retailers dealing in food products,[67] animal feed,[68] dry goods,[69] insecticides,[70] and dynamite,[71] but has been withheld as to dealers in automobiles,[72] packaged hair dye,[73] and sliding glass doors.[74]

The Washington position appears to be that recovery under an implied warranty theory will generally be allowed against a retailer. Most of the Washington cases so hold,[75] and two of the three decisions wherein recovery was denied can be distinguished on the basis of their fact patterns. The automobile dealer expressly limited his warranty liability by contract with the injured consumer.[76] The building contractor in the sliding glass door case[77] was not a retailer of goods but

the Uniform Commercial Code can provide consumers with the equivalent protection.

Indeed, even when strict liability is applied to retailers, there will be times in which an injured plaintiff will be entitled to relief under the Code provisions and not under a strict liability theory. Thus, when a mother bought a can of applesauce, the contents of which gave off a bad odor and caused her two sons, to whom she fed it, to gag, necessitating the pumping of their stomachs, she was allowed recovery under the warranty of merchantability, even though there was no showing that the contents were deleterious. Martel v. Duffy-Mott Corp., 15 Mich. App. 67, 166 N.W.2d 541 (1968) (Defendant was a manufacturer.) Under the Code it is sufficient to show the product is not fit for the ordinary purposes for which it is to be used. It is doubtful that recovery in this case could have been given under the RESTATEMENT (SECOND) because it would have been necessary to show the applesauce was deleterious in order to meet the burden of proving a defective condition unreasonably dangerous to the user.

However, the fact that protection for injured consumers is provided by the Code does not obviate the reasons for adopting the rule of strict liability because, as was pointed out in *Ulmer*, 75 Wash. Dec. 2d at 544, 452 P.2d at 733, the doctrine of strict liability is preferable to a doctrine of implied warranty stripped of the customary incidents of warranty.

66. 75 Wash. Dec. 2d 537, 547 n.5, 452 P.2d 729, 734-35 n.5.

67. Pulley v. Pacific Coca-Cola Bottling Co., 68 Wn. 2d 778, 415 P.2d 636 (1966); Baum v. Murray, 23 Wn. 2d 890, 162 P.2d 801 (1945); Nelson v. West Coast Dairy Co., 5 Wn. 2d 284, 105 P.2d 76 (1940).

68. Larson v. Farmer's Warehouse Co., 161 Wash. 640, 297 P. 753 (1931).

69. Martin v. J. C. Penney Co., 50 Wn. 2d 560, 313 P.2d 689 (1957); Ringstad v. I. Magnin & Co., 39 Wn. 2d 923, 239 P.2d 848 (1952).

70. Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 P. 1050 (1929).

71. Brewer v. Oriard Powder Co., 66 Wn. 2d 187, 401 P.2d 844 (1965) (dictum).

72. Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) *affirmed on second appeal* 179 Wash. 123, 35 P.2d 1090 (1934).

73. Esborg v. Bailey Drug Co., 61 Wn. 2d 347, 378 P.2d 298 (1963).

74. Dipangrazio v. Salamonsen, 64 Wn. 2d 720, 393 P.2d 936 (1964) (held contractor not retailer).

75. *See* cases cited in notes 67-71 *supra*.

76. Baxter v. Ford Motor Co., 168 Wash. 456, 459, 12 P.2d 409, 411 (1932).

77. Dipangrazio v. Salamonsen, 64 Wn. 2d 720, 724, 393 P.2d 936, 938 (1964). *But see* House v. Thornton, 76 Wash. Dec. 2d 586, 457 P.2d 199 (1969) (holding vendor of lands subject to implied warranty).

a vendor of land. Neither of these cases justify exceptions to a general rule of strict liability against all retailers because strict liability cannot be disclaimed or expressly limited and extension of the rule to vendors of land is not advocated.

There is, however, one general situation in which the Washington court has declined to extend liability to retailers. In *Esborg v. Bailey Drug Co.*[78] the court adopted the Sealed Container Doctrine,[79] which exempts from liability retailers selling products packaged by the manufacturer for resale in sealed containers, and thus denied recovery against a retailer by a purchaser who had voluntarily selected a brand name hair dye from the shelf. *Esborg* is of lesser importance today, since it was decided under the implied warranty provisions of the Uniform Sales Act.[80] The strict liability theory advanced in *Ulmer,* in contrast with the implied warranty rationale of reliance and merchantability, is premised on the allocation of the risk of loss. This is not to say that the Sealed Container Doctrine is no longer the rule in Washington; its acceptance by the court was recent,[81] and was made only after extended consideration.[82] It would be reasonable to conclude that the court will not readily discard it.[83]

However, the Sealed Container Doctrine should not be retained under a rule of strict liability to retailers. The Doctrine may be appropriate under the fault rationale of negligence theory or that of reliance or merchantability under warranty theory; but it is inappropriate under a principle of loss distribution.[84] Furthermore, the

78. 61 Wn. 2d 347, 378 P.2d 298 (1963).
79. *See* note 29 *supra.*
80. Esborg v. Bailey Drug Co., 61 Wn. 2d 347, 354, 378 P.2d 298, 302 (1963).
81. *Id.* at 354, 378 P.2d at 302.
82. *See* Baum v. Murray, 23 Wn. 2d 890, 898-99, 162 P.2d 801, 805 (1945).
83. At least one jurisdiction which has extended the rule of strict liability to retailers has adopted the Sealed Container Doctrine. McLeod v. W. S. Merrell Co., 174 So. 2d 736 (Fla. 1965).
84. The Sealed Container Doctrine was not recognized in the original RESTATEMENT OF TORTS § 402 (1934), which expressed the view that a retail dealer of goods resold in their original packages was liable if, by exercising reasonable care, he could have discovered the dangerous condition of the product by virtue of his peculiar opportunity and competence. This view was rejected in the RESTATEMENT OF TORTS § 402 (Supp. 1948), which adopted the Sealed Container Doctrine, relieving the retailer of any obligation to inspect goods he resells in their original packages. The reason given for the change of position was that the revised view expressed the greater weight of authority. The RESTATEMENT (SECOND) OF TORTS § 402 (1965) clarified the Doctrine in light of its acceptance of strict liability in § 402A. The Sealed Container Doctrine was limited to liability based upon negligence because negligence takes into account the actor's

Esborg court excluded food products from the Doctrine,[85] and it is difficult to see why the court should grant relief to a consumer poisoned by a can of salmon, but not to a consumer burned by a chemical preparation for hair which was used according to its directions. Questionable even as to its present application, the Doctrine certainly does not deserve to be retained in a strict liability jurisdiction where loss distribution is the central concern.

CONCLUSION

Commitment to the rule of strict products liability, as against *all* manufacturers, has been made in Washington; it would be consistent and fair to extend that rule to include *all* retailers as well. The distinctions between retailers previously drawn by the Washington court in applying the implied warranty rule are not appropriate under a strict liability rule.

Of the various arguments which have been suggested in support of extension of strict liability to retailers, the most persuasive are the conduit theory and the need for a fair rule on the burden of proof. The burden of proof for the injured party can be reduced for the small cost of inconvenience to the retailer, who will act as a conduit to shift the loss back to the manufacturer. Extension of the rule of strict liability to retailers will further that rule's goal of optimal loss distribution with the greatest justice to all parties concerned.

knowledge, whereas strict liability is imposed irrespective of the actor's knowledge of the particular facts giving rise to his liability. *See* comments to RESTATEMENT (SECOND) § 402.

85. 61 Wn. 2d 347, 354, 378 P.2d 298, 302 (1963).